1 12369 12

65591

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 559.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

MINNESOTA STATE LAW LIBRARY

vs.

THE DELAWARE AND HUDSON COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21355)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 559.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE DELAWARE AND HUDSON COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Writ of error	2	1
Citation and service	3	2
Petition in mandamus	4	3
Notice of application for alternative writ of mandamus	14	7
Order granting alternative writ of mandamus	16	8
Appearance for defendant	18	9
Answer	23	9
Exhibit A 1. Act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company, passed April 23, 1823	38	18
A 2. Act to amend the act of April 23, 1823, passed April 7, 1824	51	28
A 3. Act to amend the act of April 23, 1823, and amendments of same, passed April 20, 1825	52	29
A 4. Act to loan the credit of the people of the State of New York to the President, Managers, and Company of the Delaware and Hudson Canal Company, passed March 10, 1827	54	30
A 5. Act to loan the credit of the State of New York to the President, Managers, and Company of the Delaware and Hudson Canal Company, passed May 2, 1829	58	33
A 6. Act to amend act of April 23, 1823, passed May 9, 1867	60	34

	Original.	Print.
Answer—Continued.		
Exhibit A 7. Act to authorize corporations owning canals to construct and operate railroads alongside of or in lieu thereof, passed June 4, 1881	62	35
A 8. Act to amend chapter 841 of the laws of 1867, passed April 28, 1899	63	35
B 1. Act to improve the navigation of the river Lackawaxen, approved March 13, 1823	66	37
B 2. A supplement to the act to improve the navigation of the river Lackawaxen, approved April 1, 1825	79	47
B 3. A further supplement to the act to improve the navigation of the river Lackawaxen, approved April 5, 1826	83	50
B 4. Act relative to the Delaware and Hudson Canal Company, approved March 23, 1830	86	52
B 5. A further supplement to the act to improve the navigation of the river Lackawaxen, approved April 30, 1852	88	53
B 6. A supplement to the act to improve the navigation of the river Lackawaxen, approved March 12, 1859	89	54
B 7. A supplement to the act to improve the navigation of the river Lackawaxen, approved April 11, 1861	91	55
B 8. A further supplement to act to improve the navigation of the river Lackawaxen, approved April 11, 1861	93	56
B 9. Pennsylvania senate committee report, April 13, 1863	94	56
B 10. A supplement to the act to improve the navigation of the river Lackawaxen, approved September 20, 1866	97	58
B 11. A supplement to the act to improve the navigation of the river Lackawaxen, approved April 30, 1868	98	59
B 12. Act to authorize the Delaware and Hudson Canal Company to construct a railroad, etc., approved March 24, 1870	99	59
B 13. Act to authorize the Delaware and Hudson Canal Company to construct a railroad etc., approved May 12, 1871	100	60
B 14. Act to authorize railroad and canal companies to aid the development of the coal, iron, lumber, and other material interests, etc., approved April 15, 1869	102	61
B 15. Act relating to certain railroads and canal companies, etc., approved May 18, 1871	103	62
C. Mortgage of the Delaware and Hudson Canal Company to the Union Trust Company of New York, trustee, August 13, 1877	105	63
Stipulation as to submission on petition and answer	119	72
Opinion of Gray, J. (omitted in printing)	121	....
Opinion of Dallas, J. (omitted in printing)	175	....
Dissenting opinion of Buffington, J. (omitted in printing)	121, 175, 181	....
Judgment	196	72
Assignment of errors	197	73
Petition for writ of error	200	74
Order allowing writ of error	202	75
Clerk's certificate	203	76

1 APRIL SESSION, 1908.

Charles J. Bonaparte, J. Whitaker Thompson.	THE UNITED STATES OF America ex rel. the Attorney-General of the United States	Mandamus.
202	*vs.*	
Robert W. de Forest, John G. Johnson.	THE DELAWARE AND HUDSON Company.	

1908, June 5. Petition for alternative mandamus filed.

1908, June 5. Copy of notice of application for writ of alternative mandamus and affidavit of service of notice filed.

1908, June 5. Order granting alternative writ of mandamus.

1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.

1908, June 9. Writ of alternative mandamus exit returnable the sixteenth day of June, 1908.

1908, June 13. Answer filed.

1908, June 16. Stipulation of counsel filed.

1908, June 26. Argued.

1908, September 10. Opinion denying petition for mandamus filed.

1908, October 6. Dissenting opinion by Buffington, J., filed.

Order for judgment filed.

Assignments of error filed.

Petition for writ of error filed.

Order of court allowing writ of error filed.

Writ of error allowed and copy thereof lodged in clerk's office for adverse party.

Citation allowed and issued.

Citation returned " service accepted " and filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the United States of America ex rel. the Attorney-General of the United States, plaintiff, and The Delaware and Hudson Company, defendant, a manifest error hath happened to the great damage of the said United States of Americal ex rel. the Attorney-General of the United States as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of October, in the year of our Lord one thousand nine hundred and eight.

[SEAL.]

HENRY B. ROBB,
Clerk of the Circuit Court of the United States.

Before DALLAS, C. J.
Allowed by THE COURT.
Attest:
HENRY B. ROBB, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Delaware & Hudson Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein the United States of America ex rel. the Attorney-General of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the Circuit Court of the United States, this 6th day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Defendant in Error.

4–5 No. 202. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA ex rel. the Attorney-General of the United States *vs.* THE DELAWARE AND HUDSON COMPANY.	On information for writ of mandamus.

Petition in mandamus.

Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 202.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States *vs.* THE DELAWARE AND HUDSON COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the United States of America.

Petitioner respectfully states that he is the Attorney-General of the United States, and that, as such, he has been requested by the Interstate Commerce Commission to institute this suit against the Delaware and Hudson Company, a common carrier, as hereinafter particularly set forth, and to make application for a writ of mandamus as hereinafter prayed.

Petitioner, therefore, states that the said "The Delaware and Hudson Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws
7 of the State of New York, having its principal office in the State of New York, at the city of New York, and also an office in the State of Pennsylvania, at the city of Scranton, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight; that the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the State of Pennsylvania, New York, Vermont, and other States; that it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Con-

gress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

Your petitioner further states, alleges, and charges against the defendant a failure, by the defendant, to comply with and a violation, by the defendant, of that provision of an act of the Congress of the United States approved February 4, 1887, entitled "An
8 act to regulate commerce," as said act was amended by an act of the Congress of the United States approved June 29, 1906, to be found in the first section of said "Act to regulate commerce," as amended by said act of June 29, 1906, which said provision is as follows, that is to say: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," in this:

(1) That the defendant holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Luzerne, Lackawanna, Susquehanna, and Wayne, in the said State of Pennsylvania, and owns, and has an interest in, the anthracite coal therein or thereupon and mined, and being mined, therefrom; and said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the
9 mining of anthracite coal, by and under the authority of the defendant.

(2) That, apart from the coal lands, coal mines, and coal held and owned by the defendant as hereinbefore stated, the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Hudson Coal Company, the Northern Coal and Iron Company, and the Jackson Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of the said coal companies; that said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Luzerne, Lackawanna, Susquehanna,

and Wayne; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, all now being operated, in the mining of anthracite coal, by and under the direct management of officers and directors all of whom are, as they have been for a long time past, officers or directors of the defendant, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant; that by virtue of the ownership of the entire capital stock of said coal companies by the defend-
10 ant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by the president and other officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(3) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your petitioner unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, Vermont, and other States for sale and delivery at the
11 markets of the said States of New York, Vermont, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(4) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is unlawful, being a failure to comply with, and a violation of that provision of said "Act to regulate commerce" hereinbefore quoted.

(5) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore

set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, thus persisting in, and continuing its failure to comply with, and its violation of, the provision of said "Act to regulate commerce" hereinbefore referred to and quoted.

(6) And so your petitioner alleges and says that the an-
12 thracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "articles or commodity" owned by it "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest, direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier;" and your petitioner respectfully repeats and alleges that such transportation, and such continuing transportation, is, and will be, a failure, by the defendant, to comply with, and a violation, by the defendant, of that provision of the law hereinbefore quoted.

Petitioner therefore prays that your honors grant an order for the issuance of an alternative writ of mandamus commanding and directing the defendant, "the Delaware and Hudson Company," to forthwith and hereafter comply with the provision of the law hereinbefore quoted by forthwith and hereafter ceasing and refraining from
transporting, in interstate commerce, as is hereinbefore alleged,
13 the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, or to appear before this court on some day to be named in said writ and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring the defendant, the said "The Delaware and Hudson Company," to forthwith and hereafter comply with said provision of the "Act to regulate commerce;" that said alternative writ of mandamus be issued and directed to the defendant, the said "The Delaware and Hudson Company;" and he further prays for such other and general relief as he may be entitled to in the premises.

CHARLES J. BONAPARTE,
Attorney-General.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Aylett T. Robinson, a notary public in, for, and of the District of Columbia aforesaid, Charles J. Bonaparte, Attorney-General of the United States, and made oath, in due form of law, that he is the Attorney-General of the United States, that he is acquainted with the facts alleged in the foregoing petition,

and that the same are true to the best of his knowledge, information, and belief.

CHARLES J. BONAPARTE.

Subscribed and sworn to before me this 4th day of June, in the year nineteen hundred and eight.

[NOTARY'S SEAL.] AYLETT T. ROBINSON,
Notary Public, D. C.

14 *To "The Delaware and Hudson Company:"*

You are hereby notified that I shall, on the fifth day of June, in the year nineteen hundred and eight, before the Honorable James B. Holland, one of the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, at his office in the city of Philadelphia, in said State of Pennsylvania, apply for alternative writ of mandamus, to be issued by the said Circuit Court against you, "the Delaware and Hudson Company," requiring you to forthwith and hereafter comply with that provision of the "Act to regulate commerce," as said act was amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "from and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines
15 and mining lands in the said State of Pennsylvania to the markets of any other State, any anthracite coal manufactured, mined, or produced by you, or under your authority, or which you may own in whole or in part, or in which you may have any interest, direct or indirect, except such of said anthracite coal as may be necessary and intended for your use in the conduct of your business as a common carrier.

Dated this fourth day of June, in the year nineteen hundred and eight.

CHARLES J. BONAPARTE,
Attorney-General of the United States.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Personally appeared before me, C. K. Klink, a notary public, L. Allison Wilmer, special assistant to the Attorney-General, and made oath that he, on the fifth day of June, in the year nineteen hundred and eight, delivered a copy of the foregoing notice to Mr. Robert W.

de Forest, of counsel for the said "The Delaware and Hudson Company."

L. ALLISON WILMER,
Special Assistant to the Attorney-General.

Sworn to and subscribed before me this fifth day of June, in the year nineteen hundred and eight.

[NOTARY'S SEAL.] C. K. KLINK,
Notary Public.

My commission expires April 18, 1911.

16 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April session, 1908. No. 202.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-General of the United States
vs.
THE DELAWARE AND HUDSON COMPANY.

Before HOLLAND, J.:

On motion in behalf of Charles J. Bonaparte, Attorney-General of the United States, on petition this day filed praying for alternative writ of mandamus to issue against "The Delaware and Hudson Company" requiring it to forthwith and hereafter comply with that provision of the "Act to regulate commerce," as amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "from and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products
17 thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the State of Pennsylvania to the markets of other States any anthracite coal manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such of said anthracite coal as may be necessary and intended for its use in the conduct of its business as a common carrier:

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

18 to 22 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA EX REL ATTORNEY-General *vs.* THE DELAWARE AND HUDSON COMPANY.	April session, 1908. No. 202.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST.
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for said Defendant.

To Clerk of said Court.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 202. April session, 1908. U. S. of America ex rel. Attorney-General v. The Delaware and Hudson Company. Filed Jun 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Order for appearance. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

23 Filed Jun 13, 1908. Henry B. Robb, clerk. By L., deputy clerk.

202. Apr. sess., 1908.

United States Circuit Court, Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States *vs.* THE DELAWARE AND HUDSON COMPANY.	April sessions, 1908. No. —.

The answer of the respondent or defendant, the Delaware and Hudson Company, to the petition of the Attorney-General of the United States, for and in behalf of the United States of America, for a writ of mandamus as prayed for therein, or to so much thereof as this defendant is advised it is material or necessary for it to answer, respectfully shows:

The defendant admits that the petitioner is the Attorney-General of the United States, and that as such he has been requested by the Interstate Commerce Commission to institute this suit or proceeding.

1. The defendant, the Delaware and Hudson Company, admits that it is a corporation created and existing under the laws of the State of New York, having its principal office in the city, county, and State of New York; also maintaining an office at Scranton, Pennsylvania, for its coal business, and an office at Albany, New
24 York, for its transportation business. Its capital stock is $42,400,000.

This defendant was incorporated by an act of the legislature of the State of New York approved April 23, 1823, constituting its charter and entitled "An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company." Its said charter authorized it to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal, and to employ its capital in the business of transporting to market coal mined from such lands. Its charter was afterwards amended and supplemented by subsequent acts of the legislature of the State of New York, one of which, enacted on April 28, 1899, authorized this defendant to abandon and sell its canal, and changed its name to "The Delaware and Hudson Company." Printed copies of all the acts before referred to as well as of the said charter are hereunto annexed, marked, respectively, Exhibits A 1, 2, 3, 4, 5, 6, 7, and 8, and made part of this answer.

The State of Pennsylvania between the years 1823 and 1871 passed divers special statutes enabling this defendant to purchase and hold coal lands in Pennsylvania, to mine coal therefrom, and to transport the coal mined by this defendant from such lands owned by it. Printed copies of all the said Pennsylvania statutes are hereunto annexed, marked, respectively, Exhibits B 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, and made part of this answer.

2. This defendant denies that it is a railroad corporation within the meaning of section 1 of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended by the act of Congress entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906; and especially within
25 the meaning of the fifth paragraph of said section 1 as amended by the said act approved June 29, 1906, which paragraph is commonly and hereafter in this answer called the "commodity clause."

Prior to the year 1823, when the defendant's charter was granted, as before stated, it was a fact of common knowledge that there was a large supply of anthracite or stone coal lying along the Lackawanna River, in the county of Luzerne, in the State of Pennsylvania, and in the regions thereunto adjacent. The section of Pennsylvania in which these deposits of anthracite coal was situated was at that time wild, mountainous, and sparsely inhabited, and of no appreciable value except by reason of such deposits of anthracite coal, which, in connection with similar deposits in other sections of Pennsylvania, were so abundant in quantity as to far exceed the necessary consumption of the people of Pennsylvania. To utilize these great deposits of coal for the benefit of the people of the United States it was essential that means of communication should be created to points within and outside of Pennsylvania for the transportation of such commodity when mined. The State of Pennsylvania at that time,

and thereafter, desired to create and foster the industry of mining such coal and to develop and facilitate the transportation thereof to the settled portions of that State and adjoining States. The State of New York was also desirous of securing a supply of such coal for the citizens of its State. By an act of the legislature of the State of Pennsylvania approved March 13, 1823, entitled "An act to improve the navigation of the river Lackawaxen," one Maurice Wurts, who then owned large tracts of coal-bearing lands on the Lackawaxen River, in the State of Pennsylvania, was authorized to improve the navigation of that river so as to afford canal or slackwater navigation thereon to the boundary line between the States of Pennsylvania and New York on the Delaware River. The New York charter of this defendant, which was enacted one month later, in terms authorized this defendant to acquire all the rights of Maurice Wurts under the said Pennsylvania act and also to purchase any lands con-
26 taining coal that he or any other person might own at or near the headwaters of the Lackawaxen River; to construct a canal from the Delaware River to the Hudson River, and to transport to market coal mined from the land so purchased. The State of Pennsylvania, by an act passed April 1, 1825, entitled "A supplement to the act entitled 'An act to improve the navigation of the river Lackawaxen,'" authorized this defendant to acquire the rights of Maurice Wurts under the aforesaid act of March 13, 1823, and also to purchase and hold lands within ten miles of the waters of the Lackawaxen not to exceed five thousand acres. The benefits of this act were duly accepted by this defendant on or before June 21, 1825. Subsequently the State of Pennsylvania passed divers supplemental and amendatory special statutes (being Exhibits B 3 to 15, both inclusive) authorizing this defendant to acquire additional lands in the State of Pennsylvania and to build railroads to facilitate the transportation of its coal and the purposes of its coal business.

Under the authority of the statutes of the State of Pennsylvania and of the State of New York before set forth and made a part of this answer this defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the State of Pennsylvania from Maurice Wurts and others, and in the construction of slackwater or canal navigation on the Lackawaxen River to the Delaware River and in the construction of a canal from the Delaware River to the Hudson River. Later, under statutes of both said States fully set forth in the exhibits annexed to this answer and forming part thereof, this defendant invested further portions of its capital in the construction of railroads in the State of Pennsylvania and in the construction and acquisition of leasehold estates in railroads in the State of New York.

This defendant therefore avers and submits that it was organized as, has always been, and still is a coal mining company, and not a "railroad company" within the meaning of the said commodity clause; although by the special statutes hereinbefore set
27 forth it has power from the States of Pennsylvania and New

York to acquire, maintain, and operate canals and railroads, principally for the transportation of coal mined by it, and incidentally only as a common carrier of passengers and property for others.

3. This defendant admits that by virtue of the rights, powers, and privileges granted and conferred upon it by the States of New York and Pennsylvania, as before set forth, it has been continuously since the year 1870, and still is, incidentally to its business as a coal-mining company, a common carrier by railroad of passengers and property, and that in respect to such passengers and property of others as are moved in commerce between the States of Pennsylvania and New York it has been and still is engaged in interstate commerce.

4. This defendant has acquired under the powers, rights, and privileges given to it as before set forth by the States of Pennsylvania and New York, large amounts of coal properties within the counties of Luzerne, Lackawanna, Susquehanna, and Wayne, in the State of Pennsylvania, and has invested large sums of money in the purchase of such lands and in the erection of suitable structures and appurtenances necessary for the mining of coal therefrom; and this defendant has similarly expended large sums of money in aiding the three coal companies hereinafter in this answer mentioned to acquire other coal lands and to equip such lands for the mining of coal therefrom.

As to many of the coal properties so acquired the interests of this defendant and of the said three coal companies therein were respectively acquired through leases upon royalties payable to the lessors in respect to each ton of coal mined from such properties, and many of such leases contain provisions requiring the payment in each year of larged fixed minimum amounts by way of royalties, irrespective of amounts actually mined in such years; so that this defendant will have to make large annual payments under the said leases,
28 whether or not it actually mines coal from the said leased lands.

Many of such leases, of great value to the defendant, also contain provisions forfeiting the same in case the same are assigned to others without the consent of the lessor. The defendant can not therefore dispose of such leases without such consent.

This defendant under the powers, rights, and privileges given to it has also expended large sums of money in the acquisition of railroads and leasehold estates in railroads within the States of Pennsylvania and New York, and such leasehold estates in railroads are subject to the payment of large fixed rentals.

This defendant would never have acquired these property interests, which were duly vested in it by the fully competent powers respectively of the States of New York and Pennsylvania, and would never have so invested its capital, except on the expectation that it could freely utilize the means thereby created for the interstate transportation of coal which it had mined; and the denial of such right of free interstate transportation is, this defendant avers, a destruction of such vested right, and the defendant's property therein invested, and a virtual confiscation or appropriation for public use of valuable rights heretofore acquired by this defendant under the powers of the

States of New York and Pennsylvania, and in the belief that the Constitution of the United States insured and guaranteed freedom of interstate commerce.

The said coal lands acquired as before stated by this defendant and the said three coal companies have little, if any, value except for the mining of coal therefrom and its sale as a commercial commodity, and if this defendant is forbidden such use thereof it will be deprived of the only possible enjoyment of property lawfully acquired by and vested in this defendant long prior to February 4, 1887.

The said mining lands and mines acquired as aforesaid by this defendant and the said three coal companies are located either directly upon or so contiguous to the said railroads of this defendant as to make such railroads the only reasonably practical and conveniently available avenues of transportation whereby the coal produced
29 therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic, and transportation uses.

This defendant has constructed lateral railroads and switches connecting its railroad lines with the mines acquired by this defendant and the said three coal companies, in order to enable the coal taken from the said mines to be loaded at the mines upon the railroad coal cars of this defendant ready for shipment upon this defendant's railroads. This said lateral railroads and switches together aggregate several miles in length, and have been constructed at considerable cost to this defendant. If this defendant is practically prohibited from mining coal from the said mines and from transporting the same in its cars upon its railroads, the said lateral railroads and switches will be absolutely of no use or value, and this defendant will be deprived of the only possible enjoyment of property lawfully acquired by and vested in this defendant long prior to February 4, 1887.

The railroads acquired by this defendant were so acquired in the expectation that this defendant would be able to secure the transportation upon such railroads of the coal mined from the lands acquired by this defendant and the said three coal companies. If this defendant is prohibited from transporting in interstate commerce the coal mined by it from its said lands over its said railroads, the gross earnings derived by it from the operation of such railroads would be largely decreased and the property rights of this defendant would be largely destroyed. The prohibition of the right hereafter possessed and enjoyed by this defendant of transporting coal mined by it interstate would result in the disintegration of its business and its organization.

The defendant moreover avers that these purchases, leases, and investments constitute a unified system, which can not be thus disintegrated without great loss and damage to this defendant and without serious impairment of its ability to pay its fixed charges and carry out its contracts.

30 5. This defendant admits that it is now and has been for many years past the owner of all the shares of the capital stock of and in several coal mining companies duly incorporated in the State of Pennsylvania, to wit:

(a) The whole capital stock, consisting of 10,000 shares of $100 each, and aggregating at such par value $1,000,000, of the Northern Coal and Iron Company, a corporation duly constituted by a special statute of the State of Pennsylvania entitled "An act to incorporate the Northern Coal and Iron Company," approved April 27, 1864; and by a supplement thereto entitled "A supplement to an act entitled 'An act to incorporate the Northern Coal and Iron Company,' approved the 27th day of April, A. D. 1864," approved April 20, 1866.

(b) The whole capital stock, consisting of 2,000 shares of $50 each, and aggregating at such par value $100,000, of The Jackson Coal Company, a corporation duly constituted by articles of agreement dated November 1st, 1866, pursuant to a general statute of the State of Pennsylvania entitled "An act relating to corporations for mechanical, manufacturing, mining, and quarrying purposes," approved July 18, 1863, and the several supplements thereto.

(c) The whole capital stock, consisting of 2,000 shares of $50 each, and aggregating at such par value $100,000, of The Hudson Coal Company, a corporation duly constituted by a special statute of the State of Pennsylvania entitled "An act to incorporate the Susquehanna Improvement Company," approved June 2, 1871, and its name changed by three decrees of court in Pennsylvania made respectively as follows:

(1) On April 14, 1883, in common pleas No. 4 for Philadelphia County, No. 870, March term, 1883, changing name of the Susquehanna Improvement Company to the Metal Railroad Tie Construction Company.

(2) On March 29, 1890, in common pleas No. 1 for Philadelphia County, No. 600, March term, 1890, changing name of the Metal Railroad Tie Construction Company to the Continental Trust and Finance Company of Philadelphia, Pennsylvania.

(3) On April 6, 1901, in common pleas No. 5 for Phila-
31 delphia County, No. 230, March term, 1901, changing name of the Continental Trust and Finance Company of Philadelphia, Pennsylvania, to the Hudson Coal Company.

This defendant further admits that by reason of stock ownership it does elect the managing directors and officers of the said corporations and that it controls and manages the same to the extent that within the meaning of the law the stockholders of a corporation control and manage its affairs.

Defendant further admits the allegation of the petition that the officers and directors of these corporations the stock of which is owned by this defendant are substantially the same as the officers and directors of this defendant. To the extent indicated, this de-

fendant admits the further allegations of paragraph second of the petition.

This defendant further states and avers that most of the said shares of the said several mentioned coal companies were duly acquired and possessed by it before February 4, 1887, and all of them many years before June 29, 1906.

6. This defendant admits that anthracite coal mined by this defendant from its own lands in the State of Pennsylvania and from the lands of the three several coal companies before mentioned has been, both before and since the first day of May, 1908, transported and is still being transported by it or under its authority, but only at lawfully established uniform and published rates upon and over its lines of railroad, and that approximately seventy per cent of the same, or about 4,300,000 gross tons, is moved by it from originating points in Pennsylvania to different destinations in New York and other States; and that the transportation of such portion thereof by this defendant constitutes commerce between different States. In such interstate commerce its daily shipments average about 12 trains of 37 coal cars each.

This defendant avers that such coal so mined and transported in interstate commerce, including the coal mined from the lands of
32 the three coal companies before mentioned, is sold, before such transportation begins, by this defendant to third persons (except as hereinafter stated as to steam sizes) at the mines in Pennsylvania from which such coal has been produced, and that this defendant does not, at the times when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligations and rights as a common carrier in the transportation thereof. It carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal. To some extent, however, the smaller sizes of coal (known as steam sizes) so mined by this defendant and in fact owned by it, are transported by this defendant for its own convenience from Pennsylvania to its storage yards in the State of New York and there stored by this defendant until the same is either used by it in the conduct of its business as a carrier or sold to purchasers after such transportation and storage. The demand by consumers for such smaller sizes of coal produced in preparing coal for sale is often proportionately less than such demand for the larger sizes, thus making necessary a storage thereof by this defendant until the same can be sold; but this defendant denies that such transportation of such coal for its own account over its own railroad, constitutes interstate commerce, or is within the provisions of the commodity clause of the act of June 29, 1906.

7. For the reasons before and hereafter in this answer given, and with the exception referred to in the preceding paragraph as to steam sizes, this defendant denies that it is the owner or part owner of the anthracite coal mined and transported as aforesaid, at the time when such transportation begins or at any time during the course of

such transportation or at any time after its delivery at the point of destination; and this defendant further denies that within the provisions of the commodity clause of the said act of June 29, 1906, it has any interest, direct or indirect, in said coal so sold by it at
33 the mines as aforesaid at the time when it is so transported; and this defendant further denies that such transportation by it is unlawful and violative of any statute of the United States and particularly of the said commodity clause.

This defendant further avers and submits that if it can not freely transport the coal mined by it from its own coal lands or those of the said three coal companies, whether owned by it or its vendees, or their subsequent assignees, from the State of Pennsylvania to points of destination in other States, it could not find a market for the larger part of such coal within the State of Pennsylvania, and the value of property lawfully acquired by this defendant would be seriously impaired, so that the denial of such freedom of interstate transportation would result in destroying rights of this defendant in and to its said property.

8. This defendant admits that in the manner aforesaid it has, since May 1, 1908, transported and now transports coal from one State to another State, either after it is sold to a purchaser or for itself as owner of said steam sizes for the purpose of storage in the State of New York as aforesaid, and this defendant is advised by counsel and believes that it may lawfully continue to do so and that the said commodity clause act of June 29, 1906, does not forbid such transportation and that if it does forbid such transportation, the said act is, for reasons hereinafter specified, invalid as violative of the Constitution of the United States.

9. This defendant denies all of the allegations of the fourth, fifth, and sixth paragraphs of the petition, except as hereinbefore admitted.

10. Nearly all of the coal-bearing lands owned by this defendant in the State of Pennsylvania, together with all its railroads in the State of Pennsylvania situated north of Scranton, are subject to the lien of a mortgage made by this defendant to the Union Trust Company of New York as trustee, bearing date August 13, 1877, and securing an issue of $5,000,000 of this defendant's bonds maturing in
34 1917, which are now outstanding and in the hands of third parties largely unknown to this defendant. Liens were created by the said mortgage and still exist upon both the railroads and the coal properties owned by this defendant in the State of Pennsylvania, which liens can not be separated without the consent of all of the holders of the said bonds. A copy of this mortgage is hereunto annexed, marked "Exhibit C."

11. This defendant is informed and believes and therefore alleges that there are railroad corporations and other common carriers by railroad engaged in interstate commerce other than this defendant which transport from one State or Territory to another State or Territory timber and the manufactured products thereof produced or manufactured by such railroad corporations or common carriers, or

under their authority, or which they own or are interested in, other than timber and the manufactured products thereof which are necessary and intended for the use of such railroad corporations or common carriers in the conduct of their business as common carriers.

12. For further answer to the petition, this defendant avers and submits that if the amendment of section one of the said act to regulate commerce made June 29, 1906, and known as the "commodity clause" be construed as applying to it and its business conducted as aforesaid, or any part thereof, the same constitutes invalid legislation in that it would deprive the defendant of any valuable enjoyment of property lawfully acquired and held by it, without compensation and without due process of law, contrary to the provisions of the fifth amendment of the Constitution of the United States.

The right of this defendant to acquire coal lands in Pennsylvania, and to make the only available use of the greater part thereof by mining coal therefrom and transporting the same to market beyond the State of Pennsylvania, was lawfully acquired by it more than eighty years before June 29, 1906, by the joint action of the States of New York and Pennsylvania. The right of citizens, including
35 lawfully created corporations, to engage in interstate commerce, is not a right created either by the Constitution of the United States or by the Congress of the United States, such right having existed before the Constitution and independently of congressional permission. Investments made by this defendant under the circumstances set forth in this answer have resulted in vested rights which are beyond the power of Congress to impair or take away.

13. This defendant avers and submits that the said commodity clause is also invalid under the said fifth amendment in that it discriminates between those common carriers that are corporations and those that are not corporations, and between carrier corporations that are railroad companies and those that are not railroad companies, there being no facts or circumstances which would justify a separate classification of railroad companies for purposes of any such legislation.

14. This defendant avers and submits that the said commodity clause is also invalid under the said fifth amendment in that it discriminates between common carriers of timber and the products thereof and common carriers of other commodities, there being no facts or circumstances justifying a separate classification of timber and its products, and the only motive for such discrimination being to foster shippers and common carriers of lumber while denying equal rights to shippers and common carriers of other commodities.

15. This defendant avers and submits that the said commodity clause is also invalid for the reason that its operation and effect is not merely to regulate interstate commerce, but to prohibit such commerce, which prohibition was not made for any purpose within any power in that behalf possessed by Congress under the commerce clause of the Constitution.

16. This defendant avers and submits that the said commodity clause is also invalid under the provisions of the eighth amend-
36 ment to the United States Constitution in that it imposes excessive fines for its violation.

17. This defendant avers and submits that the said commodity clause is also invalid because it imposes such excessive penalties both upon this defendant itself and also upon such of its officers and directors for each violation thereof as would naturally operate, and must be construed as having been intended to operate, to deter a railroad company from contesting the validity of the statute, which contest could be made only after a violation thereof.

18. This defendant further avers and submits that the said commodity clause is also invalid, because under the tenth amendment to the Constitution of the United States the power which it seeks to exercise has been expressly reserved to the States and to the people thereof and has been withheld from the United States.

Wherefore the defendant prays that the petition herein be dismissed and that the prayer of the relator for the issue of a writ of mandamus to the defendant be denied, with costs.

JAMES H. TORREY,
Attorney for Defendant, the Delaware and Hudson Company, Scranton, Pennsylvania.

JAMES M. BECK,
WM. S. OPDYKE,
Of Counsel.

[SEAL.]

37 UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

L. F. Loree, being duly sworn, doth depose and say: I am the president of the Delaware and Hudson Company, the above-named defendant. I have read the foregoing answer and know the contents thereof. The same is true to the best of my knowledge, information, and belief.

L. F. LOREE.

Sworn to before me this tenth day of June, 1908.

THOS. J. CURRAN, [SEAL.]
Notary Public (139), N. Y. Co., N. Y.

38 EXHIBIT A1.

New York act, approved Apr. 23, 1823.

(Laws of 1823, chap. 238.)

An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company. (Passed April 23, 1823.)

Whereas it is desirable that a channel should be opened through which the city of New York and other parts of this State may receive

a supply of stone coal, which is found in the interior of the State of Pennsylvania: and whereas there is a large body of this valuable article, belonging to Maurice Wurts, of the said State of Pennsylvania, situated near the headwaters of the river Lackawaxen, which empties into the river Delaware opposite the county of Sullivan, and the legislature of that State has recently passed an act authorizing the above-named individual to improve the navigation of the said river; and whereas it is represented that a water communication can be formed between the rivers Delaware and Hudson through the counties of Orange, Sullivan, and Ulster, or some one or more of them, so that a supply of this coal may be had from the source aforesaid; and a number of the citizens of this State have petitioned the legislature to incorporate a company for the purpose of making such a communication betweene the said rivers: Therefore,

I. Be it enacted by the people of the State of New York, represented in senate and assembly, That for the purpose of cutting a canal and making a complete slack-water navigation between the rivers Delaware and Hudson it shall be lawful to open books for receiving and entering subscriptions to the amount of five hundred thousand dollars, in shares of one hundred dollars each share, under the management and superintendence of G. B. Vroom, Philip Hone, Lynde Catlin,
39 Jonathan Thompson, Garret B. Abeel, George Janeway, and Elisha Tibbits, of the city of New York, or any three or more of them in the city of New York; and under the management and superintendence of George D. Wickham and Hector Craig, of the county of Orange, and Abraham Hasbrouck, and John C. Broadhead, of the county of Ulster, or any two of them, at such place or places within the counties of Orange, Sullivan, or Ulster as they, or any two of them, may deem expedient; the said books shall be opened at such time as the above-named commissioners may think most suitable, of which they shall give at least thirty days' notice by advertisement inserted in at least two newspapers printed in the city of New York and one newspaper printed within the counties of Orange, Sullivan, or Ulster, and they shall continue open for the space of thirty days, if the whole number of shares aforesaid should not sooner be subscribed; and if, at the expiration of that time, the whole number of shares aforesaid, or any part thereof, shall not have been subscribed, then it shall be lawful for the commissioners above named to adjourn from time to time and place to place until the whole number of shares shall be subscribed, of which adjournment they shall give such public notice as the occasion may require: Provided, That every person offering to subscribe to the said stock shall previously pay to the attending commissioners the sum of five dollars for every share by him subscribed, out of which shall be defrayed the expenses attending the taking of such subscriptions and other incidental expenses, and the remainder shall be paid by the said commissioners to the treasurer of the corporation hereby created as soon as the same shall be organized and the officers chosen, as hereinafter mentioned.

II. And be it further enacted, That whenever two thousand shares shall have been subscribed, as aforesaid, the persons so subscribing, and those who may thereafter subscribe, to the stock of the company hereby incorporated, shall be, and they are hereby, made and constituted a body politic and corporate, by the name, style, and title of "The President, Managers, and Company of the Delaware and Hudson Canal Company;" and by that name shall be capable of perpetual succession, may sue and be sued, defend and be defended, in law and equity, in all courts whatsoever, may have and use a common seal, such as they shall devise, and the same may alter and change at pleasure; and may make and establish such by-laws, rules, and regulations as shall from time to time appear necessary and convenient for the good government of said corporation, and the due management of their property, interests, and affairs, provided the same be not repugnent to the constitution and laws of this State or of the United States; and shall be capable of taking and holding their capital stock, and the increase and profits thereof, and of enlarging the same from time to time, by new subscriptions, in such manner and form as they shall think proper, under the same rules, regulations, and penalties, however, as are or may be imposed on the original subscribers, if such enlargement shall be found necessary to fulfill the intention of this act; and shall be capable, also, of purchasing, taking, and holding to them, their successors and assigns, in fee simple, or for any less estate, all such lands, tenements, hereditaments, and estate, real and personal, as shall be necessary to them in the prosecution of their works, and generally shall have power to do and execute, all and singular, the acts, matters, and things which to the said corporation it may appertain to do under the regulations, restrictions, limitations, and provisions herein prescribed and declared.

III. And be it further enacted, That the management of the concerns of the said corporation shall be entrusted to thirteen managers, who shall be stockholders; and the commissioners named in the first section of this act, or a majority of those of them who may attend to the receiving of subscriptions, shall designate the time and place of holding the election for the first board of managers, and give reasonable notice thereof; and the said commissioners, or a majority of them, as aforesaid, shall be inspectors of said election, and shall certify under their hands the names of those duly elected, and shall deliver over to them the subscription books; and the managers so elected shall hold their office for one year after their election, as aforesaid, or until others shall be elected in their places; and that at the first and all subsequent elections for managers of said company each share shall entitle the holder to one vote: Provided, however, That no transfer of stock shall entitle any person to vote unless such transfer of stock shall have been entered upon the books of the corporation at least three days previous to the election at which the vote is offered.

IV. And be it further enacted, That all elections for managers, after the first, shall be held annually, at such times and places and

under such regulations as shall be prescribed by the by-laws of the corporation; and the board of managers shall give thirty days'
41 notice of each and every election, by advertisement in at least two of the newspapers of the city of New York; and all elections shall be by ballot, by the stockholders, either in person or by proxy; and the persons who shall have the greatest number of votes shall be the managers; and if two or more persons shall have an equal number of votes, then the said commissioners, at the first election, and afterwards the managers in office, at any future election, or a majority of them, shall, by a plurality of ballots, determine which of the said persons so having an equal number of votes shall be a manager or managers, so as to complete the whole number to be elected; and all vacancies that may occur by death, resignation, or otherwise in the board of managers shall be filled, for the remainder of the year in which they shall happen, by such person or persons as the residue of the managers, or a majority of them, shall appoint; and the corporation hereby created shall not be dissolved by reason of not holding an annual election on the day prescribed by the by-laws, but it shall be lawful for the board of managers to provide for and direct an election on any other day, in case the stockholders shall neglect to make an election on the day fixed by the by-laws; and until such provisional election the managers for the time being shall continue to discharge the duties of their office.

V. And be it further enacted, That the managers shall choose a president, a secretary, and treasurer, to hold their offices during the pleasure of the board; and a majority of the managers shall be a quorum for the transaction of business; and the said managers shall have power to declare the stock of such persons as shall neglect to pay for the same according to the terms of the subscription, and all previous payments thereon, to be forfeited to the use of said company, or may sue for and recover from such delinquent subscribers and stockholders the amount due on such shares, in an action of assumpsit, in any court having cognizance thereof, whether any payment shall have been made by such delinquent subscriber on said stock or not; and no stockholder, whether an original subscriber or an assignee, shall be entitled to vote at any election, or at any general or special meeting of the said company, on whose share or shares any installment or arrearages may be due and payable more than thirty days previously to such election or meeting.

42 VI. And be it further enacted, That the board of managers shall meet at such times and places as shall be found most convenient for the transacting of their business; and, when met, in the absence of the president, may choose a chairman; and they shall keep minutes of all their transactions fairly entered in a book; and a quorum being formed, they shall have full power and authority to appoint all such surveyors, engineers, superintendents, and other artists and officers as they shall deem necessary to carry on their intended works, and to fix their salaries and wages; to ascertain the times, manner, and proportions in which the stockholders shall pay

the monies due on their respective shares; to draw orders on the treasurer: Provided, That such drafts or orders be signed by the president, or, in his absence, by a majority of the quorum present; and generally to do all such other acts, matters, and things as by this act and by the by-laws and regulations of the company they may be authorized to do.

VII. And be it further enacted, That the managers first chosen shall procure certificates or evidence of stock for all the shares of the said company, and shall deliver one such certificate, signed by the president and countersigned by the treasurer, and sealed with the common seal of the said corporation, to each person for every share by him subscribed and held; which certificates or evidence of stock shall be transferable at the pleasure of the holder in person, or by attorney duly authorized, in presence of the president or treasurer, each of whom shall keep a book for that purpose, subject, however, to all payments due, or to become due thereon; and the assignee holding any certificate, having first caused the assignment to be entered in a book of the company, to be kept for the transfer of stock, shall be a member of the said corporation, and for every certificate assigned to him as aforesaid shall be entitled to one share of the capital stock and to all the estates and emoluments of the company incident to one share, and to vote as aforesaid at the meetings thereof, and shall be subject to all the forfeitures and to being sued for all the balance due or to become due on each share as the original subscribers would have been.

VIII. And be it further enacted, That the corporation created by this act be, and they hereby are, authorized and empowered to make, construct, and forever maintain a canal or slack water navigation, of suitable width, depth, and dimensions, to be determined by
43 the said corporation, from such point on the river Delaware, within the jurisdiction of this State, through any one or more of the counties of Orange, Sullivan, and Ulster, to such point on the river Hudson as the said corporation shall judge best; said corporation may form and construct a towing path, or paths, all necessary locks, aqueducts, culverts, dams, waste weirs, and toll houses, artificial harbors for boats, side cuts or lateral canals, connected with said basins or with the said Delaware or Hudson River, at such place or places as shall be found expedient and all necessary feeders from said rivers or from other streams, if more convenient, and all other works, incident to or necessary and convenient for constructing, maintaining, and repairing said canal or navigation.

IX. And be it further enacted, That said corporation may purchase, and forever hold, any and all lands and real estate necessary for constructing, maintaining, and repairing said canal, and the works connected therewith, as aforesaid; and may also receive, hold, and take all voluntary grants and donations of real estate and lands which shall be made to them, to aid the objects of said corporation; and whenever, in either of the ways aforesaid, said corporation shall become possessed of and own any lands and real estate which it may

be unnecessary for them to retain for the purposes aforesaid, it shall be lawful for them to lease, occupy, alien, and convey the same, by lease or deed, with their seal affixed thereto; and to sell or lease any and all surplus waters of said canal, not wanted for the most commodious navigation thereof, on such terms, and for such purposes, as they shall deem expedient; and for the purpose of assuring to said corporation all the lands, real estate, and waters requisite for most economically constructing and maintaining said canal, and the works connected therewith, and incident and necessary to the navigation of the same, whenever the said lands and waters shall not be obtained by voluntary donation or fair purchase, it shall be lawful for said corporation, by their agents, superintendents, or engineers, to enter upon, take possession of, and use all such lands, real estate, and streams as shall be necessary for the purposes aforesaid; and in case of disagreement between the managers of the company and any person or persons owning any land or property which the said corporation may so occupy as aforesaid, or which may be injured by the necessary operations to complete such navigation, respecting the amount of the damages sustained by such person or persons, it
44 shall be lawful for the parties to appoint five suitable and judicious persons, who shall be under oath or affirmation fairly and impartially to estimate the same, and who shall reside within the proper county where the land lies; but if the parties can not agree upon such persons, or if either party shall refuse or neglect to join in such appointment, within twenty days after requisition for that purpose upon him made, or if the owner of such lands shall be feme covert, under age, non compos mentis, or out of the State, or if the person, or a majority of the persons appointed by the parties, shall not, within thirty days after receiving notice of their appointment, file a report of their estimate in the office of the clerk of the court of the county where the land lies, then, and in either of these cases, either of the parties may apply to the court of the county where the land lies; and the said court shall award a venire, directed to the sheriff, requiring him to summon a jury of disinterested men, in order to ascertain and report to the said court, under their oaths or affirmation, what damages, if any, have been sustained by the owner or owners of said land or property; which report being confirmed by the court, judgment shall be entered thereon, and execution may issue, in case of nonpayment, for the sum awarded, with reasonable costs, to be assessed by the court; and it shall be the duty of the jury, or five appraisers, as the case may be, in valuing any land or property, or in estimating the damage done thereto, to take into consideration the advantages derived to the owner or owners of the premises from the said navigation passing through the same; and it shall further be the duty of the said jury or appraisers to describe and ascertain the bounds of the lands or premises by them valued, and annex the same to their report or appraisement: Provided, always, That either party may appeal to the court of the county in which the premises are situated, within thirty days after such report may have

been filed in the office of the clerk of the court of the county, in the same manner as appeals are allowed in other cases. And on payment by the company to the owner or owners of the premises of the sum awarded by the five appraisers, or by the report of the jury, or by final judgment on appeal from such report, as the case may be, the said company shall be seized in fee of the premises by them occupied and used as aforesaid, as if the same had been conveyed by the owner or owners to them and their successors, in fee, by legal conveyance.

45 X. And be it further enacted, That if any person or persons shall be injured by means of any dam or dams being erected under the provisions of this act, or the land of any person shall be inundated by swelling the water by means of any dam, or dams, or any mill, or other water works, injured by swelling the water into the tail race of any such mill, or other water works, which may have been erected on any stream that the corporation hereby created may use for the improvements authorized by this act; and if the managers of the said corporation cannot agree with the owner or owners thereof, as to the compensation to be paid for such injury, the same proceedings shall be had as is provided in the preceding section of this act; and the persons or jury valuing the damages having been first sworn or affirmed justly and impartially to assess the same shall take into consideration the advantages which may be derived by such owner or owners from the navigation aforesaid.

XI. And be it further enacted, That the managers of the said corportation, by and with their superintendents, engineers, artists, workmen, and laborers, with their tools, instruments, carts, wagons and other carriages and beasts of draught and burthen, may enter upon the lands contiguous and near to the track of the said intended canal or navigation, giving notice to the owners or occupiers of such lands; and from thence take and carry away any stone, timber, gravel, sand, earth, or other material, doing as little damage thereto as possible, and repairing any breach they may make in the enclosures thereof, and making amends for any damages that may be done thereon, and paying for the materials so taken away, the amount whereof, if the parties can not agree, shall be assessed and valued by any three disinterested freeholders residing in the neighborhood, under oath or affirmation, to be appointed by the parties; or, if they can not agree in their appointment, then to be appointed by any disinterested justice of the peace of the township; and it shall be the duty of the said freeholders to file a report of their assessment within seven days after they shall have agreed upon the same, with a neighboring justice of the peace, by whom the same shall be entered upon his docket; and the said freeholders shall, also, within the said seven days, notify each of the parties of the name of the justice of the peace with whom their report has been filed; and either party may appeal from the

46 said report to the court of the county, at any time within thirty days after the same shall have been so filed.

XII. And be it further enacted, That it shall and may be lawful for the managers of the said company, as soon as the said canal and navigation, or any fifteen miles thereof, shall be completed so as to allow of the passage of boats, to appoint such and so many collector' of tolls for the passage of boats and vessels in and through the same, and in such places as they shall think proper; and that it shall and may be lawful for such collectors of tolls and their deputies to demand and receive of and from the persons having charge of any boat, ark, craft, raft, or other vessel passing through the said canal and navigation, such toll and rates as the said managers shall think proper at any lock or other convenient place: Provided, That the said toll shall not in the whole exceed the rate of eight cents per mile for every ton weight of the ascertained burthen or capacity of any boat, ark, craft, or vessel laden with or engaged in the transportation of stone coal, and one-half that sum for every ton weight of the ascertained burthen or capacity of any boat, ark, craft, or vessel laden with or engaged in the transportation of any other article of mechandise; and the same for every hundred feet, cubic measure, of timber, and one thousand feet, board measure, of boards, plank, or scantling and for every five thousand shingles; and so, in proportion, for any other distance and less number of locks.

XIII. And be it further enacted, That the collectors of tolls, duly appointed by the managers of the company, may stop and detain all boats, vessels, craft, or rafts using the said canal and navigation, until the owner or commander or supercargo of the same shall pay the toll so as aforesaid fixed; and if any owner, skipper, or supercargo of any boat or ark, craft, or raft shall pass by any place appointed for receiving tolls, without making payment thereof, according to the provisions of this act, and with the intent to defraud the said company out of such toll, he, she, or they so suffering shall forfeit and pay, for every time they shall so pass by each appointed place, to the said company the sum of twenty dollars, to be sued for and recovered by action of debt, in like manner and subject to the same rules and regulations as debts under fifty dollars may be sued for and recovered, together with the costs of suit.

47 XIV. And be it further enacted, That in order to ascertain the tonnage of boats using and passing the said navigation, and to prevent disputes between the supercargoes and collectors of tolls concerning the same, upon the request of the owner, skipper, or supercargo of such boat or the collector of said tolls, at any lock or place appointed for receiving of tolls upon the said navigation, it shall and may be lawful for each of them to choose one skillful person to measure and ascertain the tonnage the said boat is capable of carrying, and to mark the said tonnage so ascertained in figures upon the head and stern of said boat in colors mixed with oil or other dura-

ble matter; and the said boat or vessel so measured and marked shall be permitted to pass through the said canal and navigation for the price to which the number of tons so marked on her shall amount, agreeably to the rates fixed in the manner aforesaid; and if the owner, shipper, or supercargo of any boat shall decline choosing a person to ascertain the tonnage thereof, then the amount of such tonnage shall be fixed and ascertained by the person appointed for that purpose by the managers of the corporation or chosen by the said collector of tolls; and the tolls shall be paid according to such measurement before any such boat shall be permitted to pass the place where such toll is made payable.

XV. And be it further enacted, That if any person shall wilfully and knowingly do any act or thing whereby the navigation shall be impeded, or any dam, lock, gate, canal, engine, machine, property, or device whatsoever thereunto belonging shall be injured or damaged, he, she, or they so offending shall forfeit and pay to the said corporation four times the amount of the damages by them sustained, together with costs, to be recovered by action of debt before a justice of the peace or in any court of competent jurisdiction.

XVI. And be it further enacted, That it shall be the duty of the master or commander of any boat, ark, raft, or vessel passing through said navigation, when he shall arrive within one-fourth of a mile from any lock erected in said navigation, under the penalty of two dollars, to blow a trumpet or horn, whereupon the keeper of such lock shall attend for the purpose of opening the gate or sluice to let the said boat, ark, raft, or other vessel pass without unnecessary delay and in safety; and if any boat, ark, raft, or other vessel shall be prevented from passing up or down any of said locks or sluices by reason of the lock not being raised, for more than thirty
48 minutes, the said corporation shall, on conviction thereof before any justice of the peace of the proper county, forfeit and pay to the person so hindered the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportion for any longer or shorter time; and the service of any civil process upon the toll gatherer, in the proper county and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served upon the president of the said corporation.

XVII. And be it further enacted, That if the said corporation shall neglect or refuse to keep in repair and good order any dam, lock, or sluice of their own construction, or shall neglect to remove any obstacle which may occur, so that boats, arks, rafts, or other vessels may safely use said navigation in the manner provided by this act, the said corporation shall, for every such offence, forfeit and pay the sum of one hundred dollars, to be sued for and recovered in any court of competent jurisdiction, one-half to the use of the informer and the other half to the use of the poor of the township or county where the neglect may occur; and the service of process upon the toll gatherer, in the proper county and next to

the place where the offence shall have been committed, shall be held as good and as available in law as if served on the president of the said corporation.

XVIII. And be it further enacted, That wherever any sluice or canal made by the company hereby incorporated shall cross any public or private laid out road or highway, or shall divide the grounds of any person or persons into two parts, so as to require a ford or bridge to cross the same, the appraisers or jury who shall inquire of the damages to be sustained, in the manner directed by the ninth section of this act, shall find and ascertain whether a passage across the same shall be admitted or maintained by a ford or bridge, and, on such finding, if in the affirmative, the said company shall cause a ford to be rendered practicable or a bridge fit for the passage of wagons and carts to be built and forever thereafter to be maintained and kept in repair at all and every place or places so ascertained by the said jury, at the costs and charges of the said company; but nothing herein contained shall prevent any person from erecting and keeping in repair any foot or other bridge across any sluice or
49 canal, at his own expense, when the same shall pass through his ground: Provided, That such foot or other bridges so to be erected by the owners of such land shall not interfere with any sluice or lock or other works of the said company.

XIX. And be it further enacted, That the managers of the said company shall keep fair and just accounts of all monies received by them from the commissioners named in the first section of this act, and from the subscribers to the company, on account of their several subscriptions, and the amount of the profits on the shares which may be forfeited, as aforesaid, and also of all monies by them expended in the prosecution of the said works; and shall, in every year, submit such accounts to the stockholders, at their annual meeting to choose officers of the company; and the aggregate amount of such receipts and expenditures shall be ascertained, and if, upon such liquidation, or when the capital stock shall be nearly expended it shall be found that the said capital stock will be insufficient to complete the said navigation, and effect the objects designed by this act, according to the true intent and meaning thereof, it shall be lawful for the said managers, with the concurrence of the stockholders, given at a stated or at a special meeting convened for the purpose, to increase the number of shares to such extent as shall be deemed sufficient to accomplish the work; and to receive and demand the monies for shares so subscribed, in like manner and under like penalties as are hereinbefore provided for the original subscription, or as shall be provided by their by-laws.

XX. And be it further enacted, That the said managers shall also keep a just and true account of all the monies received by their several and respective collectors of toll, and all other emoluments; and shall make and declare a dividend of the clear profits and income thereof, among all the stockholders not in arrear to the company, all contingent costs and charges being first deducted; and shall, on the first

Monday in June, and the first Monday in December, in every year, publish the half-yearly dividends made of the clear profit, and the time when and where the same will be paid to the stockholders, not exceeding twenty days thereafter, and shall cause the same to be paid accordingly.

XXI. And be it further enacted, That it shall be lawful for the corporation hereby created, or for the commissioners named in the first section of this act, if they shall think proper, to contract,
50 for the use and benefit of said corporation, with Maurice Wurts, of the State of Pennsylvania, for the purchase of all the rights, privileges, and immunities granted to him, his heirs or assigns, by the legislature of said State, by an act entitled "An act to improve the navigation of the river Lackawaxen;" and also for the purchase of any lands containing stone coal, that he or any other person may own at or near the head waters of the said river; and after such purchase, to receive a conveyance of and hold the same in like manner as the said Maurice Wurts or such other person now does, or can do; and it shall also be lawful for the said corporation to apply any part of their capital to the payment and satisfaction of such purchase, and also to the improvement of the said river Lackawaxen, in the same manner as the said Maurice Wurts is authorized to do by the above mentioned act; and further, to employ so much capital as they may deem expedient in the business of transporting to market the coal which they may have purchased as aforesaid.

XXII. And be it further enacted, That the said company shall not, by anything in this act contained, be authorized to take possession of, or exercise any control over, any private property, land, or water, without the consent of the owner thereof, until ample security shall be given by such company, to be approved of by the clerk of the county wherein the same is situated, to pay the damages to be assessed as aforesaid, as provided by this act.

51 EXHIBIT A2.

New York act, approved Apr. 7, 1824.

(Laws of 1824, chap. 174.)

An act to amend the act entitled "An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company, passed April 23, 1823. (Passed April 7, 1824.)

Whereas by the act to which this is amendatory the corporation thereby created is authorized to use any capital that may be necessary to effect the objects contemplated by the act, but the amount of original subscriptions is limited to five hundred thousand dollars; and whereas it appears from an actual survey and examination of the route that it will require a larger sum to make a canal or slack water navigation from the Hudson to the headwaters of the Lackawaxen, and the proprietors of the coal mines near this river have represented

to the legislature that they deem it expedient that the whole line of improvement should be made by one company, to be organized under the act to which this is amendatory: Therefore

I. Be it enacted by the people of the State of New York, represented in senate and assembly, That for the purpose of effecting the objects contemplated by the act to which this is amendatory, the subscription of five hundred thousand dollars, authorized by the first section thereof, shall be, and the same is hereby enlarged to the sum of fifteen hundred thousand dollars, anything in the said act to the contrary notwithstanding.

II. And be it further enacted, That for the purpose of making a canal or slack water navigation from or near Carpenter's Point, on the river Delaware, to the mouth of the river Lackawaxen, the said corporation shall have and possess, within the jurisdiction of this State, the same powers, privileges, and authority, subject, however, to the same restrictions and limitations as have been granted and imposed upon it for the purpose of enabling it to make a canal or slack water navigation between the Delaware and Hudson rivers.

52 EXHIBIT A3.

New York act, approved Apr. 20, 1825.

(Laws of 1825, chap. 220.)

An act to amend the act entitled "An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company," and the several acts amending the same. (Passed April 20, 1825.)

I. Be it enacted by the people of the State of New York, represented in senate and assembly, That the President, Managers, and Company of the Delaware and Hudson Canal Company have, and shall have, full power and authority to make any contract or agreement with Maurice Wurts, or his assigns, or with any other person or persons whatsoever, by which the improvement of the navigation of the river Lackawaxen, according to the provisions of the act of the legislature of Pennsylvania, entitled "An act to improve the navigation of the river Lackawaxen," shall be secured, or stipulated to be made, and by which a sufficient supply of coal for the use and benefit of the said corporation may be obtained; and for the fulfilment of any such contract or agreement, may take such security from the person or persons with whom they shall be made, as they may deem necessary or proper and may employ such part of the capital of the said corporation as may be necessary to carry into effect any such contract or agreement on the part of the said corporation, or as may be necessary for the transportation to market of the coal which, under any such contract or agreement, may be obtained. Provided, That nothing in this section contained shall be construed to exonerate the said President, Managers, and Company from any of the conditions

and restrictions imposed by the several acts heretofore passed in relation to the said company, excepting only so much thereof as requires the said company to own any lands or tenements out of this State.

II. And be it further enacted, That the seventh section of the act entitled "An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company" shall not
53 be so construed as to prevent any subscriber to the capital stock of the said corporation from including in one certificate of stock the whole number of shares subscribed and held by him, or such portion thereof as he may deem proper; and that it shall be the duty of the managers first chosen to insert in each certificate so many shares as the subscribers entitled thereto shall respectively require; and that the assignee of such certificate, or of any number of the shares mentioned therein, shall be entitled to as many shares as shall be so assigned to him, and to all the estates and emoluments of the company incident thereto, in as full a manner, and subject to the same liabilities, as if a separate certificate had been originally issued for each share.

54 EXHIBIT A4.

New York act, approved Mar. 10, 1827.

(Laws of 1827, chap. 62.)

An act to loan the credit of the people of the State of New York to the President, Managers, and Company of the Delaware and Hudson Canal Company, and for other purposes. (Passed March 10, 1827.)

1. Be it enacted by the people of the State of New York, represented in senate and assembly, That it shall be lawful for the comptroller of the State of New York, and he is hereby directed to issue to the President, Managers, and Company of the Delaware and Hudson Canal Company, in such manner and under such restrictions as in this act provided, special certificates of stock, to the amount of five hundred thousand dollars, for the redemption of which, and the due payment of interest thereon (as in this act provided), to the owners of such stock, the faith and credit of the people of this State is hereby pledged.

2. And be it further enacted, That the said stock shall be issued by the comptroller in sums not exceeding one thousand dollars, and not more than one hundred thousand dollars at one time, the first one hundred thousand dollars on the delivery of the security by this act provided to be given to the people of this State for the said loan of five hundred thousand dollars; and before the comptroller shall issue stock beyond the first sum of one hundred thousand dollars the President, Managers, and Company of the Delaware and Hudson Canal Company shall deposit with the said comptroller the monthly accounts of the agent of the said company rendered to them and signed

by the said agent, and approved and countersigned by the president and treasurer of the said company, showing the expenditure on said canal of the amount of the stock previously issued by the said comptroller, which accounts so attested shall be a sufficient voucher to the comptroller for a further issue of stock, until the whole sum of five hundred thousand dollars is issued.

55 3. And be it further enacted, That the stock shall be made payable to the said corporation, or their order, and may be transferred by the said corporation, at their pleasure, and shall bear an interest of five per cent, payable quarter-yearly at the office of the said company in the city of New York, and shall be redeemable at the pleasure of the State, at any time after the year one thousand eight hundred and forty-seven; which certificates shall be transferable only in person, or by attorney legally constituted, at the office of the said company in the city of New York, in books to be provided for that purpose.

4. And be it further enacted, That the president and treasurer of said company shall cause public notice, for at least ten days, to be given in two of the daily newspapers printed in the city of New York, of the time and place at which the said certificate of stock will be sold, and the said certificates shall be sold at such time and place, at public auction, to the highest bidder, and the amount of any premium received on such sales, or on any sales of the said certificates, shall be paid into the treasury of this State, to be appropriated to the common school fund.

5. And be it further enacted, That whenever any holder of any such certificates shall desire to transfer the same, and to divide any certificate he may hold, or to consolidate any such certificates, he shall be authorized to do so upon surrendering the same to the said company, and thereupon the said company may issue new certificates of stock to the amount of such as shall have been surrendered, under their corporate seal, which shall be countersigned by the recorder of the city of New York, to whom the said original certificates shall be delivered, to be by him returned or transmitted to the comptroller; and for countersigning every such certificate the said recorder may charge and receive the sum of ten cents; the said certificates shall express the authority of the company to issue the same, and the terms, times, and place of the payment of the principal and interest.

6. And be it further enacted, That for the purpose of completely securing the people of the State of New York from any risk or responsibility incurred by the pledge of their credit, as aforesaid, the comptroller of this State, with the advice of the attorney-general thereof, is hereby authorized and directed, before he issues

56 the said stock, or any part thereof, to obtain from the said company a good and sufficient assignment to the people of the State, by way of mortgage or other collateral security of the said Delaware and Hudson Canal, already made, or hereafter to be made, with all the lands and tenements, rights, members, and privileges

thereunto belonging, or in any wise appertaining, as heretofore granted or hereafter to be granted to the said company, or existing by virtue of the laws of this State and of the State of Pennsylvania, which said mortgage, or other instrument to be taken, shall be recorded in the office of the secretary of state, in the same manner and for the same purpose that deeds and other securities upon real estate are there recorded; and in case of the nonpayment of the interest on the said special stock, at the time of payment thereof, or in case of the nonredemption of the said special stock at the time appointed therefor, as aforesaid, that then, and in either case, it shall and may be lawful for the said comptroller to proceed, by due course of law, to sell the premises to be pledged, as aforesaid, or such portion thereof as may be necessary, to the highest bidder, due notice being given of such sale; or to purchase the same in for the benefit and security of the State, for such amount as the State shall be then liable for on account of its faith and credit being so pledged, as aforesaid, if it shall be deemed necessary for the better security of the people of this State; and in case the said President, Managers, and Company shall faithfully comply with the provisions aforesaid in the redemption of the said special stock aforesaid, and of the punctual payment of the interest thereof, in manner and at the times aforesaid, that then, and in such case, the comptroller shall release, discharge, cancel, and give up to the said company all and all manner of securities so taken, as aforesaid, from the said company, and the said company shall be fully released and discharged from the same forever.

7. And be it further enacted, That it shall and may be lawful for the President, Managers, and Company of the Delaware and Hudson Canal Company to raise, on the general credit of the said company, by loan, upon such terms as shall be approved of by a majority of the board of managers of said company, a sum of money not exceeding three hundred thousand dollars, by a pledge of all or any portion of the said canal or property connected therewith, and held by the said corporation, if they shall deem such loan necessary to
57 carry into effect more effectually the special objects of their canal incorporation: Provided, That such loan shall not be made or effected until the sum of five hundred thousand dollars raised on the loan of the credit of the people of this State shall have been wholly expended by the said company on their said canal, or works connected therewith, and incident and necessary thereto, and that no part of such loan shall be used for or employed in banking by the said company: And provided further, That every written instrument to be executed by the said company, by way of pledge, mortgage, or other collateral security upon the said canal, or any other property connected therewith, for the purpose of effecting the loan authorized by this section of this act, shall contain within it a recital that such property is already pledged to the State, and the sum for which it is so pledged.

8. And be it further enacted, That until the average annual income of the said corporation, from the time of its commencing business,

shall amount to six per centum per annum on its whole capital, the President, Managers, and Company of the Delaware and Hudson Canal Company shall not be liable to be taxed or assessed as an incorporated company, under any present or future law for the assessment and collection of taxes, on any property held by them on or near the canal, and necessarily connected therewith, or for the bed of the said canal: Provided, That this exemption shall not extend beyond the period of six years from the passing of this act: Provided, That nothing in this act contained shall be taken to give any person a lien on the premises to be mortgaged or pledged to the State prior to the lien of the State.

9. And be it further enacted, That this act is declared to be a public act, and shall be favorably construed in all courts for every beneficial purpose herein contained.

58 EXHIBIT A5.

New York act, approved May 2, 1829.

(Laws of 1829, chap. 346.)

An act to loan the credit of the State to the President, Managers, and Company of the Delaware and Hudson Canal Company. (Passed May 2, 1829.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The comptroller is hereby directed to issue to the President, Managers, and Company of the Delaware and Hudson Canal Company, in such sums as the said company may require, special certificates of stock, to the amount of three hundred thousand dollars, redeemable at any time after the year one thousand eight hundred and forty-nine, at the pleasure of the State, and bearing an interest at the rate of four and a half per cent per annum, payable quarterly, at the office of the said company in the city of New York; for the redemption of which stock, and the due payment of the interest thereon to the owners of such stock, the faith and credit of the people of this State are hereby pledged.

SEC. 2. The said stock shall be so issued by the comptroller on the delivery of the security hereinafter provided to be given to the people of this State by the said company, for the said loan of three hundred thousand dollars.

SEC. 3. The said stock shall be made payable to the said corporation, or their order, and may be transferred by the said corporation at their pleasure.

SEC. 4. For the purpose of completely securing the people of this State for the responsibility incurred by the pledge of their credit, as aforesaid, the comptroller, with the advice of the attorney-general, before he issues the said stock, or any part thereof, shall receive
59 from the said company the like security as is provided in the sixth section of the act entitled "An act to loan the credit of the people of the State of New York to the President, Managers, and

Company of the Delaware and Hudson Canal Company, and for other purposes," passed March 10th, 1827, together with the bond of the company, under their corporate seal.

SEC. 5. The comptroller, upon the delivery to him by the said company of any portion, not less than ten thousand dollars, of the certificates of said stock, shall cancel the same and credit their amount in satisfaction of so much of the security by this act directed to be given by the said company to the people of this State for the aforesaid loan.

SEC. 6. Before the certificates of stock created by this act are issued by the comptroller satisfactory evidence shall be given to the comptroller and the attorney-general that all the estate and property now mortgaged to the State by the said company, including property since acquired, the railroad, and its appendages, are included in the mortgage by this act directed to be executed, and that no intermediate lien has been created or exists on said property.

60 EXHIBIT A6.

New York act, approved May 9, 1867.

(Laws of 1867, chap. 841.)

An act to amend an act entitled "An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company," passed April 23d, 1823. (Passed May 9, 1867.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. In addition to the powers conferred upon said canal company by an act entitled "An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company," passed April 23d, 1823, and the several acts amendatory thereof, for the purpose of opening and of mining and bringing to market a supply of stone coal, which is found in the interior of the State of Pennsylvania, it shall be lawful for the said canal company, for the purpose of increasing said supply of coal, to construct, own, and maintain railroads within this State, to contract with any railroad corporation now existing or hereafter to be created for the use of its road for the transportation of coal; to lease the railroad, or any parts thereof, of any incorporated company now or hereafter to be created upon which said canal company may desire to transport coal, and, also, to subscribe for and take stock or bonds of and in any railroad company which they may lease, or with which they may contract, now existing or hereafter to be incorporated, subject to the same rights, restrictions, and liabilities as other stockholders or bondholders.

SEC. 2. That in the constructing, owning, and maintaining of railroads within this State by said canal company, under the authority of this act, said canal company shall have, possess, and
61 enjoy all the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April 2d, 1850, and the several

acts amending the same, and be subject to all the duties, liabilities, and provisions, so far as relates to any powers or privileges by this act upon said company conferred, and hereafter exercised, and not inconsistent with the provisions of said company's charter.

SEC. 3. This act shall take effect immediately.

62 EXHIBIT A7.

New York act, approved June 4, 1881.

(Laws of 1881, chap. 452.)

An act to authorize corporations owning canals to construct and operate railroads alongside of or in lieu thereof. (Passed June 4, 1881, three-fifths being present.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. It shall be lawful for any corporation of this State owning and operating a canal to construct and operate along or in lieu of such canal a railroad, and the exercise of the authority hereby conferred shall not be deemed to forfeit or impair its corporate rights under its charter or act of incorporation.

SEC. 2. Such company in the construction and maintenance of any such railroad under the authority of this act shall have, possess, and enjoy all the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and the several acts amending the same, and be subject to all the duties, liabilities, and provisions so far as relates to any powers or privileges by this act upon said company conferred and hereafter exercised.

SEC. 3. Nothing in this act contained shall authorize the construction of any railroad except upon or along such canal owned and operated by any such company, and not in any other locality.

SEC. 4. This act shall take effect immediately.

63 EXHIBIT A8.

New York act, approved Apr. 28, 1899.

(Laws of 1899, chap. 469.)

An act to amend chapter eight hundred and forty-one of the laws of eighteen hundred and sixty-seven, entitled "An act to amend an act entitled 'An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company,' passed April twenty-third, eighteen hundred and twenty-three." (Became a law April 28, 1899, with the approval of the governor. Passed, a majority being present.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Chapter eight hundred and forty-one of the laws of eighteen hundred and sixty-seven, passed May ninth, eighteen hundred and

sixty-seven, entitled "An act to amend an act entitled 'An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company,' passed April twenty-third, eighteen hundred and twenty-three," and constituting chapter two hundred and thirty-eight of the laws of eighteen hundred and twenty-three, is hereby amended by inserting therein the following new sections, to be known as sections three, four, five, and six:

SEC. 3. Whenever it shall appear to the managers of said canal company that it is able to fulfill the aforesaid purpose of opening and of mining and bringing to market a supply of stone coal which is found in the interior of the State of Pennsylvania more economically by rail over its own or other lines than by its canal, it shall be lawful for said company, and it is hereby authorized and empowered, by vote of said managers, to lease, sell, or discontinue to use or maintain said canal, or any parts thereof, which in their judgment are no longer necessary for said purpose.

SEC. 4. Whenever the said company shall exercise the power and authority granted in section three of this act to discontinue to use or maintain said canal, or any part thereof, it shall, within a
64 reasonable time thereafter, restore the highway crossings of such part of said canal as is so discontinued to their former state, so far as the same can be done, either by the removal of the bridges thereover and the approaches thereto and filling in the bed of the canal at such crossings, or in such other way as may be found most practicable for that purpose. It shall also be the duty of said company, in the event of such discontinuance of said canal, or any part thereof, to make such provision for the private crossings over that part of said canal so discontinued as will furnish those entitled thereto a suitable crossing thereover, either by the removal of the bridges and approaches now existing at and for such private crossings and filling in the bed of the canal thereat, or in such other way as may be found most practicable for that purpose. It shall also be the duty of said company, in the event of such discontinuance of said canal or any part thereof, to make such provision for the streams now discharging into said canal on that part of it which may be so discontinued as will restore them to their original channels; but where to make such restoration has become or is now impossible, such provision shall be made for the discharge of the water of such streams from said canal as the existing situation now permits, and as will avoid injury to other property. It shall also be the duty of said company, its successors or assigns, to take such precautions and make such provisions for the carrying away of water that may flow into the bed of such portion of said canal as may be discontinued as will prevent such stagnant pools of water therein as are liable to become injurious to public health.

SEC. 5. It shall be lawful for said canal company, and it is hereby authorized and empowered, to use any part of its net earnings or surplus for the purchase or purchasing or extinguishing of securities or shares of stock of itself or of any corporation with which it may have

entered into any contract or lease, or upon whose securities or stock it may have become liable to pay interest or dividends. The amount to be so used and the time and manner in which the same shall be so applied shall be fixed by a vote of a majority of the stockholders present at any meeting in person or by proxy. Such action may be subsequently modified or rescinded after notice of the changes contemplated given for the same time and in the same manner as is required regarding notice of the annual meetings of the company and by a vote of the stockholders, such as is above specified, at a regular or special meeting pursuant to such notice.

SEC. 6. The corporate name of said company is hereby changed from "The President, Managers, and Company of the Delaware and Hudson Canal Company" to "The Delaware and Hudson Company," by which last-mentioned name it shall be hereafter known and designated with the same force and effect as though it had been originally incorporated by that name.

SEC. 2. This act shall take effect immediately.

EXHIBIT B1.

Pennsylvania act, approved Mar. 13, 1823.

(Laws of 1823, chap. 61.)

An act to improve the navigation of the river Lackawaxen.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that it shall and may be lawful for Maurice Wurts, of the city of Philadelphia, his heirs and assigns, with his or their surveyors, engineers, superintendents, artists, and workmen to enter upon the river Lackawaxen, and any one of the streams emptying into the same that may appear to the said Maurice Wurts, his heirs or assigns, most suitable for the purposes contemplated by this act, to open, enlarge, or deepen the same, in any part or place thereof, in the manner which shall appear to them most convenient for opening, enlarging, changing, making anew, or improving the channel; and also to cut, break, remove, and take away all trees, rocks, stones, earth, gravel, sand, or other material, or any impediments whatsoever within the said river Lackawaxen and the branch thereof which the said Maurice Wurts, his heirs and assigns, may select, and to use all such timber, rocks, stones, gravel, earth, or other material in the construction of their necessary works, and to form, erect, and set up any dams, locks, or any other device whatsoever which the said Maurice Wurts, his heirs or assigns, shall think most fit and convenient to make a good and safe descending navigation, at least once in every six days, except when

the same may be obstructed by ice or floods, from or near Wagner's Gap, in the county of Luzerne, or from or near Rix's Gap, in the county of Wayne, to the mouth of the said river Lackawaxen, with a channel not less than twenty feet wide and eighteen inches deep, for arks and rafts, and of sufficient depth of water to float down boats of the burthen of one hundred barrels, or ten tons: Provided, That no toll shall be demanded for any boat, vessel, or craft in ascending said stream of water, unless the same is converted into a complete slack-water navigation, as is authorized by this act.

67 SEC. 2. And be it further enacted by the authority aforesaid, That if any person or persons shall be injured by means of any dam or dams being erected under the provisions of this act, or the land of any person shall be inundated by welling the water by means of any dam or dams, or any mill or other water works injured by swelling the water into the tail race of any such mill or other water works, which may have been erected in the said river Lackawaxen, or the branch thereof which the said Maurice Wurts, his heirs and assigns, may use for the improvements authorized by this act; and if the said Maurice Wurts, his heirs and assigns, can not agree with the owner or owners thereof as to the compensation to be paid for such injury, the same proceedings shall be had as is provided in the fourth section of this act; and the persons or jury valuing the damages, having been first sworn or affirmed, justly and impartially to assess the same, shall take into consideration the advantages which may be derived by such owner or owners from the navigation aforesaid, and if the owner of any such land, mill, or water works shall be apprehensive that the same will be injured by any dam or dams then about to be erected by the said Maurice Wurts, his heirs or assigns, such owner may require the said Maurice Wurts, his heirs or assigns, to give to him sufficient security for the payment of any damages that may be thereafter awarded to him under the provisions of this act, for or by reason of injury arising to him from such dam or dams; and after such requisition shall have been made in writing, it shall not be lawful for the said Maurice Wurts, his heirs or assigns, to proceed in the erection of such dam or dams until such security shall have been given; and if the parties can not agree upon the amount and sufficiency of the security, the same shall be judged of by the court of common pleas of the county in which such land, mill, or water works may be situated.

And whereas on examination and survey it may appear to the said Maurice Wurts, his heirs or assigns, practicable and expedient to make slack-water navigation between the points aforesaid: Therefore

SEC. 3. Be it further enacted by the authority aforesaid, That it shall and may be lawful for the said Maurice Wurts, his heirs and assigns, if they shall think proper, to make a complete slack-water navigation from or near Wagner's Gap, aforesaid, or from or near

Rix's Gap, aforesaid, to the river Delaware, at or near the
68 mouth of the river Lackawaxen, so as to admit a safe and easy passage for loaded boats, arks, and other vessels up as well as down the said river Lackawaxen, and any one of the streams emptying into the same which the said Maurice Wurts, his heirs or assigns, may deem most suitable for such navigation, or by means of such collateral sluices and locks as they may devise for the purpose. And for the purpose of making such slack-water navigation, the said Maurice Wurts, his heirs and assigns, shall have and possess the same powers, privileges, and authority as is given to them by the first section of this act, to enable them to make a descending navigation.

SEC. 4. And be it further enacted by the authority aforesaid, That whenever it shall be necessary for the said Maurice Wurts, his heirs or assigns, to enter in, and upon, and occupy, for the purposes of said navigation, any land which may be suitable and necessary for erecting a lock sluice, canal, tow-path, or other device; if the owner or owners of such land shall refuse to permit such entry and occupation, and the parties cannot agree upon the compensation to be made for any injury, or supposed injury, that may be done to the same, it shall and may be lawful for the parties to appoint five suitable and judicious persons to estimate such damage, who shall be under oath or affirmation, fairly and impartially to estimate the same, and shall reside within the proper county where the land lies; but if they cannot agree upon such persons or if the owner of such land shall neglect or refuse to join in such appointment within twenty days after requisition for that purpose upon him made, or if such owner shall be feme covert, under age, non compos mentis, or out of the State; or if the persons, or a majority of the persons, appointed by the parties shall not, within thirty days after receiving notice of their appointment, file a report of their estimate in the prothonotary's office of the Court of Common Pleas of the county where the land lies, then, and in either of these cases, either of the parties may apply to the Court of Common Pleas of the proper county where the land lies, and the said court shall award a venire, directed to the sheriff, requiring him to summon a jury of disinterested men, in order to ascertain and report, under their oaths or affirmation to the said court, what damages, if any, will be sustained by the owner or owners of said ground by reason of such lock, canal, sluice, tow-path, or other device passing through his, her, or their land, which report, on being con-
69 firmed by the court, shall be taken as the measure of damage in such case: Provided, That either party may appeal to the court within thirty days after such report may have been filed in the prothonotary's office of the proper county, in the same manner as appeals are allowed in other cases, and the court shall direct an issue to be formed to try the fact. And it shall be the duty of the jury or five appraisers, as the case may be, in valuing any land, or in estimating the damage that may be done to the same, to take into consideration the advantages that will arise to the owner or owners thereof

from the said navigation. And on payment by the said Maurice Wurts, his heirs or assigns, to the owner or owners of such land, of the sum awarded by the five appraisers, or by the report of the jury, or by final judgment on appeal from such report, as the case may be, then it shall be lawful for the said Maurice Wurts, his heirs or assigns, by themselves, their superintendents, engineers, artists, or workmen, to enter in and upon and occupy such land for the purpose of said navigation, and there to dig, construct, make, and erect such lock, sluice, canal, tow-path, or other device, as they may deem necessary.

SEC. 5. And be it further enacted by the authority aforesaid, That the said Maurice Wurts, his heirs and assigns, by and with their superintendents, engineers, artists, workmen, and laborers, with their tools, instruments, carts, wagons and other carriages, and beasts of draught and burden, may enter upon the lands contiguous and near to the said river Lackawaxen, and the branch thereof which they may select for their improvements, giving notice to the owners or occupiers of such lands, and from thence take and carry away any stone, timber, gravel, sand, earth, or other material, doing as little damage thereto as possible, and repairing any breach they may make in the enclosures thereof, and making amends for any damages that may be done thereon, and paying for the materials so taken away, the amount whereof, if the parties cannot agree, shall be assessed and valued by any three disinterested freeholders residing in the neighborhood, under oath or affirmation, to be appointed by the parties, or if they cannot agree in their appointment, then to be appointed by any disinterested justice of the peace of the proper county. And it shall be the duty of the said freeholders to file a report of their assessment within seven days after they shall have agreed upon the same, with a neighboring justice of the peace, by whom the same shall be entered upon his docket; and the said free-
70 holders shall, also, within the said seven days notify each of the parties, or the agent or attorney of the respective parties, of the name of the justice of the peace with whom their report has been filed, and either party may appeal from said report to the Court of Common Pleas of the proper county, at any time within thirty days after the same shall have been so filed: Provided, however, That the owner of any stone, timber, gravel, sand, or other material which the said Maurice Wurts, his heirs or assigns, may be about to remove as aforesaid may require the said Maurice Wurts, his heirs or assigns, to give to him sufficient security for the payment of such valuation as may afterwards be put upon the same, or so much of the same as may be removed and appraised under the provisions of this section, and after such requisition shall have been made in writing it shall not be lawful for the said Maurice Wurts, his heirs or assigns, to remove any of the said materials until such security shall have been given, the amount and sufficiency whereof, if the parties cannot agree upon the same, shall be judged of by any disinterested justice of the peace of the township in which such materials may be situated.

SEC. 6. And be it further enacted by the authority aforesaid, That the said Maurice Wurts, his heirs and assigns, shall cause the guard walls, locks, gates, and canal to be erected and made at each respective situation before the dam intended for such situation, and to which the same are to be appurtenant, shall be extended into the stream so as to interfere with the rafting channel thereof.

SEC. 7. And be it further enacted by the authority aforesaid, That it shall be the duty of the said Maurice Wurts, his heirs and assigns, to make, construct, and fix suitable and sufficient slopes and aprons or other devices at each and every dam which he or they shall or may erect under the provisions of this act in such place and part of the channel of the stream and in such manner as shall enable rafts of any description that can now be run in the other parts of the stream, when the same is in good rafting condition, to pass with safety over such dam or dams. And in case the said Maurice Wurts, his heirs or assigns, shall neglect or refuse to make and fix such slope or slopes, apron or aprons, device or devices as aforesaid, at any dam or dams by him or them constructed as aforesaid, or shall for a term of nine months after notice in writing neglect or refuse
71 to amend, repair, or reconstruct any slope, apron or other device of their own construction, which shall or may have become out of repair, he, the said Maurice Wurts, his heirs or assigns, shall be liable to pay a fine not exceeding one hundred dollars, to be recovered before any justice of the peace of the proper county, to the use of such person or persons as shall have sustained damages by such neglect; and in case the said neglect shall be continued until the next court of quarter sessions after the expiration of the said nine months then and in such case the said Maurice Wurts, his heirs or assigns, shall be liable to prosecution by indictment for the same, and on conviction thereof it shall be lawful for the court to order the dam or dams where such neglect shall have occurred to be pulled down, destroyed, and completely removed out of the rafting channel of the stream, and the expense incidental to the pulling down or removal of such dam or dams shall be paid by the said Maurice Wurts, his heirs or assigns; and the service of process under the provisions of this section, upon the toll gatherer in the proper county at or nearest to the place where the neglect shall have occurred, shall be as good and as available in law as if served upon the said Maurice Wurts, his heirs or assigns: Provided, however, That this section shall not be construed to extend to or effect any dam or dams erected by the said Maurice Wurts, his heirs or assigns, at or above the highest point or place from which rafts can or do now run in the present natural or unimproved state of the river: And provided further, That this section shall not be so construed as to authorize boats, arks, craft, or other vessels above the burthen of three tons laden with merchandise to evade the payment of the tolls fixed in this act by passing over the slopes or aprons appurtenant to any dam.

SEC. 8. And be it further enacted by the authority aforesaid, That whenever any sluice or canal shall cross any public or private laid

out road or highway, or shall divide the grounds of any person or persons into two parts, so as to require a ford or bridge to cross the same, the appraisers or jury who shall inquire of the damages to be sustained in the manner directed by the fourth section of this act, shall find and ascertain whether a passage across the same shall be admitted or maintained by a ford or bridge, and on such finding the said Maurice Wurts, his heirs and assigns, shall cause a ford to be rendered practicable, or a bridge fit for the passage of wagons and carts to be built, and forever thereafter to be maintained and
72 kept in repair, at all and every place or places so ascertained by the said appraisers and jury, at the cost and charges of the said Maurice Wurts, his heirs and assigns, but nothing herein contained shall prevent any person from erecting and keeping in repair, any foot or other bridge across any sluice or canal at his own expense when the same shall pass through his ground: Provided, That such foot or other bridges so to be erected by the owners of such land shall not interfere with any sluice or lock or other works of the said Maurice Wurts, his heirs and assigns.

SEC. 9. And be it further enacted by the authority aforesaid, That the said Maurice Wurts, his heirs or assigns, shall have the privilege and be entitled to use the water power from the said river Lackawaxen and the branch thereof which they may use for the making of the navigation authorized by this act, and from their sluices or canals to propel such machinery as they may think proper to erect on the land which they may previously have purchased from the owner or owners, or may sell in fee simple, rent, or lease for one or more years, the said water power to any person or persons, to be used in such manner and on such terms as they may think proper: Provided, It be done so that it shall not at any time impede or interrupt the navigation.

SEC. 10. And be it further enacted by the authority aforesaid, That as soon as the said Maurice Wurts, his heirs or assigns shall have completed ten miles of the descending navigation authorized by this act, and so from time to time as they shall complete other ten miles, they may give notice thereof to the governor of the Commonwealth, who shall thereupon forthwith appoint three skillful, judicious, and disinterester persons, having practical knowledge of river navigation, to view and examine the same, and to report to him in writing, under oath or affirmation, whether the said navigation is completed in the manner aforementioned, according to the true intent and meaning of this act, and if the report of them, or a majority of them shall be in the affirmative, then the governor shall, by license, under his hand and the lesser seal of the Commonwealth, permit and suffer the said Maurice Wurts, his heirs or assigns, or such person or persons as they shall from time to time appoint as toll collectors, or their deputies, to demand and receive of and from the person or persons having charge of any boat, vessel, ark, craft, or raft passing through
73 any lock in said navigation, such tolls and rates for every ton weight of the ascertained burthen of said boat, vessel, ark, or

craft, and for every one thousand feet, board measure, of boards, timber, plank, or scantling, and for every ton weight of shingles or other material in rafts, as the said Maurice Wurts, his heirs and assigns, may think proper: Provided, That the said toll shall not, in the whole, exceed the toll of three cents per mile for every ton of the ascertained burthen of such boat, vessel, ark, or craft, and one-half that rate for every one thousand feet, board measure, of boards, timber, plank, or scantling, and for every ton weight of shingles or other material in rafts: And provided also, That where any dam, erected by the said Maurice Wurts, his heirs or assigns, at any point or place now passable or used for rafting purposes in the present natural or unimproved state of the stream, shall not be so constructed by means of a slope or other device, as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles, when the stream in other respects is in a good rafting condition, such rafts of timber, boards, scantling, or shingles, if they do not carry some article of merchandise, shall be permitted to pass the locks appurtenant to such dam, free from toll.

SEC. 11. And be it further enacted by the authority aforesaid, That if, in pursuance of the authority herein given, the said Maurice Wurts, his heirs or assigns, shall determine to make a slack-water navigation, then so soon as they shall have perfected one lock therein, and so from time to time as they shall perfect one additional lock, they may give notice thereof to the governor of the Commonwealth, who shall thereupon appoint three skillful, judicious, and disinterested persons, having practical knowledge of river navigation, to view and examine that part said to be completed and report to him in writing, under oath or affirmation, whether the said navigation is so far executed in a masterly and workmanlike manner, according to the true intent and meaning of this act; and if at any time their report, or the report of a majority of them, shall be in the affirmative, then the governor shall, by license, under his hand and the lesser seal of this Commonwealth, permit the said Maurice Wurts, his heirs and assigns, or such person or persons as he or they shall from time to time appoint as toll collectors or their deputies, to demand and receive of and from the person or persons having the charge of any boat, ark, vessel, or other craft, passing through any lock erected by them in the completion of said navigation, twelve
74 and one-half cents upon each and every ton of the ascertained burden of such boat, ark, vessel, or other craft, and one-half of the same for every thousand feet, board measure, of boards, timber, plank, or scantling, and for every ton weight of shingles or other material in rafts: Provided, That where any dam erected by the said Maurice Wurts, his heirs or assigns, at any point or place now passable or used for rafting purposes in the present natural or unimproved state of the stream, shall not be so constructed, by means of a slope or other device, as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles, such rafts of timber, boards, scantling, or shingles, if they do not carry

some article of merchandise, shall be permitted to pass the locks appurtenant to such dam free from toll: And provided also, That if, at the expiration of two years after said slack-water navigation shall be computed, the tolls should enable the said Maurice Wurts, his heirs and assigns, after paying all repairs and other necessary expenses, to divide more than nine per centum per annum on the capital sum expended, then and in such case the tolls shall be so reduced that the dividends shall not exceed nine per cent and shall so continue for five years; and if, at the expiration of that time, they shall exceed fifteen per cent, they shall be so reduced as not to exceed fifteen per cent, and shall at that period be so regulated from time to time as not to exceed fifteen per cent per annum; and if at any time after the expiration of two years from the completion of the said work the net profits aforesaid shall not amount to nine per cent upon the money expended in the said work, it shall be lawful for the said Maurice Wurts, his heirs or assigns, to raise the said tolls so as to divide nine per cent.

SEC. 12. And be it further enacted by the authority aforesaid, That in order to ascertain whether any dam or dams erected under the authority of this act have been constructed in the manner contemplated by the seventh section of this act, and also by the second proviso to the tenth and the first proviso to the eleventh section of this act, it shall be the duty of the Court of Common Pleas of the county in which any dam may be situated, on complaint of any citizen to said court setting forth that such dam is not so constructed as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles, to appoint three reputable, judicious, and disinterested persons to view and examine the same and to report
75 to the said court in writing, under oath or affirmation, whether the dam so complained of is or is not so constructed as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles; and if their report, or a report of a majority of them, shall be in the affirmative, then it shall be lawful for the said Maurice Wurts, his heirs and assigns, to demand and receive from the person or persons having charge of any raft of timber, boards, scantling, or shingles passing through the lock appurtenant to such dam toll according to the rate above established; but if their report, or the report of a majority of them, shall be in the negative, then such rafts of timber, boards, scantling, or shingles, unless they carry some article of merchandise, shall be permitted to pass through the locks appurtenant to such dam free from toll, until the same be made passable for rafts in the manner contemplated by the provisos above mentioned. And it shall be lawful for the said Maurice Wurts, his heirs or assigns, to apply in like manner at all times to the Court of Common Pleas of the proper county for the appointment of viewers, and upon such application the like proceedings shall be had as are above directed, upon the application and complaint of any citizen.

SEC. 13. And be it further enacted by the authority aforesaid, That in order to ascertain the size of arks and rafts and the tonnage of

boats, using and passing the said navigation, and to prevent disputes between the supercargoes and collectors of tolls concerning the same, upon request of the owner, skipper, or supercargo of such boat, raft, or ark, or of the collector of said tolls, at any lock upon the said navigation, it shall and may be lawful for each of them to choose one skillful person to measure and ascertain the size of said raft or ark, and the tonnage the said boat is capable of carrying, and to mark the said tonnage so ascertained in figures, upon the head and stern of said boat, in colors mixed with oil or other durable matter, and the said boat or vessel, so measured and marked, shall be permitted to pass through the said locks for the price to which the number of tons, so marked on her, shall amount, agreeably to the rates fixed in the manner aforesaid; and if the owner, skipper, or supercargo of any ark, raft, or boat shall decline choosing a person to ascertain the tonnage thereof, then the amount of such tonnage shall be fixed and ascertained by the person appointed for that purpose by the said Maurice Wurts, his heirs or assigns, or chosen by the said
76 collector of tolls, and the tolls shall be paid according to such measurement, before any such raft, ark, or boat shall be permitted to pass the place where such toll is made payable.

SEC. 14. And be it further enacted by the authority aforesaid, That if any person or persons shall wilfully and knowingly do any act or thing whereby the navigation shall be impeded, or any dam, lock, gate, canal, engine, machine, property, or device whatsoever thereunto belonging, shall be injured or damaged, he, she, or they so offending, shall forfeit and pay to the said Maurice Wurts, his heirs and assigns, four times the amount of the damages by them sustained, together with costs to be recovered by action of debt before a justice of the peace, or in any court of competent jurisdiction.

SEC. 15. And be it further enacted by the authority aforesaid, That the locks shall be, in the clear, at least eighteen feet wide, and sixty-four feet in length; and it shall be the duty of the master or commander of any boat, ark, or other vessel passing said navigation, when he shall arrive within one-fourth of a mile from any lock so erected, under the penalty of two dollars, to blow a trumpet or horn, whereupon the keeper of such lock shall attend for the purpose of opening the gate or sluice to let the said boat, ark, or other vessel pass without unnecessary delay, and in safety; and if any boat, ark, or other vessel shall be prevented from passing up or down any of said locks, or sluices, by reason of the lock not being raised for more than thirty minutes, the said Maurice Wurts, his heirs and assigns, shall, on conviction thereof, before any justice of the peace of the proper county, forfeit and pay to the person so hindered, the sum of one dollar for every thirty minutes beyond the said time, that he shall be so prevented, and in the same proportion for any longer or shorter time, and the service of any civil process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served upon the said Maurice Wurts, his heirs and assigns.

SEC. 16. And be it further enacted by the authority aforesaid, That if the said Maurice Wurts, his heirs or assigns, shall neglect or refuse to keep in repair and good order any dam, lock, or sluice of their own construction, or shall neglect to remove any obstacle
77 which may occur, so that boats, arks, rafts, or other vessels may safely use said navigation in the manner provided by this act, the said Maurice Wurts, his heirs and assigns, shall, for every such offence, forfeit and pay the sum of one hundred dollars, to be recovered in the manner as debts of equal amount are by law recoverable before a justice of the peace of the proper county where the offence shall be committed, one-half to the use of the informer, and the other half to the use of the poor of the township or county where the neglect may occur, and the service of process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served on the said Maurice Wurts, his heirs or assigns: Provided, That the payment of such penalty shall not be taken to exempt the said Maurice Wurts, his heirs and assigns, from their responsibility to any person who may be injured by such refusal or neglect.

SEC. 17. And be it further enacted by the authority aforesaid, That if any owner, skipper, or supercargo of any boat or ark, craft or raft, shall pass by any place appointed for receiving tolls without making payment thereof according to the provisions of this act and with intent to defraud the said Maurice Wurts, his heirs and assigns, out of such toll he, she, or they so offending shall forfeit and pay for every time they shall so pass by each appointed place to the said Maurice Wurts, his heirs and assigns, the sum of twenty dollars, to be sued for and recovered by action of debt before any justice of the peace in like manner and subject to the same rules and regulations as debts under one hundred dollars may be sued for and recovered, together with the costs of suit.

SEC. 18. And be it further enacted by the authority aforesaid, That at the expiration of thirty years from the passage of this act the said Maurice Wurts, his heirs or assigns, shall render, under oath or affirmation, to the legislature an exact account of the amount of money expended by them in making said navigation and in keeping the same in repair, and also of the amount of tolls received by them during that time. And if it shall thereupon appear that the tolls during that time have amounted to so much above six per centum per annum on the amount of moneys so expended in making and keeping in repair said navigation as will be equal to the capital sum so expended,
78 then the legislature may resume all the rights, liberties, and franchises hereby granted; but if it shall appear that the tolls during that time have not amounted to so much above six per centum per annum on the amount of money so expended in making and in keeping in repair said navigation as will be equal to the capital sum so expended, then it shall be lawful for the legislature, on payment to the said Maurice Wurts, his heirs or assigns, of the difference or deficiency, to resume all the rights, liberties, and franchises hereby

granted; and in case of such resumption, the legislature shall be bound to fulfil all and singular the obligations enjoined by this act on the said Maurice Wurts, his heirs or assigns. And if neither the descending nor the slack water navigation authorized by this act shall be completed within ten years from the passage thereof, then the legislature may resume all the rights, liberties, and franchises hereby granted to the said Maurice Wurts, his heirs or assigns.

JOSEPH LAWRENCE,
Speaker of the House of Representatives.

WILLIAM MARKS, Jr.,
Speaker of the Senate.

Approved the thirteenth day of March, one thousand eight hundred and twenty-three.

JOSEPH HIESTER.

79 EXHIBIT B2.

Pennsylvania act, approved Apr. 1, 1825.

(Laws of 1825, chap. 78.)

A supplement to the act entitled "An act to improve the navigation of the river Lackawaxen."

Whereas by an act entitled "An act to improve the navigation of the river Lackawaxen" Maurice Wurts, his heirs or assigns, is authorized to improve the navigation of the said stream; and whereas by an act of the legislature of the State of New York a company has been incorporated, by the name of "The President, Managers, and Company of the Delaware and Hudson Canal Company," to make a canal from the Hudson to the Delaware River, terminating at a point near the mouth of the Lackawaxen; and whereas the stock in the said company having been jointly subscribed by the citizens of the two States, and the improvements authorized by the said acts being essentially connected with each other, the citizens of Wayne and Pike counties have, by petition, represented to the legislature that it is desirable that those engaged in the improvement of the Lackawaxen should be able to avail themselves of the assistance of the Delaware and Hudson Canal Company, and pray the legislature to grant the necessary legislative facilities for that purpose: Therefore,

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That, by and with the consent of Maurice Wurts, his heirs or assigns, it shall be lawful for "The President, Managers, and Company of the Delaware and Hudson Canal Company" to improve the navigation of the river Lackawaxen, and any one of its branches, in the manner authorized and

provided by an act entitled "An act to improve the navigation of the river Lackawaxen," passed the thirteenth day of March, one thousand eight hundred and twenty-three; and, after the making of such navigation, the said company shall and may hold and enjoy the
80 same as fully and effectually as Maurice Wurts, his heirs or assigns, might or could do, under and subject, however, to all the provisions, conditions, restrictions, duties, and obligations imposed by the said act on the said Maurice Wurts, his heirs or assigns, and under and subject to the conditions, restrictions, and limitations hereinafter provided; and it shall further be lawful for the said company to purchase and hold any quantity of lands, situate at any place within ten miles of the waters of the Lackawaxen, not exceeding five thousand acres: Provided, however, That in any judicial proceeding instituted against the said company within the jurisdiction of this State the service of process upon any toll gatherer, or other known agent of the said company, in the proper county, shall be as good and as available in law as if served upon the president of the company.

SEC. 2. And be it further enacted by the authority aforesaid, That the toll which the said company may exact, under the provisions of the act to which this act is supplementary, shall not, in the whole, exceed the rate of one cent and a half per ton per mile on the ascertained burthen or capacity of any ark, boat, or craft laden with or engaged in the transportation of stone coal; and the said company shall not exact any higher toll than is above provided for on such arks, boats, or craft, laden as aforesaid, on the works erected by them on the Delaware, between the mouth of the Lackawaxen and Carpenter's Point: Provided, The said arks, boats, or craft, laden as aforesaid, shall have come down the said river Lackawaxen, and proceed down the said river Delaware, and not through the canal to be made through the State of New York, between the Hudson and Delaware, by the said company.

SEC. 3. And be it further enacted by the authority aforesaid, That the said company shall not erect any works, or make any improvements connected with the Delaware River, unless the same shall be so constructed as to leave the channel of the said river as safe and as convenient for the descent of rafts as it now is; and any boat or craft ascending the natural channel of the Delaware River, from any point or place below Carpenter's Point, or descending the same to Carpenter's Point, from any place above the mouth of the Lackawaxen River, shall be permitted to pass, toll free, through any locks which the said company may erect between Carpenter's Point
81 and the mouth of the Lackawaxen River. And it shall further be the duty of the said company, at each and every place where their works may be connected with the river Delaware, to erect a lock, or locks, and keep lock tenders, so as to provide for the ascent and descent of boats and craft, as aforesaid, and without delay.

SEC. 4. And be it further enacted by the authority aforesaid, That it shall not be lawful for the said company to engage, either directly or indirectly, in the business of banking or of manufacturing within the jurisdiction of this State; nor shall this act, or any part of it, be deemed or construed to recognize or admit an exclusive jurisdiction by the State of New York, over the waters of the Delaware River, between Carpenter's Point and the northern boundary of this State; and if it shall appear to any future legislature of this State, after full examination by competent engineers, to be appointed by the legislature, who shall declare, in their report, the fact that the channel of the river is by any of the said works or improvements rendered less safe and convenient for navigation, as aforesaid, it shall be lawful for such legislature to repeal this law, and the privileges by this act granted shall be thereby absolutely determined.

SEC. 5. And be it further enacted by the authority aforesaid, That the property of the said company, whether real or personal, within this State, shall at all times be liable for its debts, and subject to taxation, in like manner as similar property held by an individual or by a corporation, now is or may be; and the said company shall, under oath or affirmation of the president and treasurer, report to the legislature, when required so to do, the amount of capital which it may have invested within this State, under pain of forfeiting the rights and privileges hereby granted for neglecting or refusing so to do; and moreover, the State of Pennsylvania shall, at all times, by its agent or attorney, duly appointed, have a right to examine the books, accounts and vouchers of the said company in relation to such reports.

SEC. 6. And be it further enacted by the authority aforesaid, That this act shall be of no force or effect unless "The President, Managers, and Company of the Delaware and Hudson Canal Company" shall, under their corporate seal, notify the governor of this
82 State of their acceptance of the same, on or before the first day of July next.

SEC. 7. And be it further enacted by the authority aforesaid, That if the said company shall misuse or abuse the privileges hereby granted the legislature reserve the right to repeal this act.

JOEL B. SUTHERLAND,
Speaker of the House of Representatives.
THOMAS BURNSIDE,
Speaker of the Senate.

Approved the first day of April, one thousand eight hundred and twenty-five.

J. ANDW. SHULZE.

Extract from the minutes of the proceedings of the governor of the Commonwealth of Pennsylvania. (Tuesday, June 21, 1825.)

An instrument, in writing, under the corporate seal, and signed by Philip Hone, president, and John Bolton, treasurer, of the Delaware

and Hudson Canal Company, certifying for themselves, and in behalf of the stockholders of the said company, their acceptance of the act of the general assembly, passed the first day of April last, entitled "A supplement to the act entitled an act to improve the navigation of the river Lackawaxen," and the privileges thereby granted, upon the terms and conditions therein expressed and contained, was this day received and duly filed in the office of the secretary of the Commonwealth.

A true extract from the minutes.

JAMES TRIMBLE,
Deputy Secretary.

83 EXHIBIT B3.

Pennsylvania act, approved Apr. 5, 1826.

(Laws of 1826, chap. 67.)

A further supplement to the act entitled "An act to improve the navigation of the river Lackawaxen," passed March 13, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That it shall be lawful for the President, Managers, and Company of the Delaware and Hudson Canal Company to construct and maintain such railways or other devices as may be found necessary to provide for and facilitate the transportation of coal to the canal by them to be constructed: Provided, That no railway hereby authorized to be made shall be extended further than from the coal beds owned by the said company to the forks of the Dyberry, on the west branch of the river Lackawaxen, or from the coal beds aforesaid to that point on the Wallenpaupack branch of the river Lackawaxen where it is crossed by the Easton and Belmont turnpike road; and, the better to effect that object, when it shall be necessary for the said company to occupy and use any land or materials and the parties can not agree in relation thereto, the same course shall be pursued as is authorized and provided by the fourth and fifth sections of the act to which this act is a supplement.

SEC. 2. And be it further enacted by the authority aforesaid, That every such railway or device shall be so constructed by the said company as not to obstruct or impede the free use of any public or private laid out road or highway which may cross or enter at the same; and in all places where such railroad or device may cross or in any way interfere with any road, as aforesaid, it shall be the duty of the said company to enable all persons travelling such road, as aforesaid, to cross or pass such railway or device by a causeway or some other suitable and convenient means to be provided and maintained by the

said company; and if the said company shall neglect or refuse
84 to provide such causeway or other suitable means, or, where provided, to maintain the same in good repair when required by the parties interested, they shall be liable to pay a penalty of ten dollars for every day the same shall be so neglected or refused to be provided or maintained, to be recovered by the supervisor of the township or by the turnpike companies, as the case may be, with costs, for the use of the township or of such companies, as debts of like amount are by law recoverable, and shall, moreover, be liable to an action or actions at the suit of any person who may be aggrieved thereby; and the service of process upon any officer or agent of the said company shall be as good and as available in law as if served upon the president thereof.

SEC. 3. And be it further enacted by the authority aforesaid, That for the accommodation of all persons owning or possessing lands through which any such railroad or device may pass, it shall be the duty of the said company, where required by the occupant of such land, to make or cause to be made a good and sufficient causeway or provide other suitable means, whenever the same shall be necessary, to enable the occupant of such land to cross or pass over the same with wagons, carts, and implements of husbandry, as occasion may require: Provided, however, That the said company shall in no case be required to make, or cause to be made, more than one such causeway or passage through each plantation or lot of land, or two, if a second should be found necessary for the accommodation of any one person possessing land through which any such railroad or device may pass; and if the said company shall neglect or refuse to provide such causeway or passage or to keep the same in good repair, the said company shall be liable to pay any person aggrieved thereby all damages sustained by such person in consequence of such refusal or neglect, to be used for and recovered before any magristrate or any court having cognizance thereof; and the service of process on any officer or agent of said company shall be as good and as available in law as if served on the president thereof.

SEC. 4. And be it further enacted by the authority aforesaid, That if any person or persons shall wilfully and knowingly break, injure, or destroy any railroad or device, or any part thereof or any work appurtenant thereto, erected under the provisions of this act, he, she, or they so offending shall forfeit and pay to the said com-
85 pany three times the actual damages sustained, to be sued for and recovered, with costs of suit, by action of debt before a justice of the peace or any court of competent jurisdiction, in the name and to the use of the said company.

SEC. 5. And be it further enacted by the authority aforesaid, That the said railway shall be deemed and taken as a public highway; and it shall and may be lawful for the said company, or such persons as they may from time to time appoint toll collectors, or their deputies, so soon as the railroad shall be perfected, to collect and receive by toll

upon the said railroad, a sum not exceeding twelve per centum per annum upon the amount of moneys which shall have been expended in the construction of the said railroads and other devices, and in the support, improvement, and continuance of the same; and to prescribe the form and kind of carriages, wagons, and conveyances to be used thereon for the transportation of persons or commodities.

JOSEPH RITNER,
Speaker of the House of Representatives.
ALEXANDER MAHON,
Speaker of the Senate.

Approved the fifth day of April, one thousand eight hundred and twenty-six.

J. ANDW. SHULZE.

86 EXHIBIT B4.

Pennsylvania resolution, approved Mar. 23, 1830.

Relative to the Delaware and Hudson Canal Company.

Resolved by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, That the President, Managers, and Company of the Delaware and Hudson Canal Company be, and they are hereby, excused and exonerated from building the river lock in the dam across the river Delaware for the present, and until they shall be required to do the same by an act or resolution of the legislature of Pennsylvania: Provided, That the said company shall, by their proper officer or officers, within six months from this time, submit to the governor of the State of Pennsylvania their consent that the State of Pennsylvania may, at any time hereafter, connect the Delaware Canal with the canal of the said company, at such point or points, at or near Carpenter's Point, and in such manner and on such terms and conditions as shall be determined on by two competent, disinterested engineers, one to be appointed by the State and one by the company; and, if they can not agree, a third to be chosen by the two, as above appointed, whose decision, or that of any two of them, is to be conclusive.

FREDERICK SMITH,
Speaker of the House of Representatives.
DANIEL STURGEON,
Speaker of the Senate.

Approved the twenty-third day of March, A. D. one thousand eight hundred and thirty.

GEORGE WOLF.

87 DEPARTMENT OF STATE,
Harrisburgh, August 5th, 1830.

By direction of the governor I have the honor to acknowledge the receipt from you of a resolution of the board of managers of the Hudson and Delaware Canal Company, complying with the provisions of a resolution of the legislature of Pennsylvania passed the 23d of March last.

Very respectfully, your obedient servant,

(For SAMUEL M'KEAN,)
H. BUCHLER,
Chief Clerk.

S. FLEWWELLING, Esq.,
Treasurer D. & H. Canal Company.

88 EXHIBIT B5.

Pennsylvania act, approved Apr. 30, 1852.

(Laws of 1852, No. 331.)

A further supplement to the act entitled "An act to improve the navigation of the river Lackawaxen."

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the eighteenth section of an act entitled "An act to improve the navigation of the river Lackawaxen," passed the thirteenth day of March, one thousand eight hundred and twenty-three, which provides for the resumption by the State of the improvements of the Delaware and Hudson Canal Company, known as the Pennsylvania section of the Delaware and Hudson Canal, together with the corresponding stipulations, if any, in the supplements to said act be, and the same are hereby, repealed. And the Delaware and Hudson Canal Company are hereby authorized to conduct their business as they have heretofore done, according to their charter, and maintain and use their works and appurtenances, as heretofore, without liability to account and surrender, as provided for in the said eighteenth section of the aforesaid act, passed on the thirteenth day of March, one thousand eight hundred and twenty-three.

JOHN S. RHEY,
Speaker of the House of Representatives.
JOHN H. WALKER,
Speaker of the Senate.

Approved the thirtieth day of April, A. D. one thousand eight hundred and fifty-two.

WM. BIGLER.

89 EXHIBIT B6.

Pennsylvania act, approved Mar. 12, 1859.

(Laws of 1859, No. 123.)

A supplement to an act to improve the navigation of the river Lackawaxen, passed the thirteenth day of March, one thousand eight hundred and twenty-three.

SEC. 1. Be it enacted by the sente and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the President, Managers, and Company of the Delaware and Hudson Canal Company be, and they are hereby, authorized to extend their railroads, with the necessary branches and fixtures, from the present terminus in the township of Blakely, Luzerne County, to any part of the adjoining township of Providence, in said county of Luzerne, and to any lands now owned or that may be hereafter purchased by them, under the provisions of this act, the damages for taking lands in the construction of said roads and branches to be assessed and secured in the manner pointed out in the provisions of an act passed the seventh day of April, one thousand eight hundred and fifty-eight, entitled "A supplement to an act to improve the navigation of the river Lackawaxen, passed the thirteenth day of March, one thousand eight hundred and twenty-three." And they are hereby authorized to purchase and hold an additional quantity of three thousand acres of land in the townships of Fell, Carbondale, Blakely, and Providence, in the county of Luzerne, for the purpose of carrying on their operations.

SEC. 2. That in addition to the power now given to said company by the said act of March thirteenth, one thousand eight hundred and twenty-three, and its supplements, to erect dams on the Lackawaxen and its tributaries, for the purpose of the canal, the said company are hereby authorized to construct dams on the tributaries of the Lackawaxen and the Lackawanna and its tributaries, for the purpose of creating water power to propel the cars over and upon
90 the railroads now constructed or hereafter to be constructed by them: Provided, That the navigation of said streams shall not be obstructed, and that the damages thereby occasioned, by taking and flowing land, shall be assessed and secured in the manner pointed out in the said act of March thirteenth, one thousand eight hundred and twenty-three, and its several supplements.

W. C. A. LAWRENCE,
Speaker of the House of Representatives.
JNO. CRESSWELL, JR.,
Speaker of the Senate.

Approved the twelfth day of March, A. D. one thousand eight hundred and fifty-nine.

WM. F. PACKER.

91 EXHIBIT B7.

Pennsylvania act, approved Apr. 11, 1861.

(Laws of 1861, No. 275.)

A supplement to an act entitled "An act to improve the navigation of the river Lackawaxen," passed the 13th day of March, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the President, Managers, and Company of the Delaware and Hudson Canal Company be, and they are hereby, authorized and empowered to erect, construct, and maintain telegraph lines and communications along the line of the said canal and railroad, commencing in the county of Pike, at or near where said company's canal crosses the river Delaware, and from thence along the line of said canal to the southern boundary line of the borough of Honesdale, and from thence along the line of the said company's railroad to the terminus thereof, in the county of Luzerne, with the further power and authority of extending the said telegraph lines into the borough of Scranton, Luzerne County, or along the line of any future lawful continuation of said railroad; and the said company, and all such persons as they may authorize and employ, shall have power and authority to enter into and upon, hold, occupy, and enjoy any land necessary for locating, constructing, maintaining, using, and repairing of the said telegraph lines and fixtures necessary thereto. And the same to be so erected and constructed as not to interfere with the common use of any road, highway, streets, or waters.

SEC. 2. That they are hereby authorized and empowered to construct and maintain, not exceeding two miles in length, branch or lateral roads, or track, from or to connect with their present railroad as the same is now erected and constructed, with the necessary branches and fixtures for the purposes of their coal business. The damages for taking lands in and for the construction of said telegraph lines, and of said branch or lateral railroads, and also for the construction of any other lawful extension of their works, within their chartered limits in this State hereafter made, and of
92 any necessary devices, fixtures, or appurtenances connected therewith, to be assessed and secured in the manner pointed out in the provisions of an act passed the seventh day of April, one thousand eight hundred and fifty-eight, entitled "A supplement to an act to improve the navigation of the river Lackawaxen, passed the thirteenth day of March, one thousand eight hundred and twenty-three."

ELISHA W. DAVIS,
Speaker of the House of Representatives.

JOHN P. PENNEY,
Speaker of the Senate (pro tem.).

Approved the 11th day of April, A. D. 1861.

A. G. CURTIN.

93 EXHIBIT B8.

Pennsylvania act, approved Apr. 11, 1861.

(Laws of 1861, No. 276.)

A further supplement to an act to improve the navigation of the river Lackawaxen, passed the 13th day of March, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That so far as the branch or lateral railroads and the telegraph lines mentioned in an act passed April 2d, 1861, entitled "A supplement to an act entitled 'An act to improve the navigation of the river Lackawaxen,' passed the thirteenth day of March, one thousand eight hundred and twenty-three," may be constructed in the counties of Wayne and Pike, the filing of bonds and all proceedings for the security and assessment of damages for taking land in and for the construction thereof shall be had and done in the said counties of Wayne and Pike, respectively, in the manner in all other respects as directed by the second section of the said act of April 2d, 1861.

ELISHA W. DAVIS,
Speaker of the House of Representatives.
ROBT. M. PALMER,
Speaker of the Senate.

Approved the 11th day of April, A. D. 1861.

A. G. CURTIN.

94 EXHIBIT B9.

Penna., senate committee report, Apr. 13, 1863.

To the Senate of Pennsylvania:

The committee appointed by the senate under the preamble and resolution adopted on the 23d of March, 1863, viz:

Whereas it is alleged by a large number of the citizens of this Commonwealth that the Delaware and Hudson Canal Company have exceeded their rights as an incorporated company, and thereby violated their chartered privileges: Therefore resolved, "That a committee of three be appointed, with power to send for persons and papers to fully investigate the condition of affairs relative to said company," beg leave to report:

That in pursuance of the duty imposed upon them the attention of your committee was directed to the charter of the company and the several supplements thereto, and to the procuring of such testimony as would enable them to determine whether the said company had exceeded their powers or failed in the discharge of their duties.

There inquiries were, therefore, as to the right of the company to hold lands for mining purposes, and the quantity they were author-

ized to hold, their powers and privileges of mining and transportation, and the tax laws to which they are subject.

The charter of the company and the supplements thereto, show that the company are authorized to hold such lands as may be appurtenant or convenient to their canal and such railway or railways or other devices, as may be necessary to facilitate the transportation of coal to their canal; and the act of April 1st, 1825, empowers them "to purchase and hold any quantity of lands, situate at any place within ten miles of the waters of the Lackawaxen, not exceeding five thousand acres," and the act of March 12th, 1859, further authorizes them to purchase and hold "an additional quantity of three thousand acres of land in the townships of Fell, Carbondale, Blakely, and Providence, in the county of Luzerne, for the purpose of carrying on their operations."

Thus it appears that besides the lands appurtenant or convenient to the use and emjoyment of their canal, and railroads leading thereto, they are authorized to hold eight thousand acres.

95 Their general business, expressed in the several acts referred to, or necessarily implied from the character of the powers conferred upon them, is mining coal and transportation.

Their lands and other property are, of course, subject to taxation for state, county, and local purposes in the townships and counties where they are located, and the company is liable to the stock and corporation taxes imposed by the several acts of assembly upon all corporations.

After ascertaining the powers conferred and the duties imposed upon the company by law, your committee proceeded to take such testimony as would enable them to discharge their duties in the premises.

This testimony is embraced in the deposition of E. W. Weston, general surveyor of the company, taken before your committee, with a schedule of the lands held by the company, furnished by him, and the answer of the auditor-general to an inquiry by your committee, which deposition, schedule, and answer they submit with this report and as part thereof.

From the testimony of Mr. Weston it appears that the company hold, in the aggregate, in this Commonwealth six thousand five hundred and fifty-five (6,555) acres (exclusive of the appurtenances to their improvements), situate in the counties of Luzerne, Wayne, and Susquehanna.

These embrace all the lands held by them, directly or indirectly, in their own right or in trust for them.

Their general business, and that which their charter and its supplements warrants, is known to be mining coal and transportation, and your committee is not aware that they are engaged in any other.

The testimony of Mr. Weston further shows that the lands of the company are all assessed, and that state, county, and other taxes are paid upon them in the townships and counties where they are located.

The communication from the auditor-general to your committee shows that, for several years the company paid into the state treasury, as stock and corporation taxes, what was afterwards determined by the Supreme Court to be in excess of its indebtedness to the Commonwealth, and that the State is, at the present time, its debtor, by reason of such overpayment, in the sum of six thousand one hundred and thirty dollars thirty-seven cents ($6,130\frac{37}{100}$).

96 How this happened will fully appear by the communication of the auditor-general, before referred to.

Your committee, therefore, can find no reason for the allegations that the Delaware and Hudson Canal Company have exceeded their powers as a corporation, and ask to be discharged from the further consideration of the subject.

HEISTAND.
TURRILL.
WALLACE.

Report made to senate April 13, 1863, read and adopted, and committee discharged.

97 EXHIBIT B10.

Pennsylvania Act, Approved Sept. 20, 1866.

(Laws of 1867, No. 1414.)

A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823.

SEC. 1. Be it enacted by the senate and house of Representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the damages which the President, Managers, and Company of the Delaware and Hudson Canal Company may be liable for, from the construction of their works as the same now are or hereafter may be altered or extended, shall be secured and assessed in the manner provided by the act of assembly, entitled "An act regulating railroad companies," approved the 19th day of February, A. D. 1849, and the supplements thereto.

SEC. 2. That said company is hereby authorized and empowered to purchase and hold 5,000 additional acres of land in the county of Luzerne.

JAS. R. KELLEY,
Speaker of the House of Representatives.

D. FLEMING,
Speaker of the Senate.

Approved the 20th day of September, A. D. 1866.

A. G. CURTIN.

98 EXHIBIT B11.

Pennsylvania Act, Approved Apr. 13, 1868.

(Laws of 1868, No. 855.)

A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823, and the supplements thereto amending the title of a supplement to said act, approved the 20th day of September, 1866, and re-enacting, ratifying, and confirming the provisions thereof, relating to assessment of damages and holding additional lands.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the title of the act entitled "A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823," and approved the 20th day of September, 1866, be, and the same is hereby, amended so that the same shall read "A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823, and the supplements thereto, " for the purpose of changing the mode and manner of assessing damages in the construction of the works authorized by said act, and the supplements thereto, and for authorizing the purchasing and holding additional lands in the county of Luzerne; and that the provisions, power, and authority given and provided for in the said act approved the 20th day of September, 1866, are hereby confirmed and re-enacted, and all acts done or that may hereafter be done, in pursuance thereof, are hereby ratified, authorized, and declared valid.

ELISHA W. DAVIS,
Speaker of the House of Representatives.

JAMES L. GRAHAM,
Speaker of the Senate.

Approved the 13th day of April, A. D. 1868.

JOHN W. GEARY.

99 EXHIBIT B12.

Pennsylvania act, approved Mar. 24, 1870.

(Laws of 1870, No. 533.)

An act to authorize the President, Managers, and Company of the Delaware and Hudson Canal Company to construct a railroad from the terminus of their present locomotive railroad at Olyphant to the city of Carbondale.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the President,

Managers, and Company of the Delaware and Hudson Canal Company be, and they are hereby, authorized to locate and construct a railroad from the terminus of their present locomotive railroad at Olyphant, in the county of Luzerne, to the city of Carbondale, and to connect the same, when constructed, with the Jefferson Railroad, at said city of Carbondale, and with any other railroad now made, or that may hereafter be made to the said city.

SEC. 2. That the said the President, Managers, and Company of the Delaware and Hudson Canal Company, in the location and construction of the said railroad, shall have all the power, authority, and privileges given in the tenth section of the act entitled "An act regulating railroad companies," approved the 19th day of February, A. D. 1849, and all damages in the location and construction of the said railroad for right of way, and land and materials taken, or otherwise, if the parties can not agree therefor, shall be secured and assessed in the manner provided by the said act of assembly entitled "An act regulating railroad companies," and the several supplements thereto.

B. B. STRANG,
Speaker of the House of Representatives.

CHAS. H. STINSON,
Speaker of the Senate.

Approved the twenty-fourth day of March, A. D. one thousand eight hundred and seventy.

JOHN W. GEARY.

100 EXHIBIT B13.

Pennsylvania act, approved May 12, 1871.

(Laws of 1871, No. 701.)

An act to authorize the President, Managers, and Company of the Delaware and Hudson Canal Company to construct a railroad from the point of intersection of the Lackawanna and Susquehanna Railroad with the line between the States of Pennsylvania and New York to an intersection of the Jefferson Railroad at or near the village of Susquehanna, in Susquehanna County, in the State of Pennsylvania.

SEC. 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the President, Managers, and Company of the Delaware and Hudson Canal Company be, and they are hereby, authorized to locate and construct a railroad from a point where the Lackawanna and Susquehanna Railroad intersects the state line between the States of Pennsylvania and New York, to an intersection of the Jefferson Railroad at or near the village of Susquehanna, in the county of Susquehanna, in the State of Pennsylvania.

SEC. 2. That the said President, Managers, and Company of the Delaware and Hudson Canal Company, in the location and construction of the said railroad shall have all the power, authority, and privileges given in the tenth section of the act entitled "An act regulating railroad companies," approved the nineteenth day of February, anno Domini one thousand eight hundred and forty-nine; and all damages in the location and construction of the said railroad for right of way and land and materials taken, or otherwise, if the
101 parties can not agree therefor, shall be secured and assessed and paid in the manner provided by the said act of assembly, entitled "An act regulating railroad companies," and the several supplements thereto.

JAS. H. WEBB,
Speaker of the House of Representatives.
WILLIAM A. WALLACE,
Speaker of the Senate.

Approved the twelfth day of May, anno Domini one thousand eight hundred and seventy-one.

JNO. W. GEARY.

102 EXHIBIT B14.

Pennsylvania act, approved Apr. 15, 1869.

(Laws of 1869, No. 33.)

An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of this Commonwealth, by the purchase of their capital stock and bonds, or either of them, or by the guarantee of or agreement to purchase the principal and interest, or either of such bonds: Provided, That this act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill.

JOHN CLARK,
Speaker of the House of Representatives.
WILMER WORTHINGTON,
Speaker of the Senate.

Approved the fifteenth day of April, anno Domini one thousand eight hundred and sixty-nine.

JNO. W. GEARY.

103 EXHIBIT B15.

Pennsylvania act, approved May 18, 1871.

(Laws of 1871, No. 830.)

An act relating to certain railroads, canal, and incorporated companies authorized to construct railroads, and authorizing such companies to purchase and hold stock and bonds; to lease roads and property of, and consolidate with each other in the counties of Susquehanna, Wyoming, Wayne, and Luzerne.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That it shall be lawful for any railroad, canal, or navigation company incorporated by or exercising within this Commonwealth and under and in pursuance of the laws thereof corporate privileges, within the counties of Susquehanna, Wyoming, Wayne, and Luzerne, to purchase and hold the stock and bonds, and to lease the road and property of or become consolidated and merged with any other incorporated company authorized by the laws of this Commonwealth to construct a railroad, or possessing railroad privileges; and for any such incorporated company so authorized to construct a railroad, or possessing railroad privileges to purchase and hold the stock and bonds, and to lease the road, canal, and property of, or become consolidated and merged with any such railroad, canal, or navigation company in the same manner as such purchases, leases, consolidation, and merger are now provided or allowed by law, and by and between railroad companies incorporated by this Commonwealth, and all the provisions of existing acts relative to such purchases, leases, consolidation, and merger, by and between railroad companies incorporated by this Commonwealth are, whenever or so far as applicable, hereby extended so as to embrace the purchases, leases, consolidations, and mergers hereby authorized, and so that the authority by this act conferred may be effectually and lawfully exercised, and when any merger and consolidation shall be made in accordance with the provisions of this act, all the property,
104 rights, franchises, and privileges of the company so merged shall by virtue of such merger be thereby transferred to and vested in the company into which such merger shall be made:

Provided, That any consolidated company formed by the merging of two or more companies under the provisions of this act shall not charge any higher rates for transportation than the rates now allowed by law over the respective roads so merged.

JAMES H. WEBB,
Speaker of the House of Representatives.

WILLIAM A. WALLACE,
Speaker of the Senate.

Approved the eighteenth day of May, A. D. one thousand eight hundred and seventy-one.

JNO. W. GEARY.

105 EXHIBIT C.

Mortgage of the Delaware and Hudson Canal Company to the Union Trust Company of New York, trustee, August 13, 1877. $10,000,000.

AGREEMENT.

Whereas the President, Managers, and Company of the Delaware and Hudson Canal Company have made, issued, and disposed of five thousand bonds for one thousand dollars each, all dated October 1st, A. D. eighteen hundred and seventy-four, and made payable October 1st, A. D. eighteen hundred and ninety-four, with interest at the rate of seven per centum per annum, payable semiannually, on the first days of April and October, which bonds contain the following provision, to wit: "That if the property of the said company in Pennsylvania (which is now unincumbered) shall hereafter at any time, before the maturity of said bonds, be mortgaged, such mortgage shall include, cover, and secure this and the other bonds in said series, and the debt thereby created."

And whereas the said company deem it proper, in order to provide the means required, and which from time to time may be required, in the presentation of its business, to make, issue, and dispose of another bond or bonds, amounting in the aggregate to not exceeding five millions of dollars, and to secure the payment of the same, with the interest thereon, and also the payment of the above mentioned bonds due in eighteen hundred and ninety-four, and the interest thereon, by a mortgage upon its railroads, canal, coal and other lands, situate in the State of Pennsylvania, hereinafter mention and referred to.

Now, therefore, this indenture made this the thirteenth day of August, A. D. eighteen hundred and seventy-seven, between the said The President, Managers, and Company of the Delaware and Hudson Canal Company, a corporation of the State of New York (hereinafter called the "canal company"), party of the first part, and the Union Trust Company of New York, a corporation of the
106 same State (hereinafter called the "trust company"), party of the second part: Witnesseth,

That the said canal company, in order the better to secure the payment of the aforesaid five thousand bonds heretofore issued, which become due in eighteen hundred and ninety-four, with the interest thereon; and, also, the bond or bonds proposed to be issued by the said canal company to the amount of five millions of dollars, as hereinafter mentioned, with the interest thereon, unto the person and persons, body and bodies politic or corporate who are or may become the holder or holders of the said bonds or any of them, his, her, or their executors, administrators, successors, or assigns, which bond or bonds to the amount of five millions of dollars are to be made and issued by said canal company in such amount or amounts, and at such time and

times, and to bear such rate of interest, and be made payable in such funds and at such times and places as the said canal company may from time to time by a resolution of its board of managers decide, order, and direct; and the said bond and bonds thus made and issued, and also the aforesaid bonds which become due in eighteen hundred and ninety-four may from time to time be taken up and cancelled and other bonds of other tenor and character be substituted therefor, without in anywise impairing the security by this indenture afforded; and in consideration of the sum of one dollar by the said trust company to the said canal company paid, at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged. Have granted, bargained, sold, aliened, enfeoffed, released, conveyed, assigned, and confirmed, and by these presents do hereby grant, bargain, sell, alien, enfeoff, release, convey, assign, and confirm unto the said trust company, its successors and assigns, all and singular, the railroads, canal, lands, and property of the said canal company, following, to wit, that is to say,

All the locomotive and gravity and other railroads which to the said canal company belong, or which are by the said canal company held, used, or operated under lease, contract, or agreement, situate and being north of the city of Scranton, in the State of Pennsylvania, and all the right, title, and interest of the said canal company to, in, and under the leases, contracts, and agreements under which the said canal company hold, use, or operate the said railroads which do not to said canal company belong; also all and singular all the branch and lateral railroad tracks connected with or pertaining to the said rail-
107 roads; also all the railroads which the said canal company may hereafter own or acquire the use of, situate in the State of Pennsylvania, which may be in any way whatsoever connected or operated in connection with the above mentioned railroads; also all that portion of the canal belonging to the said canal company, situate and being in the State of Pennsylvania; also all and singular the right of way and other lands necessary to and connected with the use and operation of the said railroads and canal; also all stationary and locomotive engines, cars, rolling stock, equipments, machine shops, machinery, station-houses, water and water stations, buildings, erections, waters, water courses, water rights, wharves, piers, docks, and all structures and superstructures which have been or hereafter may be constructed or acquired by the said canal company, connected with or relating to the said railroads and canal; together with the betterments, improvements, and additions which may be made thereto, with the hereditaments and appurtenances.

Also all and singular the lands to the said canal company now belonging, situate in the county of Luzerne and State of Pennsylvania, which were to the said canal company conveyed by the deeds following, to wit, which are recorded in said county:

	Grantors.	Date of deed.	Where recorded.
	John Wurts and others	28th July, 1825	Book 23, page 313
	John Wurts	1st November, 1825	" 24, " 235
	Commissioners of Luzerne County	26th January, 1831	" .. " ...
	Commissioners of Luzerne County	26th January, 1831	" .. " ...
	William Wurts	8th June, 1837	" 33, " 49
	Joseph R. Priestley, attorney	29th August, 1839	" 35, " 319
	Harvey Hackley	7th March, 1843	" 39, " 684
	Joseph R. Priestly, attorney	22d January, 1844	" 44, " 37
	Maurice Wurts	7th February, 1848	" 62, " 400
	Harvey Hackley	31st July, 1848	" 47, " 380
	John P. Farnham and wife	30th December, 1848	" 48, " 4
	James Archbald and wife	23d May, 1849	" 48, " 435
	James Archbald and wife	3d December, 1850	" 51, " 202
	James Clarkson and others	25th February, 1851	" 51, " 435
108	James Clarkson and wife	12th May, 1851	" 57, " 145
	James Clarkson and wife	30th May, 1851	" 55, " 210
	James Clarkson and others	9th June, 1851	" 55, " 213
	Margaret Vaux and others	20th July, 1852	" 54, " 548
	Heirs of Wm. Russel and others	6th August, 1852	" 54, " 615
	James Archbald and wife	24th March, 1855	" 62, " 398
	William Maxey and wife	3d September, 1855	" 62, " 396
	David J. Jones and others	10th September, 1855	" 62, " 397
	Edward Dolph	7th May, 1856	" 66, " 116
	Edward Dougherty and wife	23d May, 1856	" 67, " 242
	William Wurts	3d July, 1856	" 67, " 282
	James Archbald and wife	13th September, 1856	" 67, " 238
	James Archbald and wife	13th September, 1856	" 67, " 234
	Michael Murphy	15th September, 1856	" 70, " 58
	William Wurts and wife	1st January, 1857	" 71, " 111
	Peter Loftus and wife	19th March, 1857	" 68, " 328
	James W. Johnson and others	6th June, 1857	" 71, " 94
	Amzi Wilson and wife	30th June, 1857	" 71, " 288
	Thomas Thomas and wife	1st December, 1857	" 72, " 293
	William Wurts and wife	1st February, 1858	" 73, " 480
	John P. Farnham and wife	25th June, 1858	" 73, " 484
	James Dickson and wife	10th September, 1858	" 74, " 196
	James S. Ward and wife	9th October, 1858	" 74, " 305
	Philip Mead	9th October, 1858	" 74, " 315
	Roswell Rice and wife	9th October, 1858	" 74, " 317
	Abel Barker and wife	4th November, 1858	" 76, " 40
	Henry C. Wademan and wife	13th December, 1858	" 75, " 200
	Samuel L. Peck and wife	15th January, 1859	" 75, " 338
	Amos R. Eno and wife	28th February, 1859	" 78, " 29
	Wm. C. Coates and wife	14th March, 1859	" 75, " 535
	Abel Barker and wife	23d March, 1859	" 77, " 150
	Wm. Ferris and others	24th March, 1859	" 74, " 605
	Peter W. Moore and wife	3d May, 1859	" 77, " 152
	Wm. Silkman and wife	9th May, 1859	" 77, " 188
109	Dr. R. Randall and wife	10th August, 1859	" 77, " 408
	John Decker and wife	17th August, 1859	" 78, " 304
	John P. Farnham and wife	5th March, 1860	" 80, " 198
	Benj. Bowen and others	9th June, 1860	" 80, " 438
	James Vincent and wife	20th October, 1860	" 82, " 300
	Ira Tripp and wife	28th May, 1861	" 84, " 377
	Gordon F. Mason and others	22d June, 1861	" 83, " 560
	Margaret Vaux and others	10th July, 1861	" 83, " 562
	Margaret Vaux and others	18th September, 1861	" 86, " 94
	G. M. Holenback and wife	15th February, 1862	" 86, " 313
	H. M. Hoyt and wife	8th May, 1862	" 86, " 546
	Lyman R. Nicholson	8th May, 1862	" 86, " 559
	Chas. B. Campbell	27th August, 1862	" 101, " 53
	Mary V. Wurts	4th April, 1863	" 91, " 384
	Jane U. Whiting	4th June, 1863	" 93, " 41
	S. S. Clark and wife	18th December, 1863	" 93, " 407
	Edward Jones & Co	12th April, 1864	" 95, " 356
	Zeno Albro and others	18th May, 1864	" 94, " 435
	Caroline Bowen	5th July, 1864	" 96, " 513
	N. Cottrill and wife	29th July, 1864	" 98, " 344
	B. Morrison and wife	19th November, 1864	" 97, " 572
	John C. Hutchins and others	7th December, 1864	" 99, " 413
	John Vincent and wife	10th October, 1865	" 105, " 324
	H. P. Zimmerman and wife	21st December, 1865	" 108, " 246
	Lewis Pugh and wife	16th February, 1867	" 140, " 45
	Edward Jones & Co	16th February, 1867	" 140, " 45
	Edmund Griffin and wife	7th May, 1867	" 11, " 408
	Abner Griffis *et al*	24th May, 1867	" 117, " 490
	Geo. Sanderson and others	7th June, 1867	" 116, " 561
	The Baltimore Coal Co	15th October, 1867	" 121, " 429
	Austin Jenkins and others	15th October, 1867	" 121, " 426
	Malinda Griffin and others	13th December, 1867	" 122, " 282
	The North Carbondale Coal Co	26th December, 1867	" 123, " 539
	Lucien Birdseye	1st April, 1868	" 126, " 75
110	Lucretia J. Wurts and others	28th September, 1868	" 130, " 141
	Cornell Birrer and wife	3d October, 1868	" 130, " 144
	Stephen Torrey and wife	14th November, 1868	" 128, " 393
	Thomas Dickson and wife	18th November, 1868	" 130, " 89

Grantors.	Date of deed.	Where recorded.
Levi H. Alden and wife	25th May, 1869	Book 136, page 2
Ira Tripp and wife	9th November, 1869	" 136, " 142
Ira Tripp and wife	15th August, 1870	" 143, " 2
Eli K. Price *et al*	15th November, 1870	" 145, " 488
Boston and Lackawanna Coal Co	5th January, 1871	" 147, " 163
Geo. M. Hull and others	11th January, 1871	" 154, " 491
Geo. M. Hull and others	13th January, 1871	" 153, " 442
John C. Birdseye	8th February, 1871	" 148, " 162
Lucien Birdseye and wife	8th February, 1871	" 148, " 163
Jos. S. Potter and others	15th February, 1871	" 149, " 133
Duane P. Truex	10th July, 1871	" 154, " 502
Lackawanna Iron & Coal Co	11th September, 1871	" 153, " 136
Theo. Von Storch *et al*	3d November, 1871	" 156, " 137
Patrick Morrison and wife	30th January, 1872	" 174, " 37
Edward H. Chase and wife	1st July, 1873	" 167, " 462
The Thomas Iron Co	30th July, 1873	" 174, " 38
C. T. Cromwell and wife	24th December, 1873	" 174, " 34
H. B. Rockwell and others	27th December, 1873	" 185, " 475
Dickson Manufacturing Co	5th May, 1874	" 177, " 176
Dickson Manufacturing Co	3d July, 1874	" 179, " 458

Also all and singular the lands to the said canal company now belonging, situate in the county of Wayne and State of Pennsylvania, which were to the said canal company conveyed by the deeds following, to wit, which are recorded in said county:

Grantors.	Date of deed.	Where recorded.
R. L. Kennedy and wife	18th April, 1866	Book 34, page 117
Anna M. Olyphant	28th May, 1874	" 45, " 156

Also all and singular the lands to the said canal company now belonging situate in the county of Susquehanna and State of
111 Pennsylvania, which were to the said canal company conveyed by the deeds following, to wit, which are recorded in said county:

Grantors.	Date of deed.	Where recorded.
Stephen H. Pierson	14th November, 1848	Book 23, page 85
R. L. Kennedy and wife	18th April, 1866	" 37, " 823
Anna M. Olyphant	28th May, 1874	" 50, " 404

Excepting from said above-mentioned lands all town lots and plots that have been laid out and sold, and are intended to be laid out and sold as such, in the cities of Carbondale, Scranton, and Wilkesbarre, and in the boroughs of Archbald, Olyphant, Blakely, and Dickson City, and in the townships of Fell and Carbondale, in said county of Luzerne.

Also all and singular the buildings, breakers, shafts, slopes, engines, tracks, machinery, and structures, superstructures, and improvements of every kind and character, and the ways, water privileges, and advantages upon, belonging to or connected with the lands hereinbefore particularly referred to or in anywise thereto appertaining, with the hereditaments and appurtenances, subject to the exceptions aforesaid. Also all and singular the chartered rights, rights, liber-

ties, privileges, franchises, easements which now are or hereafter may be vested in or belonging to the said canal company, their successors or assigns, in respect to the property hereinbefore mentioned and referred to.

To have and to hold all and singular the aforesaid railroads, canal, lands, and property, with the hereditaments and appurtenances thereto belonging or in anywise appertaining, unto the said trust company, their successors and assigns, to the only proper use and benefit and behoof of the said trust company, their successors and assigns, forever.

In trust, nevertheless, for the use and benefit of the person and persons, body and bodies politic or corporate, who are or may become the holder or holders of the said bonds which this indenture is given to secure the payment of, or of any of them, and subject to the terms, stipulations, and conditions of the said bonds and of the laws of the States of New York and Pennsylvania relating to the said canal company; and subject also to the absolute right of the said canal company, their successors and assigns, to have, possess, manage, use, enjoy, and control the said railroads, canal, lands, property,
112 rights, franchises, and privileges hereinbefore more particularly described, with as full, free, and perfect a right to use, mine, and take away the coal and other minerals from said lands, and enjoy and make profit of the same, and every part and parcel thereof, until the same are taken possession of by the said trust company for the cause and in the manner hereinafter specified, as if this indenture had not been made; and the said trust company shall not have the right to prevent, hinder, molest, or interrupt the said canal company, their successors or assigns, by any means or legal proceedings whatsoever, from having and enjoying the full, free, perfect, and entire control, use, and management of all and every part of the railroads, canal, and property, rights, and franchises hereinbefore granted and conveyed, in any other way than as hereinafter provided.

And this indenture further witnesseth that the said canal company, for itself, its successors and assigns, covenants and agrees to make, execute, and deliver, in due and legal form, to the said trust company and its successors, all and singular such further grants, assurances, and conveyances as the said trust company may, under advice of their counsel learned in the law, require for the better carrying into effect the purposes of this indenture and to perfect and make more effectual the lien hereby intended to be created.

And this indenture further witnesseth that in case the said canal company, its successors or assigns, shall fail to pay either the principal of or any installment of the interest upon the said bonds, or any of them, within six months after the same becomes due, the full and entire possession and control of all and singular the aforesaid mortgaged railroads, canal, lands, and property shall be by the said canal company, its successors or assigns, delivered and surrendered to the said trust company, or its successors; and the said trust company, or its successors, shall take the possession thereof and enter into and

upon, and use, operate, and manage the same for the use and benefit of the holder and holders of the said bonds; and upon the written request of any bona fide holder or holders of said bonds who hold at least one-tenth part of the whole amount of the bonds, the payment whereof is by this indenture secured, shall advertise all and singular the railroads, canal, property, rights, and franchises hereinbefore granted and conveyed, or intended so to be, for sale at public auction at the Coal and Iron Exchange in the city of New York, or at some other suitable place in said city, which advertisement shall contain as full and minute a description of the property and
113 rights to be sold as may be practicable, and of the improvements therewith connected, and shall be inserted and published at least once a week in two newspapers published in the city and State of New York and in one newspaper published in the city of Scranton, in the State of Pennsylvania, for three months previous to the day of sale. And if at the time fixed for said sale there shall remain unpaid any portion of the principal of or interest upon any of the aforesaid bonds (whether upon those held by the parties requesting the sale or upon any other of the said bonds), the said trust company, or its successors, shall, and they are hereby authorized by the said canal company, on the day fixed by such advertisement, or on any subsequent day to which the said trust company or its successors shall, as hereinafter provided, adjourn said sale, to sell at public auction all and singular the aforesaid railroads, canal, lands, property, rights, and franchises for the best price that can be obtained; it being hereby understood and stipulated that the said trust company and its successors shall, upon a written request of a majority in amount of the holders of all the bonds then unpaid, the payment whereof is secured by this indenture, adjourn the said sale from time to time, in accordance with such request.

And upon the sale being made, shall make, execute, and deliver to the purchaser or purchasers thereof all proper assurances, deeds, and conveyances, to the end that the title and right thereto may be vested in the purchaser or purchasers, his or their heirs, successors, or assigns. And the said canal company do hereby covenant and agree that the assurances, deeds, and conveyances which, as aforesaid, may be executed by the said trust company or its successors, shall have the same force and effect, and shall vest in the purchaser or purchasers the same rights and title which would be acquired by a purchase made at a judicial sale of said railroads, canal, property, rights, and franchises, pursuant to the order, decree, or judgment of a court having jurisdiction in the premises; and shall be a complete and perpetual bar and estoppel, both in law and equity, against the said canal company, its successors and assigns, and against all persons and parties claiming by, from, or under it or them, in anywise or manner whatsoever.

And this indenture further witnesseth that the said trust company and its successors shall, so soon as the proceeds arising from said sale may be received, pay the principal of and the interest to that time

accrued upon the aforesaid bonds which shall have been issued and are then outstanding, or so much thereof pro rata as the
114 said proceeds, after deducting the commissions to which the said trust company may be entitled, and the counsel and attorney fees, costs, and expenses connected with such sales, will pay; and if, after paying said commissions, fees, costs, and expenses, and the principal and accrued interest upon all said bonds, there shall be a surplus, the same shall be paid to the said canal company.

Provided always that if the said canal company, their successors or assigns, shall and do well and truly pay or cause to be paid unto the person and persons, body and bodies politic and corporate, that may be or become the holder or holders of said bonds, the full amount thereof, with the interest thereon, as the same becomes due and payable, according to the tenor and effect, true intent and meaning of the said bonds, then and in that case and from thenceforth as well this indenture and the estate, property, and rights hereby granted as the said bonds shall cease, determine, and become void, anything hereinbefore contained to the contrary thereof in anywise notwithstanding; and the said trust company shall enter full satisfaction of this indenture upon the records of the several counties where the same may be recorded.

And provided further that whenever and so often as the said canal company, their successors or assigns, shall pay and take up one hundred thousand dollars of the said bonds, the said trust company shall, upon the request of the said canal company, enter satisfaction to that amount and to that extent upon the record of this indenture in the several counties where it is recorded.

And provided further that nothing hereinbefore contained shall be so construed as to prevent the said canal company from selling, disposing of, or changing any of the rolling stock or personal property, it being intended, however, to have the same kept good in quantity and value; and in case the said canal company should at any time sell and dispose of any of the real estate and rights covered by this indenture, the said trust company shall release the same from the lien of this indenture upon receiving from the said canal company the bonds hereby secured to an amount equal to the purchase money received for such real estate.

And this indenture further witnesseth that the bonds which are hereby issued, the payment whereof is by this indenture secured, shall not become obligatory until the said trust company shall endorse upon each bond their certificate to the effect that
115 that bond is one of the bonds the payment whereof is secured by this indenture.

And this indenture further witnesseth that the said trust company hereby accepts the trust created by the foregoing indenture, but upon the express understanding and condition that they will be responsible only for the exercise of reasonable diligence in the management of

the said trust, and that they will not be responsible or liable for the acts of any agent by them appointed in the execution thereof.

In witness whereof this indenture is signed on behalf of the President, Managers, and Company of the Delaware and Hudson Canal Company, by its president, and its common seal is hereto affixed and attested by its treasurer, pursuant to a resolution of its board of managers.

And this indenture is also signed on behalf of the said Union Trust Company by its president, and its common seal is hereto affixed and attested by its secretary, pursuant to a resolution of its board of trustees, this the thirteenth day of August, A. D. 1877.

THE PRESIDENT, MANAGERS & COMPANY OF THE
DELAWARE & HUDSON CANAL COMPANY.

[L. S.] By THOS. DICKSON, *President.*

Attest:

J. C. HARTT, *Treasurer.*

UNION TRUST COMPANY OF NEW YORK,

[L. S.] By EDWD. KING, *President.*

Attest:

JAS. H. OGILVIE, *Secretary.*

STATE, COUNTY, AND CITY OF NEW YORK, *ss:*

Be it remembered that on this the 13th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, before me, a commissioner of the State of Pennsylvania, residing in the city of New York, duly commissioned and authorized to take the acknowledgment and proof of deeds, &c., to be recorded in the
116 State of Pennsylvania, personally appeared Thomas Dickson, who, being by me first duly sworn, did depose and say: That he is the president of the President, Managers, and Company of the Delaware and Hudson Canal Company, and that as such he signed the foregoing indenture for and on behalf of said company; that the seal to said indenture affixed is the common seal of said company; that J. C. Hartt is the treasurer of said company; that the said seal was affixed and attested by the said treasurer in deponent's presence, and that the said indenture was thus executed and is by this deponent acknowledged and delivered for and on behalf of the said company as and for its act and deed for the purposes therein expressed pursuant to a resolution of the board of managers of said company.

And be it also remembered that on the same day before me personally came Edward King, who, being by me first duly sworn, did depose and say: That he is the president of the Union Trust Company in the foregoing indenture named; that he knows the common seal of said company; that James H. Ogilvie is the secretary of said company; that he knows the common seal of said company; that as president of the said trust company he signed the foregoing indenture for and on its behalf; that the seal thereto affixed is the common

seal of said company; that it was affixed, and that the said James H. Ogilvie signed his name in attestation thereof in deponent's presence, and that the said indenture was thus executed and is hereby acknowledged as and for the act and deed of said company for the purposes therein expressed pursuant to a resolution of the board of trustees of said company.

EDWARD KING.
THOMAS DICKSON.

Sworn to and subscribed before me the day and year aforesaid.
Witness my hand and official seal.

JAMES W. HALE,
Commissioner for Pennsylvania in New York, 69 Wall Street.

117 STATE OF PENNSYLVANIA,
County of Luzerne, ss:

Recorded in the office for recording deeds in and for said county, in mortgage book No. 35, page .
Witness my hand and seal of office at Wilkesbarre this 15th day of August, A. D. 1877.
[L. S.] C. E. HUNGERFORD,
Acting Recorder.

STATE OF PENNSYLVANIA,
County of Susquehanna, ss:

Recorded in the office for recording deeds in and for said county, in mortgage book No. 9, page 506, on the 16th day of August, A. D. 1877.
Witness my hand and seal of office at Montrose the date aforesaid.
[L. S.] H. F. BEARDSLEY,
Recorder.

STATE OF PENNSYLVANIA,
County of Wayne, ss:

Recorded in the office for the recording of deeds, &c., in and for said county, in mortgage book No. 9, page , August 17, 1877.
Witness my hand and official seal.
[L. S.] P. S. BARNES,
Recorder.

PENNSYLVANIA,
Pike County, ss:

Entered and recorded in the office for recording deeds, mortgages, &c., in and for said county, in mortgage book No. 6, page 1, etc., the 17th day of August, A. D. 1877.
Witness my hand and seal of office at Milford the day and year above written.
[L. S.] JNO. C. WESTBROOK,
Recorder.

119 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April session, 1908. No. 202.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States
vs.
THE DELAWARE AND HUDSON COMPANY.

It is stipulated and agreed between counsel in the above cause that its submission on petition and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 202. April session, 1908. U. S. v. The Delaware and Hudson Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

(NOTE.—Here follows opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.)

196 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. At law. No. 202.

UNITED STATES OF AMERICA
vs.
DELAWARE AND HUDSON COMPANY.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon petition and answer, the petition is refused and judgment is entered in favor of defendant.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 202. U. S. vs. Delaware and Hudson Company. Order directing judgment. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

197 No. 202. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-General of the United States

vs.

THE DELAWARE AND HUDSON COMPANY.

Now comes the plaintiff and, in connection with the petition for writ of error, assigns the following errors in the action and proceedings of the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled case, that is to say:

1. That the Circuit Court erred in denying the petition for writ of mandamus in this case.

2. That the Circuit Court erred in refusing to grant an order for the issuance of a peremptory writ of mandamus and for the relief prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States.

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
198 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the so-called "commodities clause."

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is dis-

criminative in its provisions, and, therefore, constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law.

199 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said plaintiff and petitioner prays that the said judgment and order of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 202. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. The Delaware and Hudson Company. Assignment of errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

200 No. 202. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States
vs.
THE DELAWARE AND HUDSON COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

And now comes the United States of America, on relation of Charles J. Bonaparte, Attorney-General of the United States, plaintiff herein, and says that on the sixth day of October, in the year nineteen hundred and eight, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated October 6th, 1908.

201 (Endorsed:) U. S. C. C. E. D. of Penna. No. 202. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. The Delaware and Hudson Company. Petition for writ of error. The clerk will please file within petition for writ of error, the assignment of errors herewith, and order of court allowing the writ when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

202 No. 202. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States
vs.
THE DELAWARE AND HUDSON COMPANY.

Before DALLAS, C. J.

This sixth day of October, in the year nineteen hundred and eight, comes the plaintiff, by Charles J. Bonaparte, Attorney-General of the United States, and files herein, and presents to the court, a petition praying for the allowance of a writ of error, and an assignment or errors intended to be urged; praying also that a transcript of the record, proceedings, and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

In consideration whereof the court does allow the writ of error as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 202. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. The Delaware and Hudson Company. Order allowing writ of error. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

203 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America ex rel. the Attorney-General of the United States v. The Delaware and Hudson Company, No. 202, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

(Indorsement on cover:) File No. 21355. E. Pennsylvania C. C. U. S. Term No., 559. The United States of America ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Delaware & Hudson Company. Filed October 10th, 1908. File No. 21355.

2

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. 560.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ERIE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21356)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 560.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

ERIE RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Writ of error	2	2
Citation and service	3	3
Petition for writ of mandamus	4	3
Notice of application for writ of alternative mandamus	14	7
Order to issue writ of alternative mandamus	17	8
Appearance for defendant	24	9
Answer	25	10
First consolidated mortgage deed, Erie Railroad Company to the Farmers' Loan and Trust Company, trustee, dated December 10, 1895	55	22
Pennsylvania collateral indenture, dated February 1, 1901, Erie Railroad Company to the Mercantile Trust Company	167	88
General mortgage, Erie Railroad Company to the Standard Trust Company of New York, trustee, dated April 1, 1903	241	131
Stipulation as to submission on petition and answer	363	201
Opinions (omitted in printing)	364	....
Gray, J. (omitted in printing)	365	....
Dallas, J. (omitted in printing)	419	....
Buffington, J. (omitted in printing)	425	....
Judgment	440	202
Assignment of errors	441	202
Petition for writ of error	444	204
Order allowing writ of error	446	205
Clerk's certificate	447	205

1 APRIL SESSION, 1908.

Charles J. Bonaparte. J. Whitaker Thompson. 204 Robert W. de Forest. John G. Johnson.	The United States of America ex rel. the Attorney-General of the United States, *vs.* Erie Railroad Company.	Mandamus.

1908, June 5. Petition for alternative mandamus filed.

1908, June 5. Copy of notice of application for writ of alternative mandamus and affidavit of service of notice filed.

1908, June 5. Order granting alternative writ of mandamus.

1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.

1908, June 9. Writ of alternative mandamus exit returnable the sixteenth day of June, 1908.

1908, June 12. Answer filed.

1908, June 16. Stipulation of counsel filed.

1908, June 26. Argued.

1908, September 10. Opinion denying petition for mandamus filed.

1908, October 6. Dissenting opinion by Buffington, J., filed.

Order for judgment filed.

Assignments of error filed.

Petition for writ of error filed.

Order of court allowing writ of error filed.

Writ of error allowed and copy thereof lodged in clerk's office for adverse party.

Citation allowed and issued.

Citation returned "service accepted" and filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the United States of America ex rel. the Attorney-General of the United States, plaintiff, and Erie Railroad Company, defendant, a manifest error hath happened, to the great damage of the said United States of America ex rel. the Attorney-General of the United States as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of

the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 6th day of October, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY B. ROBB,
Clerk of the Circuit Court of the United States.

Before Dallas, C. J.
Allowed by

THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Erie Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington within thirty days, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein the United States of America ex rel. the Attorney-General of the United States is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the Circuit Court of the United States, this 6th day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Defendant in Error.

4 No. 204. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
ERIE RAILROAD COMPANY.

On information for writ of mandamus.—Petition.

Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
ERIE RAILROAD COMPANY.
April sessions, 1908. No. 204.

To the honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the United States of America.

Petitioner respectfully states that he is the Attorney-General of the United States, and that, as such, he has been requested by the Interstate Commerce Commission to institute this suit against the Erie Railroad Company, a common carrier as hereinafter particularly set forth, and to make application for a writ of mandamus as hereinafter prayed.

7 Petitioner therefore states that the said "Erie Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New York, having its principal office in the State of New York, at the city of New York, and also an office in the State of Pennsylvania, at the city of Susquehanna, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight. That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of

the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

Your petitioner further states, alleges, and charges against the defendant a failure, by the defendant, to comply with and a violation, by the defendant, of that provision of an act of the
8 Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," as said act was amended by an act of the Congress of the United States, approved June 29, 1906, to be found in the first section of said "act to regulate commerce," as amended by said act of June 29, 1906, which said provision is as follows; that is to say: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," is this:

(1) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Hillside Coal and Iron Company and of the Pennsylvania Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold by
9 conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Lackawanna, Luzerne, and Susquehanna, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective officers and directors of said coal companies, most of whom are, in the case of each of said coal companies, as they have been for some time past, either officers or directors of the defendant. That, by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and

mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(2) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part
10 of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors, one of whom is president, as he has been for a long time past, of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last mentioned coal company by a board of directors, one of whom is an officer of the defendant, as hereinbefore stated, the operations of said last mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(3) That from time to time since the first day of May, in the
11 year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your petitioner unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported

as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(4) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being,
12 mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, that provision of the "act to regulate commerce" hereinbefore quoted.

(5) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, thus persisting in, and continuing, its failure to comply with, and its violation of, the provision of said "act to regulate commerce" hereinbefore referred to and quoted.

(6) And so your petitioner alleges and says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it
13 "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article of commodity" necessary and intended, or which will be necessary and intended, "for its use in the conduct of its business as a common carrier;" and your petitioner respectfully repeats and alleges that such transportation, and such continuing transportation, is, and will be, a failure, by the defendant, to comply with, and a violation, by the defendant, of that provision of the law hereinbefore quoted.

Petitioner therefore prays that your honors grant an order for the issuance of an alternative writ of mandamus commanding and directing the defendant, "Erie Railroad Company," to forthwith and hereafter comply with the provision of the law hereinbefore quoted by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, as is hereinbefore alleged, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, or to appear before this court on some day to be named in said writ, and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring the defendant, the said "Erie

Railroad Company," to forthwith and hereafter comply with said provision of the "act to regulate commerce;" that said alternative writ of mandamus be issued and directed to the defendant, the
14 said "Erie Railroad Company;" and he further prays for such other and general relief as he may be entitled to in the premises.

CHARLES J. BONAPARTE,
Attorney-General.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me, Aylett T. Robinson, a notary public in, for, and of the District of Columbia aforesaid, Charles J. Bonaparte, Attorney-General of the United States, and made oath, in due form of law, that he is the Attorney-General of the United States, that he is acquainted with the facts alleged in the foregoing petition, and that the same are true to the best of his knowledge, information, and belief.

CHARLES J. BONAPARTE.

Subscribed and sworn to before me, this 4th day of June, in the year nineteen hundred and eight.

[Notary's seal.]

AYLETT T. ROBINSON,
Notary Public, D. C.

To "Erie Railroad Company:"

You are hereby notified that I shall, on the fifth day of June, in the year nineteen hundred and eight, before the Honorable James B. Holland, one of the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, at his office in the city of Philadelphia, in said State of Pennsylvania, apply for alternative writ of mandamus, to be issued by the said Circuit Court
15 against you, "Erie Railroad Company," requiring you to forthwith and hereafter comply with that provision of the "act to regulate commerce" as said act was amended by an act of the Congress of the United States approved June 29, 1906, which prescribes, "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the said State of Pennsylvania to the markets of any other State, any anthracite coal

manufactured, mined, or produced by you, or under your authority, or which you may own in whole, or in part, or in which you may have any interest direct or indirect except such of said anthracite coal as may be necessary and intended for your use in the conduct of your business as a common carrier.

16 Dated this fourth day of June, in the year nineteen hundred and eight.

CHARLES J. BONAPARTE,
Attorney-General of the United States.

STATE OF PENNSYLVANIA,
City and county of Philadelphia, ss:

Personally appeared before me, C. K. Klink, a notary public, L. Allison Wilmer, special assistant to the Attorney-General, and made oath that he, on the fifth day of June, in the year nineteen hundred and eight, delivered a copy of the foregoing notice to Mr. Robert W. de Forest, of counsel for the said "Erie Railroad Company."

L. ALLISON WILMER,
Special Assistant to the Attorney General.

Sworn to and subscribed before me this fifth day of June, in the year nineteen hundred and eight.

[Notary's seal.] C. K. KLINK,
My commission expires April 18, 1911. *Notary Public.*

17 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* ERIE RAILROAD COMPANY.	April sessions, 1908. No. 204.

Before HOLLAND, J.

On motion in behalf of Charles J. Bonaparte, Attorney-General of the United States, on petition this day filed praying for alternative writ of mandamus to issue against "Erie Railroad Company" requiring it to forthwith and hereafter comply with that provision of the "act to regulate commerce" as amended by an act of the Congress of the United States approved June 29, 1906, which prescribes, "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its

18 authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in

the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the State of Pennsylvania to the markets of other States, any anthracite coal manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such of said anthracite coal as may be necessary and intended for its use in the conduct of its business as a common carrier.

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition.

By the Court.

Attest:
George Brodbeck,
Deputy Clerk.

24 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

United States of America ex rel. Attorney-General
vs.
Erie R. R. Company. } April session, 1908. No. 204.

Enter our appearance for defendant in the above case. June 5th, 1908.

Robert W. de Forest,
John G. Johnson,
Per F. Marko Rivinus,
Attorneys for said Defendant.

To Clerk of said Court.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 204. April session, 1908. U. S. of America ex rel. Attorney-General v. Erie R. R. Company. Filed Jun. 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Order for appearance. Robert W. de Forest, John G. Johnson, attorneys for defendant.

25 204. Apr. sess., 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mandamus proceeding.

The United States of America, plaintiff,
vs.
Erie Railroad Company, defendant.

ANSWER OF ERIE RAILROAD COMPANY.

GEO. F. BROWNELL,
Solicitor and Counsel for Defendant.
ADELBERT MOOT, *of Counsel.*

Filed Jun. 12, 1908. Henry B. Robb, clerk. By L., deputy clerk.

27 United States Circuit Court, Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* ERIE RAILROAD COMPANY, DEFENDANT. { No. ——. April sessions, 1908. Answer to petition for mandamus.

The defendant, Erie Railroad Company, for answer to the petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the plaintiff herein, respectfully shows:

1. The defendant, Erie Railroad Company, admits and alleges that it is, and since long before the first day of May, 1908, and since long before the passage of the act of Congress, approved June 29, 1906, amending the interstate commerce act, has been a corporation created, organized, and existing under the laws of the State of New York, and is, and during all such times has been, engaged in the operation of a railroad, with its lines, branches, and connec-

28 tions extending through parts of the States of New York, New Jersey, Pennsylvania, and other States, and engaged in interstate as well as intrastate transportation of passengers and property thereover, including the transportation of the article or commodity known as anthracite coal from mines and mining lands in the State of Pennsylvania to points and markets in other States. The defendant was duly organized under the provisions of the stock corporation law of the State of New York providing for the reorganization of corporations whose property and franchises have been sold under mortgage foreclosure, with the right to hold and acquire the stocks and bonds of any other corporation, domestic or foreign, and duly succeeded to and lawfully acquired the railroads, stocks, and other property, rights, and franchises theretofore possessed by the New York, Lake Erie & Western Railroad Company, including those formerly possessed by the Erie Railway Company or by the New York and Erie Railroad Company, the predecessors in interest of said New York, Lake Erie & Western Railroad Company. The New York and Erie Railroad Company was incorporated by a special act of the legislature of the State of New York, passed April 24, 1832, being chapter 224 of the laws of 1832, whereby said New York and Erie Railroad Company was duly authorized to build and operate a railroad to carry passengers and freight from some

29 point in or near New York City to Lake Erie. Thereafter

by chapter 199 of the laws of 1846 and chapter 316 of the laws of 1847 of the laws of New York said corporation was given power to build a portion of its railroad in Pennsylvania, in so far as the State of New York could give it such power. To make such grant of power by the State of New York effective, the State of Pennsylvania, by an act of its general assembly entitled "An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania," and acts supplementary thereto passed respectively March 26, 1846, and April 1, 1848, granted to the said New York and Erie Railroad Company the right to construct and operate said railroad in said State of Pennsylvania, and various other powers and rights necessary or convenient for the construction and operation of such railroad, upon condition that it pay annually to the State of Pennsylvania $10,000 for such right or franchise so granted to it.

2. Said corporation, said New York and Erie Railroad Company, and its successors, at great expense, did construct and operate such railroad in the States of New York and Pennsylvania. The $10,000 so required to be paid the State of Pennsylvania for such franchise has been annually paid to the State of Pennsylvania to and including January, 1908, for the right to build and operate such railroad in said State of Pennsylvania. The country through which such rail-
30 road was built in New York and Pennsylvania was mountainous, was thinly settled by pioneers, was largely covered with forests, and was greatly in need of railroad transportation, but it was then difficult to get the capital to build a railroad necessarily so expensive to build in so difficult a country, and there was not enough traffic then to make such a railroad pay its operating expenses and fixed charges. The returns from its business were poor, the debt necessarily incurred in building it was large, and said company to provide the necessary capital therefor and for its corporate purposes from time to time mortgaged all its property, rights, and franchises to secure the payment of its bonds issued thereunder, viz, first mortgage, dated May 14, 1845, to secure bonds of which $2,482,000 in amount are outstanding, maturing May 1, 1947; second mortgage, dated March 1, 1849, to secure bonds of which $2,149,000 in amount are outstanding, maturing September 1, 1919; third mortgage, dated March 1, 1853, to secure bonds of which $4,617,000 in amount are outstanding, maturing March 1, 1923; fourth mortgage, dated August 15, 1857, to secure bonds of which $2,926,000 in amount are outstanding, maturing October 1, 1920; fifth mortgage, dated June 1, 1858, to secure bonds of which $709,500 in amount are outstanding, maturing June 1, 1928.

Said New York and Erie Railroad Company in accordance
31 with law, under date of June 1st, 1858, mortgaged its property, rights, and franchises to James Brown and John C. Bancroft Davis, trustees for bondholders, which mortgage was afterwards foreclosed, and the said property, rights, and franchises duly sold and conveyed by deed of Philo T. Ruggles, referee in foreclosure proceed-

ings, dated December 28th, 1861, to Dudley S. Gregory and John C. Bancroft Davis, trustees, which sale was duly confirmed by the Supreme Court of the State of New York.

The said trustees and their associates duly organized the Erie Railway Company, a body corporate, under the laws of the State of New York, and particularly chapter 160, laws of 1860, and chapter 119, laws of 1861, and in accordance with an act of the general assembly of the State of Pennsylvania passed March 22, 1860, known as "An act relating to the foreclosure and sale of the New York and Erie Railway Company." Under such foreclosure, and such statutes of New York and Pennsylvania and such reorganization, said Erie Railway Company lawfully acquired and became vested with all the rights, franchises, and property formerly held by the New York and Erie Railroad Company, and was authorized to mortgage the same.

3. For the purpose of furnishing an outlet from the anthracite coal region of Pennsylvania, and principally for the transportation of anthracite coal, a railroad was constructed by the Jefferson Railroad Company, prior to 1869, from Carbondale, Pa., to a connection
32 with the railroad of the Erie Railway Company at or near Lanesboro, Pa., a distance of about forty miles. Said Jefferson Railroad Company was incorporated and duly organized under the acts of the assembly of Pennsylvania, approved February 19, 1849, April 28, 1851, March 18, 1863, and holds letters patent granted February 15, 1864.

Said Jefferson Railroad Company has since constructed or acquired, principally for the transportation of anthracite coal, a railroad extending from Honesdale, Pa., to Hawley, Pa., a distance of nine miles, and also mine branches and tracks solely for the transportation of anthracite coal and mine supplies, extending from Erie Breaker to Edgerton, near Mayfield, a distance of two and a half miles; to reach Erie Breaker, near Mayfield, Pa., one mile, and to reach Glenwood Breaker, one mile.

The said branch to Edgerton Breaker was constructed and is now used solely for the transportation of anthracite coal from, and mine supplies to, the operations of the Temple Iron Company at Edgerton Colliery.

Said tracks to Erie Breaker and Glenwood Breaker were constructed and are now used solely for the purpose of the transportation of anthracite coal from, and mine supplies to, the said collieries owned and operated by the Hillside Coal and Iron Company.

The railroad of said Jefferson Railroad Company was built
33 at great expense and is constructed almost entirely through a mountainous and sparsely settled country to reach the anthracite coal region.

Over 80 per cent of the total tonnage transported by this defendant over the Jefferson Railroad is anthracite coal tonnage of the Pennsylvania Coal Company and the Hillside Coal and Iron Company, and over 70 per cent of the entire revenue from transportation by defendant over the railroad of Jefferson Railroad Company is derived from

the transportation of anthracite coal tonnage of said Pennsylvania Coal Company and Hillside Coal and Iron Company. Substantially all of said coal is transported by defendant from Pennsylvania to other States. Under date of January 1, 1869, the Erie Railway Company leased the railroad of said Jefferson Railroad Company, and ever since that date said Erie Railway Company and its said successors, including this defendant, have leased and operated the same.

If defendant is prohibited from transporting to such other States coal owned, mined or produced by said Pennsylvania Coal Company, Hillside Coal & Iron Company, and Temple Iron Company, said railroad branches above referred to reaching said Erie, Edgerton, and Glenwood collieries will become substantially valueless and the value of said Jefferson Railroad and of its capital stock will be greatly impaired.

4. By chapter 66 of the laws of 1862 of the State of New York
34 the organization of said Erie Railway Company was ratified and affirmed, and said company was granted certain other rights, and it was provided:

"And if any corporation duly organized or to be organized in the State of New Jersey or Pennsylvania, shall undertake to construct a coal road to connect the same with the road of the Erie Railway Company between Oxford Station in Orange County and Deposit in the county of Delaware for the transportation of coal, said Erie Railway Company is hereby authorized to lease the said coal road, and to contract for the leasing and operation of the same, and for the transportation of coal over said coal road, and upon any road that may be owned or operated by said Erie Railway Company."

Pursuant to such authority, the Erie Railway Company entered into a contract, dated June 9, 1862, with a Pennsylvania corporation, the Pennsylvania Coal Company, whereby said Pennsylvania Coal Company did undertake to construct a coal road from a connection at Hawley, Pa., with its gravity railroad already constructed, to a connection with the Erie Railway Company's railroad between Oxford Station and Deposit as aforesaid. Under such contract said coal road was to be constructed for the transportation of coal from the mines of said Pennsylvania Coal Company in Pennsylvania to the
35 lines of said Erie Railway Company, and thereupon said Erie Railway Company was to lease said coal road and operate the same with its own engines, cars and men; and the Erie Railway Company thereby undertook, pursuant to such authority, to transport such coal to interstate markets over its own lines of railroad.

Thereupon said Pennsylvania Coal Company constructed such coal road at great expense and the Erie Railway Company did thereupon lease and operate the same, and the coal of the Pennsylvania Coal Company was transported over such railroad to the railroad lines of said Erie Railway Company, and thence transported by said Erie Railway Company over its railroad lines to markets in other States. By such contract, and succeeding contracts, the Erie Railway Company and its successors, including this defendant, came into pos-

session of said coal road of the Pennsylvania Coal Company, operated said coal road and have transported the coal of said Pennsylvania Coal Company to interstate markets to this day.

Said Pennsylvania Coal Company and Erie and Wyoming Valley Railroad Company, a corporation organized under the laws of the State of Pennsylvania, at various times built at great expense other lines of railroad and mine branches in part to replace the gravity railroad of the Pennsylvania Coal Company above referred to, which lines and branches, together with the coal road above referred to,
36 subsequently became vested in and are now owned by said Erie and Wyoming Valley Railroad Company, constituting a railroad with 75 miles of main track, 40 miles of yards and sidings, and 35 miles of mine branches and breaker tracks, owned by said company.

The main line of the railroad now owned by the Erie and Wyoming Valley Railroad Company was built solely for the purpose of transporting to market the coal owned, mined or produced by the Pennsylvania Coal Company, and nearly all the branches thereof have been built solely for the purpose of reaching and transporting to market coal owned, mined or produced by the Pennsylvania Coal Company or Hillside Coal and Iron Company.

A portion of the said railroad and its branches, constituting a mileage of 35 miles, was constructed and is now used solely for the purpose of transporting coal from, and mine supplies to, collieries of the Pennsylvania Coal Company and of Hillside Coal and Iron Company, and is so situated that no traffic from any other shipper, either of anthracite coal or otherwise, can be obtained, and if the coal of the Pennsylvania Coal Company and the Hillside Coal and Iron Company can not be carried by it, such portion of said railroad will be substantially valueless.

The Erie and Wyoming Valley Railroad Company has, at great cost, constructed upwards of forty miles of double track, tracks in
37 yards and passing sidings solely for the accommodation and transportation of the anthracite coal tonnage handled by it, which will be unnecessary, useless, and valueless for railroad purposes if it can not transport the tonnage of the Pennsylvania Coal Company and Hillside Coal and Iron Company.

Over 95 per cent of the total tonnage transported over the railroad of the Erie and Wyoming Valley Railroad Company is anthracite coal, and over 95 per cent of such anthracite coal is owned, mined, or produced by the Pennsylvania Coal Company and Hillside Coal and Iron Company, and more than 85 per cent of the total earnings from transportation over the said railroad is derived from the transportation of the anthracite coal of such companies. Practically all of such coal is transported by defendant from Pennsylvania to other States. Said Erie and Wyoming Valley Railroad is so situated that it can reach and transport practically no other coal tonnage than that shipped by the Pennsylvania Coal Company and the Hillside Coal

and Iron Company, and that shipped from some of the mines of the Temple Iron Company.

If the railroad of said Erie and Wyoming Valley Railroad Company cannot transport the anthracite coal so shipped by the Pennsylvania Coal Company and Hillside Coal and Iron Company, it cannot be operated at a profit, and the value of said railroad and of the capital stock of said railroad company will be greatly impaired.

38 5. This defendant is the successor to all the rights, privileges, franchises, immunities, and property of the New York and Erie Railroad Company through the foreclosure of a mortgage upon it, as aforesaid, and said sale December 28, 1861, and the reorganization into the Erie Railway Company in accordance with said statutes of Pennsylvania and New York in such case made and provided. It is likewise the successor to all the rights, privileges, franchises, immunities, and property of said Erie Railway Company through chapter 66, laws of New York for 1862, chapter 430, laws of New York for 1874, and an amendment thereof, chapter 446, laws of New York for 1876, and a mortgage upon such rights, privileges, franchises, immunities, and property executed by said corporation February 4, 1874, the foreclosure of the last-mentioned mortgage, the sale of the property mortgaged April 24, 1878, the purchase of such property by the mortgagee, and a reorganization of said railroad company by the formation of a new company designated as the New York, Lake Erie and Western Railroad Company, the mortgage of all the railroads, stocks, and other property, rights, privileges, immunities, and franchises, acquired by it (including the stock of the Hillside Coal and Iron Company and of the Jefferson Railroad Company, which had been acquired by defendant's predecessors many years previously) to the Farmers' Loan & Trust Company,

39 October 5, 1878, the foreclosure of the last-mentioned mortgage in the United States Circuit Court for the Southern District of New York, and the sale of its property to duly appointed representatives of its mortgage bondholders, November, 1895, the reorganization of said corporation under the statutes of New York and in accordance with the decrees and orders of said court, November 14, 1895, whereby this defendant obtained good title in and to, and became the lawful owner of the property, rights, privileges, immunities, and franchises, of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by its said predecessor companies, the railroads so owned by it and by its said subsidiary companies having an aggregate mileage of over 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois.

6. Said Pennsylvania Coal Company was organized as a corporation of Pennsylvania by act of the general assembly No. 73, laws of 1838 of the State of Pennsylvania, which act gave such corporation

the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mines." For that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to "construct railroads with one or more tracks." Such power to buy
40 and hold coal lands, mine and sell coal, construct, extend, and operate railroads was from time to time enlarged so as to cover more lands for mines, railroads, wharves, and depots by the following acts of the general assembly of the State of Pennsylvania, viz: Act No. 155, laws 1839; act No. 57, laws 1841; act No. 116 and act No. 354, laws 1849; act No. 250, laws 1850 of the laws of Pennsylvania. In particular by act of general assembly No. 140, laws of Pennsylvania for 1853, said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York and Erie Railroad; also said Pennsylvania Coal Company was authorized to "connect or consolidate with, or lease, some railroad, or canal, in said States of New Jersey or New York, and acquire, hold, and exercise the rights, privileges, and franchises of such corporations." The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was further extended by act No. 85, of said general assembly, laws 1857; act No. 366, laws 1864; act No. 634, laws 1867; act No. 1018, laws of Pennsylvania for 1868. In each case said Pennsylvania Coal Company proceeded to exercise the authority so vested in it, and thereupon it issued capital stock and evidences of indebtedness, obtained much capital, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads with depots and terminals, made railway connections so
41 authorized, and did other like acts to promote such business of supplying all persons needing the same with anthracite coal; and said corporation thus obtained, and now enjoys, a large interstate business in mining, producing, and selling anthracite coal.

Because of the location of said mines of said corporation, the railway and connections of said Pennsylvania Coal Company naturally brought the coal of said corporation to the predecessors of this defendant, and still bring such coal to this defendant.

7. The Hillside Coal and Iron Company was organized as a corporation of Pennsylvania by act of its general assembly No. 1279, laws of Pennsylvania for 1869, and given power to "purchase and hold in fee simple, by lease or otherwise, coal, iron, mineral, and lumber lands in this Commonwealth, not exceeding at any one time 5,000 acres, with power to connect said lands by railroad not exceeding twenty miles in length with other railroads, canals, or public improvements;" also power to use its capital in "purchasing, mining, vending, and transporting coal, iron, lumber, and other products of their lands; in manufacturing, vending, and transporting iron and other materials and metals, and in such other objects as may be considered necessary and expedient in the prosecution of said business."

Under an act of the general assembly of the State of Pennsylvania, approved April 18, 1867, and under an agreement of merger
42 adopted December 24, 1873, said Hillside Coal and Iron Company was merged and consolidated with the Keystone Coal Company, Sugar Cabin Coal Company, Standard Coal Company, and North Mountain Coal Company, corporations organized under various special acts of the general assembly of the State of Pennsylvania granting to said companies, respectively, various rights to mine, transport, and sell coal and construct railroads and, in particular, act No. 1030 of said general assembly, laws of 1873, and act No. 532 of said general assembly, laws of 1862, affecting the said Standard Coal Company, which provide, among other things, that any incorporated railroad company shall have the power to subscribe to the capital stock of said company.

By act of said general assembly No. 1309, laws of Pennsylvania for 1869, said corporation was authorized to increase its capital to not to exceed 30,000 shares.

The said corporation, Hillside Coal and Iron Company, proceeded to act upon such authority, and to issue stock and evidences of indebtedness, obtain large capital, buy coal and lumber lands, develop coal mines and railroads, manufacture lumber, and to transport and sell coal. The said corporation thus came to have a large interstate business in supplying the fuel needs of many citizens of many States. The mines of said corporation have been conveniently reached by the railroad lines of this defendant and its predecessor, and they have transported such coal to interstate markets.

43 8. Said corporations, said Pennsylvania Coal Company and said Hillside Coal and Iron Company, are still mining, producing, transporting, and selling large quantities of such coal to supply the great demand for fuel among citizens of various States outside of Pennsylvania. Said companies annually mine, produce, and sell several million tons of such coal in said markets, outside of Pennsylvania, more than ninety per cent of such coal being consumed outside of Pennsylvania. Over 70,000,000 tons per annum of anthracite coal is now produced in Pennsylvania, but there is no sufficient market in Pennsylvania therefor, over eighty per cent thereof being necessarily marketed in other States and in Canada. Over ninety per cent of the anthracite coal traffic of this defendant is furnished by the Pennsylvania Coal Company and the Hillside Coal and Iron Company, substantially all of which is transported by it from Pennsylvania to other States, and the bulk of which is marketed at points on the lines of this defendant in such other States. The anthracite coal tonnage furnished this defendant by said coal corporations for the year ending June 30, 1907, was over twenty-two per cent of its entire freight tonnage, and defendant's revenue therefrom was over 20 per cent of its total revenue from transportation.

9. A large amount of the coal mined or produced by said Pennsylvania Coal Company and Hillside Coal and Iron Company
44 is consumed by this defendant in the operation of its railroad,

such consumption of coal in the year ending June 30th, 1907, amounting to nearly 400,000 tons.

On account of the greater cleanliness of anthracite coal as compared with bituminous coal, competitive reasons, police regulations of growing centers of population, and other reasons, the consumption of anthracite coal for railroad fuel purposes is increasing and will tend to further increase. Such use of anthracite coal suitable for domestic use would be wasteful and extravagant on account of the higher price and value of such coal. The smaller sizes of anthracite coal suitable for locomotive fuel purposes are a by-product of the production of the more valuable sizes of coal suitable for domestic purposes. The proportion of the total product of such smaller sizes in the mining of coal is, with the Pennsylvania Coal Company and the Hillside Coal and Iron Company, about 35 per cent at the present time. The mines of said Pennsylvania Coal Company and Hillside Coal and Iron Company could not be operated solely for the production of railroad fuel coal without wasteful and ruinous extravagance.

It is important for the purposes of the future operation of the railroad of this defendant that it be secured an available supply of anthracite coal for its fuel purposes, for its own protection and the protection of the public against failure or interruption of supply for such use.

45 10. This defendant denies that it owns the anthracite coal lands, or coal, of the Pennsylvania Coal Company, or the Hillside Coal & Iron Company, or the Temple Iron Company, or any other anthracite coal lands, directly or indirectly, in whole or in part. It alleges that it has no interest therein direct or indirect, as it is advised by counsel learned in the law, although it admits and alleges that long before the commodity clause was enacted this defendant, or its said predecessors in interest, did lawfully acquire nearly all the capital stock of the Pennsylvania Coal Company and the Hillside Coal & Iron Company, and a small minority of the stock of the Temple Iron Company.

And this defendant admits and alleges that as a stockholder of the Pennsylvania Coal Company and of the Hillside Coal & Iron Company it has voted for directors of said corporations, as it lawfully might do; but this defendant denies that it has managed or is managing those corporations, and alleges that its relations to and with them have not been other than as a stockholder thereof. On the contrary, it admits and alleges that they have been lawfully managed, respectively, by their own directors and by their respective officers lawfully chosen by said directors. And this defendant denies that it has managed the Temple Iron Company or authorized it to do any business whatever, and alleges that its relations to and with said company have not been otherwise than as a stockholder thereof.

It denies it has sold the coal of any of said corporations.

46 This defendant admits and alleges that since May 1, 1908, it has been, is now, and for many years has been transporting the coal of said corporations to markets outside the State of Penn-

sylvania, many of which markets can only be reached over the railroad lines of this defendant; that such coal mines are most economically and naturally reached by lines of this defendant with which they have been so connected for many decades, and most of them are not reached by any other line of railroad, and other lines could not be constructed to reach many of them except at prohibitive cost.

This defendant and its predecessors, long prior to the passage of said amendment of the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, Hillside Coal & Iron Company, Jefferson Railroad Company, and Erie and Wyoming Railroad Company, and pledged the same under various of their mortgages, under and pursuant to which there have been issued and are now outstanding bonds for large sums aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world, in reliance upon the property mortgaged and pledged, including the railroad of this defendant and the said stocks which form necessary and substantial portions of the security for said bonds.

It alleges that the business of producing or mining anthra-
47 cite coal is not a business of such a nature that said commodity clause is a reasonable or lawful regulation of interstate transportation thereof.

11. This defendant denies that the operation, mining or producing of coal by any coal corporation, or company so-called, has been, or now is carried on under the management or authority of this defendant; or that it has been, or now is the owner, in whole or in part, of any coal transported by it as a part of interstate commerce; or that it has had, or now has any interest, direct or indirect, in any coal transported to interstate markets by it; or that it has violated, or failed to comply with the so-called commodity clause of the interstate commerce act; or that it is engaged in any unlawful transportation of coal; or that it intends hereafter to violate such clause by unlawfully transporting any coal to interstate markets. On the contrary this defendant alleges that as a common carrier it is its duty to continue to transport such coal of the Pennsylvania Coal Company, the Hillside Coal and Iron Company, and The Temple Iron Company to citizens demanding it at interstate and other markets upon the same terms and conditions as those upon which this defendant transports other like coal to citizens of the United States and of the several States at such markets; and that interstate consumers of such coal, citizens of the United States and the several States, have the right to exercise liberty of contract and those constitutional rights and
48 immunities of citizens of the United States and the several States secured to them by various provisions of the Constitution of the United States and of the amendments thereto; and that they may buy and burn such coal as fuel as they choose to buy and burn instead of being forced through said commodity clause to buy and burn wood as fuel under the same circumstances and conditions. Defendant alleges that such citizens in the exercise of their rights

and immunities as citizens of the United States, and of the several States, have the right to enjoy the just and equal protection of the laws, and liberty of contract, and to continue to buy and burn such particular anthracite coal; and that to enable such citizens to enjoy such constitutional rights, among others, it is the duty of the Government of the United States and of this high court to protect this defendant in continuing to transport such coal, for otherwise the constitutional rights of said citizens, and of this defendant, and its stockholders and bondholders, will be impaired or destroyed.

12. To acquire title to all its property, rights, and franchises, and to improve and extend the same by purchase and otherwise, this defendant borrowed much capital, and was compelled to mortgage and pledge such property, or parcels thereof, from time to time. All its stock in said coal corporations has long since become collateral security for some one or more of such mortgages held by
49 trustees for bondholders, many thousands in number, and the same contain no provisions for releasing the stock of said coal corporations.

The dates and amounts of some of such mortgages are the following:

December 10, 1895, first consolidated mortgage deed to Farmers' Loan and Trust Company, due January 1st, 1996, securing bonds, of which there are outstanding $80,342,000;

February 1, 1901, Pennsylvania collateral indenture to the Mercantile Trust Company securing $36,000,000 bonds due February 1st, 1951, of which are outstanding $34,000,000;

April 1, 1903, general mortgage to The Standard Trust Company of New York securing $50,000,000 bonds due April 1st, 1953, of which there are outstanding $22,000,000.

Copies of said first consolidated mortgage deed, said Pennsylvania indenture, and said general mortgage are hereunto annexed, marked Exhibits "A," "B," and "C," respectively, and made a part of this answer.

Said bonds are held by purchasers thereof in good faith for value, in reliance upon the property mortgaged and pledged, including the said stocks which form necessary and substantial portions of the security for said bonds. A great number of said bondholders
50 are citizens of the United States, and of the several States, and are entitled to enjoy all their constitutional rights and immunities as such, and to have this defendant enjoy all its, in order that the contracts of this defendant and of said trustees and bondholders may not be impaired or destroyed, and that their securites and property, and those of this defendant, may not be taken, impaired, or destroyed without due process of law, or just compensation, contrary to the Constitution of the United States, in such case made and provided. If such commodity clause be construed to apply to this defendant, the rights and property of this defendant, and of its stockholders, and of its trustees and creditors and bondholders, will be impaired and destroyed contrary to the Constitution of the United States.

Defendant, for greater certainty and in support of its denials and allegations herein contained, prays leave to refer, as a part hereof, to all of the acts of the New York legislature, and of the general assembly of Pennsylvania, and to all of the mortgages, charters and articles of incorporation herein referred to, as if the same were set forth at large herein.

13. If that part of the interstate commerce act commonly called the commodity clause is so construed as to prohibit this defendant from transporting anthracite coal from Pennsylvania to markets outside the State of Pennsylvania, in cases where this defendant is a
51 a stockholder in the corporation owning, mining or producing the same, then this defendant pleads that such commodity clause violates the Constitution of the United States, and is null and void in that:

(a) It will, in effect, prohibit commerce between the States, which commerce is not harmful, but beneficial, and it is not in any proper or legal sense a regulation of commerce, whereas, under the United States Constitution, article one, section eight, Congress is granted power only to regulate such interstate commerce.

(b) It will deny full faith and credit to the public acts of the State of New York incorporating this defendant and granting it the right to own and hold stock in corporations of the State of Pennsylvania, and to the public acts of the State of Pennsylvania granting this defendant the right to own stock in mining corporations of Pennsylvania, and to build, lease, and operate railroads, and to transport coal and other commodities therein produced to markets in other States, contrary to article four, section one, of the United States Constitution.

(c) It will deny to this defendant and numerous citizens of the States of Pennsylvania, New York, and other States of the United States, bondholders of and stockholders in this defendant, the privileges and immunities of citizens of the several States, contrary to article four, section two, subdivision one, of the Constitution of the United States.

52 (d) It will deprive this defendant and numerous persons who are its stockholders, and bondholders, and citizens of the United States and of the several States thereof, of liberty and property without due process of law, and take from them private property without just compensation, contrary to the fifth amendment to the Constitution of the United States.

(e) It will subject this defendant, its directors, officers, lessees, agents, and other persons acting for or employed by it, and its stockholders to excessive fines, and cruel and unusual punishments, contrary to the eighth amendment to the Constitution of the United States.

(f) It will deny to defendant and its stockholders, and bondholders, and disparage those certain rights possessed by the people of the several States when the Constitution of the United States and the amendments thereto were adopted, and which were retained by the people under the Constitution and especially by the ninth and tenth

amendments thereof, among which rights are the liberty to make innocent contracts and do innocent business upon the same terms and conditions permitted to all other persons, the right to use, sell, or enjoy property acquired by lawful contract, the right to have such contracts continue unimpaired, and the right to that justice and the equal protection of the laws which the Constitution was established to
53 make secure to all persons; and it will exceed the limitations imposed on the powers of Congress by the nature of the Federal Government, and the fundamental principles thereof.

(g) It will deny to this defendant and its stockholders, and bondholders, who are citizens of the United States and of the State of Pennsylvania or New York, their certain rights in real estate, and in corporations of said States, and in business in each of said States, and in the United States, contrary to the rights reserved to them, and granted to them by section two of article four, and by the fifth, eighth, ninth, tenth, and fourteenth amendments of the Constitution of the United States.

Wherefore this defendant prays this honorable court to dismiss the petition herein.

ERIE RAILROAD COMPANY,
By JOSEPH E. PACKER,
Asst. Secretary.
GEORGE F. BROWNELL,
Solicitor and Counsel for Defendant.

ADELBERT MOOT, *of Counsel.*

54 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph E. Packer, being duly sworn, deposes and says that he is asst. secretary of the Erie Railroad Company, the defendant above named; that he has read the foregoing answer of said defendant, and that the same is true to the best of his knowledge, information, and belief.

JOSEPH E. PACKER.

Sworn to before me this 6th day of June, 1908.

[SEAL.] A. L. TRAVIS,
Notary Public, No. 75, Kings County.

Certificate filed in New York County.

55 *First consolidated mortgage deed.*

Erie Railroad Company to the Farmers' Loan and Trust Company, trustee. Dated December 10, 1895. Stetson, Tracy, Jennings & Russell, general counsel, 15 Broad street, New York.

57 This indenture, made this tenth day of December, in the year one thousand eight hundred and ninety-five, between

Erie Railroad Company, a corporation created by, and existing under, the laws of the State of New York, hereinafter called the "railroad company," party of the first part, and

The Farmers' Loan and Trust Company, of New York, a corporation created by, and existing under, the laws of the State of New York, hereinafter called the "trustee," party of the second part.

Whereas the railroad company, party of the first part, owns, possesses, controls, or leases divers lines of railway, together with franchises, rights, privileges, lands, tenements, and hereditaments thereunto belonging or appertaining, on which lines of railway or various portions thereof and of the equipment thereof, bonds, secured by mortgages, and other liens are now outstanding;

And whereas the railroad company owns various stocks and bonds, including stock and bonds of the Chicago and Erie Railroad Company, a corporation of Indiana;

And whereas all such railroads, properties, leaseholds, stocks, and bonds have been received by the railroad company by, under, or in pursuance of a certain plan of reorganization of the New York, Lake Erie and Western Railroad Company and subordinate companies, and of the transfer to it or for its benefit of various stocks, bonds, and other properties so transferred to or for its benefit by Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, the
58 committee named in the certificate of incorporation of the railroad company, upon the express promise and agreement of the railroad company, among other things, to make, execute, issue, and use its bonds as herein provided, including a limited issue thereof from time to time to be made to the said Coster, Fitzgerald, and Thomas jointly, and not severally, or their survivors or successors, and further issues thereof to be made for the redemption and acquisition of bonds and stocks and equipment liens and for new acquisitions, construction, and betterments, all as herein provided;

And whereas the board of directors of the railroad company, at a meeting thereof held at New York on the nineteenth day of November, in the year eighteen hundred and ninety-five, adopted a resolution in the following words; that is to say:

"*Resolved*, That the president and the secretary of the Erie Railroad Company be, and they are hereby, authorized and directed, in its behalf and under the corporate seal, when approved by the stockholders, and in form substantially that now submitted to this board, to execute and deliver a mortgage or deed of trust upon the property and franchises of the corporation to be known as its 'First consolidated mortgage deed,' to the Farmers' Loan and Trust Company, as trustee, to secure two issues of bonds, one to the aggregate amount of $35,000,000, to be called 'Prior lien bonds,' and the other and remaining issue of bonds, to the aggregate amount of $140,000,000, to be called 'General lien bonds,' the principal of both such issues of bonds to be payable in gold coin of the United States, of the present standard of weight and fineness, at the office or agency of this

company in the city of New York, on the 1st day of January, 1996, with interest thereon at the rate of four per cent per annum, except that for two years from July 1st, 1896, the general lien bonds shall bear interest at the rate of three per cent per annum; all interest to be payable semiannually in like gold coin at the said office or agency on the first days of January and July in each year; such bonds to be issued and disposed of, on the terms and conditions, for the purposes and in the manner set forth in said form of mortgage."

59 And whereas, it was also resolved by the board of directors of the railroad company at said meeting that the president, or any vice-president, and the secretary, or any assistant secretary of the railroad company or of any railroad company being lawful and sole successor to the railroad company for the time being, should from time to time, as directed by the board of directors of the railroad company or of its said successor, execute, in the behalf and name of the railroad company, and under its corporate seal, the two issues of bonds, to be secured by the said mortgage to the aggregate amount of one hundred and seventy-five million dollars ($175,000,000), the said two issues to be respectively: "Prior lien bonds," for an aggregate principal amount of $35,000,000, and "general lien bonds," subordinate and subject in lien to the prior lien bonds, for an aggregate principal amount of $140,000,000; such bonds to be substantially of the following tenor, to wit:

(Form of prior lien bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company. Prior lien four per cent gold bond. Secured by first consolidated mortgage deed.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder, one thousand dollars in gold coin of the United States of the present standard of weight and fineness, on the first

60 day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, N. Y., with interest at the rate of four per cent per annum from January 1, 1896, payable semiannually at said office or agency in like gold coin on the first days of January and July in each year, but only upon surrender of the annexed coupons therefor as they severally mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom, under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon and registered bonds of the railroad company, known as " prior lien bonds," duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such prior lien bonds at any one time outstanding shall never exceed the total sum of $35,000,000. All of such prior lien bonds are equally secured by a mortgage deed dated December 10th, 1895, executed by said railroad company to The Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged and the nature and extent of the security and the rights of the holders of said bonds under the same.

This bond may be registered as to principal in the owner's name on the company's books, at its office or agency in the city of New York, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again from time to time be registered or
61 transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereunto this tenth day of December, 1895.

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of interest coupon, of which the first is to be payable July 1, 1906.)

On the first day of , , Erie Railroad Company will pay the bearer at its agency in the city of New York, N. Y., twenty dollars in gold coin, without deduction for taxes, being six months' interest then due on its prior lien bond No. .

Treasurer.

62 (Form of registered prior lien bond.)

UNITED STATES OF AMERICA,

Erie Railroad Company. Prior lien four per cent registered gold bond. Secured by first consolidated mortgage deed.

No. P. R. $——.

Know all men by these presents that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay or assigns, the sum of dollars, in gold coin of the United States of the present standard of weight and fineness, on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, and to pay interest thereon from the first day of January or July, as the case may be, next preceding the date hereof, at the rate of four per cent per annum, payable semiannually in like gold coin, at said office or agency, on the first days of January and July in each year, until payment of said principal sum.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom under or by reason of any present or future law; the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as prior lien bonds, duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such prior lien bonds, both coupon and registered, at any one
63 time outstanding, shall never exceed the total sum of $35,000,000. All of such prior lien bonds are equally secured by a mortgage deed, dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the company's books at its office or agency in the city of New York, upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage deed.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or assistant secretary this day of .

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, Secretary.

64 (Form of general lien bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company general lien gold bond. Secured by first consolidated mortgage deed.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder, one thousand dollars in gold coin of the United States of the present standard of weight and fineness on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, N. Y., with interest from July 1, 1896, at the rate of three per cent per annum for two years and at the rate of four per cent per annum thereafter, payable semiannually at said office or agency in like gold coin on the first days of January and July in each year, but only upon surrender of the annexed coupons therefor as they severally mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom, under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "general lien bonds," duly authorized and approved by the directors and stockholders of the railroad
65 company, issued and to be issued, but so that the aggregate amount of such general lien bonds at any one time outstanding shall never exceed the total sum of $140,000,000.

All of such general lien bonds are equally secured by a mortgage deed dated December 10th, 1895, executed by said railroad company to the Farmers' Loan & Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a

description of the property and franchises mortgaged and the nature and extent of the security and the rights of the holders of said bonds under the same.

This bond may be registered as to principal in the owner's name on the company's books at its office or agency in the city of New York, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again from time to time be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed of the trustee under said mortgage deed.

In witness whereof the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary, and coupons for said interest 66 with the engraved signature of its treasurer to be attached hereunto, this tenth day of December, 1895.

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of interest coupon, of which the first is to be payable January 1, 1897.)

On the first day of Erie Rai'road Company will pay the bearer at its agency in the city of New York, N. Y., dollars in gold coin, without deduction for taxes, being six months' interest then due on its general lien bond No.

, *Treasurer.*

(Form of registered general lien bond.)

UNITED STATES OF AMERICA.

Erie Railroad Company, general lien registered gold bond. Secured by first consolidated mortgage deed.

No. G. R. $ ——

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value

received, promises to pay or assigns, the sum of dollars in gold coin of the United States of the present standard of weight and fineness on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of
67 New York, and to pay interest thereon from the first day of January or July, as the case may be, next preceding the date hereof, at the rate of three per cent per annum from July 1st, 1896, to June 30th, 1898, and four per cent per annum thereafter, payable semiannually in like gold coin at said office or agency, on the first days of January and July in each year, until payment of said principal sum.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be requir'd to pay, or to retain therefrom under or by reason of any present or future law; the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as general lien bonds, duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such general lien bonds, both coupon and registered, at any one time outstanding, shall never exceed the total sum of $140,000,000. All of said bonds are equally secured by the mortgage deed, dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the company's books at its office or agency in the city of New York, upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage deed.

After the expiration of the voting trust authorized in the
68 certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage deed.

In witness whereof the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or assistant secretary this day of

ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

And whereas the coupons to be attached to said bonds of both issues are to be authenticated by the engraved signature of the present treasurer or of any future treasurer of the railroad company, or of any successor company, it being intended that the railroad company and any such successor company may adopt and use for that purpose the engraved signature of any such treasurer, notwithstanding the fact that such person may have ceased to be such treasurer at the time when any such bonds shall be actually certified and delivered;

And whereas it was further resolved that there shall be endorsed on each of such bonds of both issues a certificate of the trustee, which certificate shall be the conclusive and only evidence that such bonds are entitled to the security of the mortgage or deed of trust therein mentioned, and that no bond shall be valid or obligatory for any purpose until such certificate shall have been executed by the trustee, such certificate, in respect of said two issues severally and respectively, to be substantially of the following tenor, viz:

69 I.

(Form of trustee's certificate as to prior lien bonds.)

This bond is one of the series of prior lien bonds described in the within-mentioned mortgage deed, executed by the Erie Railroad Company to the undersigned.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By , *Vice-President.*

II.

(Form of trustee's certificate as to general lien bonds.)

This bond is one of the series of general lien bonds, described in the within-mentioned mortgage deed, executed by the Erie Railroad Company to the undersigned.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By , *Vice-President.*

And whereas, subsequently, to wit, on the 19th day of November, 1895, all the stockholders of the railroad company, owning and holding every share of its capital stock, namely, three hundred thousand shares of first preferred stock, one hundred and sixty thousand shares of second preferred stock, and one million shares of the common stock of said corporation, did, in the manner and form provided by and in section 2 of the stock corporation law of the State of New York, consent to the issue of this mortgage, which consent is in writing, and has been filed and recorded in the office of the clerk of the city and county of New York, and also in the office of the register of the city

and county of New York, that being the county in which the railroad company has its principal place of business.

And whereas, the printed form of mortgage submitted to and approved by the board of directors at their said meeting, and submitted to the stockholders of the corporation at the time of the execution of their consent as aforesaid, was in the form of this indenture.

70 And whereas, in pursuance of said resolutions and consent and of all and every legal power and authority in it vested, the railroad company proposes to make and execute, and from time to time to issue and deliver bonds of both the issues secured hereby.

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and interest of all such bonds at any time outstanding and lawfully issued, as provided in such bonds and in this indenture, and the performance of all the covenants and conditions herein contained,

The railroad company, party of the first part, in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents with all the covenants and conditions thereof, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto the trustee, party of the second part, its successors and assigns forever:

All the estate, right, title and interest of the railroad company of, in and to:

All and singular the railway of the railroad company, from and including Piermont, on the Hudson River, in the State of New York, to and including the terminus of the said railway on Lake Erie at or near Dunkirk, in said State, and the railway known as the Newburgh Branch, from Newburgh to the main line, and also all that part of the railway designated as the Buffalo Branch of the Erie Railway

71 extending from Hornellsville to Attica, in the State of New York, also that part of the railway known as the Newburgh and New York Railroad, extending from Turners on the main line to Vail's Gate on the Newburgh branch; also the railway formerly belonging to the Lockport and Buffalo Railroad Company and extending from Lockport to Black Rock, both in the State of New York; also the railway formerly belonging to the Erie International Railway Company, and extending from a point of connection with Suspension Bridge and Erie Junction Railroad in Niagara County to International Bridge in Erie County, both in the State of New York; and also all other railways now belonging to the railroad company in the States of New York, Pennsylvania, and New Jersey, or any of them; also, all the estate, right, title and interest, terms and remainder of terms, franchises, privileges and rights of action of whatsoever name or nature in law or in equity conveyed or assigned unto the New York

and Erie Railroad Company, or unto the Erie Railway Company, or to the New York, Lake Erie and Western Railroad Company, by the Union Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Buffalo, New York and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the Bergen County Railroad, a corporation existing under the laws of the State of New Jersey; by the Buffalo, Bradford and Pittsburg Railroad Company, a corporation existing under the laws of the States of New York and Pennsylvania; by the Rochester and Genesee Valley Railroad Company, a corporation existing under the laws of the State of New York; by the Long Dock Company, a corporation existing under the laws of the State of New Jersey; by the Goshen and Deckertown Railroad Company, a corporation existing under the laws of the State of New York; by the Hoboken Land and Improvement Company, a corporation existing under the laws
72 of the State of New Jersey, by the New York and Fort Lee Railroad Company, a corporation existing under the laws of the State of New Jersey, and the New Jersey Junction Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Jefferson Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Montgomery and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Docks and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the Paterson, Newark and New York Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Pennsylvania Coal Company, a corporation existing under the laws of the State of Pennsylvania; by the Newark and Hudson Railroad Company, a corporation existing under the laws of the State of New Jersey, and by the Suspension Bridge and Erie Junction Railroad Company, a corporation existing under the laws of the State of New York.

And also all the railroad formerly of the Buffalo and Southwestern Railroad Company, extending from Jamestown, in Chautauqua County, to Buffalo, in Erie County, both in the State of New York, subject only to two mortgages thereon prior to the lien of this indenture; the first to secure an issue of bonds for $1,500,000, the second executed November 19th, 1895, by the railroad company to secure an issue of its bonds for $1,000,000.

And also all the estate, right, title, and interest of the railroad company in and to certain real estate situate in Hudson County, in the State of New Jersey, known as the Penhorn property, and to two certain other parcels of real estate situate in the county of Passaic, in the State of New Jersey, and known respectively as the Post farm and the Fredericks farm. And also to a certain parcel of land lying west of the Bergen Tunnel, in Hudson County, State of New
73 Jersey, known as the Laundry property. And also all other real estate of the railroad company, situate in the State of New Jersey, of every kind and description, and wherever in the said State

the same may be situate. Also a tract of land, being about four acres, situate in the township of Texas, county of Wayne, in the State of Pennsylvania.

And also all the estate, right, title, and interest of the railroad company of, in and to certain piers, bulkheads and water fronts in the said city of New York; that is to say: Piers 29, 30, 31, and 32, North River, with bulkheads between piers 30 and 31, 31 and 32, and half the bulkhead between piers 32 and 33; also the pier at the foot of West Twenty-third street, and the bulkhead between Twenty-second and Twenty-third streets; also the piers 7 and 8, East River, and the bulkhead between them.

And, also, all tracts of land or interest therein of the railroad company lying and being in the following States and counties, namely: Counties of Rockland, Orange, Sullivan, Delaware, Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Genesee, Erie, Niagara, Cattaraugus, Chautauqua, and Monroe, in the State of New York; counties of Hudson, Essex, Bergen, and Passaic, in the State of New Jersey; counties of Susquehanna, Jefferson, Pike, and McKean, in the State of Pennsylvania.

Also all the right, title, and interest of every name and nature hereafter acquired by the railroad company in or to the property, railroad and franchises now of the New York, Pennsylvania and Ohio Railroad Company, or any branch, extension or leased or operated line thereof or therefrom (except certain lands and interests in lands not immediately appurtenant to said railroad, of which lands and interests the description is on file in the possession of the party of the second part) or in any bonds, stocks or other security of such railroad company, or of any successor company or companies, subject to the terms upon which any such acquisition may have been made;
74 provided, however, that nothing herein is intended or shall be construed to affect or limit the reserved right of the railroad company at its option to modify from time to time or to elect not to continue the agreement dated November 18th, 1895, under which it is now operating the said New York, Pennsylvania and Ohio Railroad.

Also all the right, title, estate, interest, property, and franchises of the railroad company of, in and to any and all other lines of railway, extension, and branches now owned, leased or held by the railroad company or in which it has any interest whatsoever, wherever located, notwithstanding the same may not be particularly set forth or described in this indenture.

Also all the right, title, estate, interest, and property of the railroad company in and to any and all lines of railway, extensions, and branches, including the franchises appurtenant thereto, and any and all bonds, stocks, and other property of every kind or description (notwithstanding that the same are not now particularly set forth in this indenture), which, from time to time, in the manner hereinafter provided, shall be designated in the verified certificates to be furnished by the railroad company to the trustee whenever it shall make any call for any of the $5,000,000 "prior lien bonds" reserved under

the provisions of this indenture for enlargement and improvement of terminal facilities, including elevation of tracks at Jersey City, Buffalo, and elsewhere, additional wharf facilities at New York, reducing grades, constructing double track, and purchasing additional equipment; or whenever it shall make any call for any of the $17,000,000 "general lien bonds" reserved under the provisions of this indenture for construction, equipment, additions to or improvements or purchases of property; and also any and all franchises and rights of any kind relating to any and all lines of railway,
75 extensions, branches and other property constructed or acquired from the use of any such prior lien bonds or general lien bonds or their proceeds.

Including any and all roadbed, superstructure, rights of way, rails, tracks, sidetracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, wood houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections and fixtures, and all other things of whatever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to the lien of this indenture, or to any branch or operated line thereof, or provided for use thereon, or in connection therewith; and any and all lands designed for depots, warehouses or other structures at any terminus, or on or along such lines of railway, or upon or along any such branch or operated line; and any and all locomotives, engines, cars and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture and other chattels now or hereafter acquired or provided for use upon such lines of railway or branches, or upon any other line or branch, or upon any operated line; and any and all leaseholds, leases, rights under lease, or contract, covenants and agreements, terms or parts of terms; and any and all property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, such lines of railway, or any such branch, or operated line; and any and all corporate rights, privileges and franchises which the railroad company now has, or hereafter can or shall acquire, possess or exercise in, to, upon, or in any respect of such lines of railway or branches or any operated line, or any part thereof, necessary for, or appertaining to, the construction, maintenance or operation of such lines of railway or any such branch or operated line, or any part there-
76 of; and any and all the rents, issues, profits, tolls and other income of such lines of railway, and of any and all branches and operated lines; and also any and all the rights, privileges, franchises, properties, real or personal, rights and things which the railroad company may or shall hereafter possess, or become entitled to possess, for the purposes of, or in connection with, such lines of railway or any such branch or operated line.

Together with all and singular the franchises, rights and privileges now or hereafter appurtenant to or used in connection with, the lines of railway above mentioned, or any branch or operated line thereof.

Also the following shares of stock, to be transferred to the trustee as hereinafter provided:

77 Name of company.	Par value per share.	Number of shares.
Buffalo, New York and Erie Railroad Company	$100	8,238
Jefferson Railroad Company	50	41,909
Buffalo, Bradford and Pittsburgh Railroad Company	100	21,899
Bergen County Railroad Company	100	2,000
Middletown and Crawford Railroad Company	50	1,600
Newark and Hudson Railroad Company	100	2,500
Paterson, Newark and New York Railroad Company	50	5,000
Bergen and Dundee Railroad Company	100	400
Long Dock Company	100	8,000
New York, Lake Erie and Western Docks and Improvement Company	100	6,040
Suspension Bridge and Erie Junction Railroad Company	100	4,992
Buffalo Creek Railroad Company	100	1,250
Chicago and Erie Railroad Company	100	1,000
Pavonia Ferry Company	100	1,000
Hillside Coal and Iron Company	100	10,000
Northwestern Mining and Exchange Company	100	5,000
Blossburg Coal Company	100	10,000
Tioga Railroad Company, preferred stock	50	3,794
Tioga Railroad Company, common stock	50	7,818
Elmira State Line Railroad Company	100	610
Arnot and Pine Creek Railroad Company	100	2,550
Union Steamboat Company	100	10,000
Union Dry Dock Company	500	300
Conesus Lake Railroad Company	50	375

Also the following bonds, to be delivered to the trustee as hereinafter provided:

$185,000 bonds of the Buffalo, Bradford and Pittsburgh Railroad Company, secured by its mortgage dated January 1st, 1865, to Dorman B. Eaton, as trustee.

78 $57,200 bonds of the Middletown and Crawford Railroad Company, secured by its mortgage dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford, as trustees.

$250,000 bonds of the Newark and Hudson Railroad Company, secured by its mortgage dated September 20th, 1871, to H. N. Otis, as trustee.

$499,000 bonds of the Paterson and Newark Railroad Company, secured by its mortgage dated January 1st, 1868, to W. C. Rushmore and C. Walsh, as trustees.

$604,000 bonds of the New York, Lake Erie and Western Docks and Improvement Company, secured by its mortgage dated June 1st, 1883, to The Farmers' Loan and Trust Company, as trustee, as modified by the supplemental contract dated

$1,900,000 bonds of the New York, Lake Erie and Western Coal and Railroad Company, secured by its mortgage dated May 15th, 1882, to the Metropolitan Trust Company of the city of New York and J. Lowber Welsh, of the city of Philadelphia, as trustees.

$35,000 bonds of the Suspension Bridge and Erie Junction Railroad Company, secured by its mortgage dated June 1st, 1870, to Horatio N. Otis, as trustee.

$9,776,000 income bonds of the Chicago and Erie Railroad Company, secured by its mortgage dated August 21st, 1890, to New York Security and Trust Company and John B. Elam, as trustees.

Also, all property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned, or transferred by the railroad company or anyone in its behalf to the trustee, which is hereby authorized to receive any property, at any and all times as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of bonds issued or to be issued hereunder, and to hold and apply any and all such property subject to the terms hereof.

79

It being intended to include within the grant of this indenture all lines of railway, extensions, branches, real estate, and railroad property conveyed to or acquired by, or for the benefit of, the railroad company, party of the first part hereto, under or in pursuance of the decree confirming the sale, and the deeds of the special master and others executed or to be executed pursuant to such decree, in the suit of Trenor Luther Park against The New York, Lake Erie and Western Railroad Company and The Farmers' Loan and Trust Company; The Farmers' Loan and Trust Company against The New York, Lake Erie and Western Railroad Company and Trenor Luther Park; consolidated cause, in equity, in the Circuit Court of the United States for the Eastern District of New York, and in the various decrees ancillary thereto, wherein also foreclosure was had of the second consolidated mortgage made by the New York, Lake Erie and Western Railroad Company, dated October 5th, 1878, to the Farmers' Loan and Trust Company, of New York, trustee.

To have and to hold the premises, railroads, properties, real or personal, rights, franchises, estates, appurtenances, stock, and bonds hereby conveyed and assigned, or intended to be conveyed or assigned, unto the trustee, its successor or successors and assigns forever:

But in trust, nevertheless, as to each of the said two issues of bonds, respectively, viz, primarily the $35,000,000 "prior lien bonds" as one issue, and secondarily the $140,000,000 "general lien bonds," as a separate, subordinate, and subject issue, for the equal, proper, and proportionate benefit and security severally and respectively of all and every the present and future holders, first, of any and every "prior lien bond," and, second, and subject thereto, of any and every "general lien bond" issued under and secured by this indenture, as well all those now issued as all hereafter issued in addition thereto or by way of substitution or exchange, in accordance with the terms of this indenture, and for enforcing payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture, and of the said bonds and interest obligations respectively, so that the "prior lien bonds," without regard of time of actual issue, shall have priority and preference, as to both principal and interest, over the "general lien bonds," and that the general lien bonds shall all be subject to the prior and superior lien of the prior lien bonds; but without preference, priority, or distinction as to lien or otherwise, of any one bond of either of such

80

two issues over any other bond of the same issue, by reason of priority in the execution, delivery, or negotiation thereof, and so that each and every bond of either of such two issues, issued and to be issued as aforesaid, shall have, under and by this indenture, the same right, lien, and privilege as every other bond of that issue, and the principal and interest of every such bond of either issue shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond of that issue, as though all had been made, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture, without regard to the date of actual issue, sale, or disposition thereof; and so that the lien and security of this indenture, and of all bonds issued hereunder, shall take effect from the day of the date hereof as though upon such day actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

81 And it is hereby expressly covenanted that all such bonds and the coupons for interest thereon are to be issued, certified, delivered, received, and negotiated, and that the mortgaged properties and franchises are to be held by the trustee subject to the following further covenants, conditions, and provisions, viz:

ARTICLE ONE.

All bonds hereby secured shall, from time to time, by the railroad company be executed and delivered for certification to the trustee, which shall thereupon certify and deliver the same as provided in this article. Only such bonds as shall bear the trustee's certificate duly endorsed thereon and duly signed shall be secured by this indenture or shall be entitled to any lien or benefit hereunder; and every such certificate of the trustee upon any bond executed in behalf of the railroad company shall be conclusive evidence that the bond so certified has been duly issued hereunder and is entitled to the benefit of the trust hereby created. Such certificates may be made and bonds may be delivered hereunder in advance of registration or record of this indenture.

The bonds and certificates for shares hereby pledged as specifically enumerated in the granting clauses hereof shall, prior to the certification of any bonds hereunder, be assigned and delivered to the Farmers' Loan and Trust Company, trustee under this indenture.

Before certifying or delivering any coupon bond the trustee shall cut off and cancel all coupons thereof then matured; and the trustee shall not certify or deliver any registered bond bearing interest from any date more than six months prior to such certification or delivery.

82 A.

Of the bonds authorized to be issued under and secured by this indenture thirty-five million dollars ($35,000,000) shall be prior lien bonds.

SECTION 1. Of the prior lien bonds authorized to be used under and secured by this indenture, bonds to the amount of fifteen million six hundred thousand dollars ($15,600,000) shall be certified by the trustee, and upon a resolution of the board of directors of the railroad company shall be delivered to Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, or their survivors or successors, the committee named in the certificate of incorporation of the railroad company, immediately upon the execution and delivery hereof, or as soon as may be thereafter.

SEC. 2. Out of and from the remainder of such authorized issue of prior lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of fourteen million four hundred thousand dollars ($14,400,000).

Said fourteen million four hundred thousand dollars ($14,400,000) of such prior lien bonds shall be certified by the trustee and delivered to the railroad company from time to time hereafter as and when called for by resolution of the board of directors of the railroad company, stating, in effect, that the same are to be used from time to time to acquire railroad and railroad equipment, now of the New York, Pennsylvania and Ohio Railroad Company (substantially as covered by its so-called "first mortgage of May 6, 1880," to the Farmers' Loan and Trust Company, trustee), subject to "prior lien" bonds of said New York, Pennsylvania and Ohio Railroad Company, equipment obligations and rentals now resting thereon, or to acquire securities of the New York, Pennsylvania and Ohio Railroad Company, or of a successor company or companies, in amounts and
83 to an extent which in the opinion of the board of directors of the railroad company shall give to the railroad company, or enable it to acquire, satisfactory control of the operation and management of said railroad.

If said prior lien bonds hereby secured shall be used to acquire securities of the New York, Pennsylvania and Ohio Railroad Company, the trustee shall certify and deliver said $14,400,000 of prior lien bonds hereby secured from time to time only at the rate of one thousand dollars par value of such prior lien bonds for each five thousand dollars par value of said so-called first mortgage bonds, which shall be acquired and pledged hereunder. If securities of a successor company or companies shall be acquired, then the trustee shall reserve out of said $14,400,000 of prior lien bonds hereby secured, an amount equal at par to the aggregate amount of all the secured and unsecured indebtedness of such successor company or companies that shall not be acquired and pledged hereunder, other than the said New York, Pennsylvania and Ohio prior lien bonds and equipment obligations and liens upon or for the benefit of properties leased or controlled by said New York, Pennsylvania and Ohio Railroad Company and ordinary operating accounts; and the bonds so reserved shall from time to time be certified and delivered by the trustee when and as a like amount of such secured or unsecured indebtedness shall be discharged

or acquired by the railroad company, and assigned to the trustee hereunder.

As to the existence and amount of any such secured or unsecured indebtedness of a successor corporation, the written opinion of the counsel of the railroad company shall, according to its terms and to any action pursuant thereto, be sufficient evidence and authority to the trustee.

When delivering any bonds under this section the trustee shall require either the immediate subjection of the property acquired to the lien hereof (excepting, however, certain lands and interests in
84 lands of the New York, Pennsylvania and Ohio Railroad Company hereinbefore mentioned), or, if this be not reasonably practicable, shall deliver the bonds upon such trusts as are, in its judgment, calculated to accomplish such subjection within a reasonable period, but the trustee shall not be liable for any error of judgment in this respect.

SEC. 3. Out of the remainder of such authorized issue of prior lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of five million dollars ($5,000,000).

Said five million dollars of such prior lien bonds shall be certified by the trustee and delivered to the railroad company from time to time hereafter, when and as called for by resolution of the board of directors to the effect that the bonds so called for and their proceeds are to be used upon lines or property now or hereafter owned by the railroad company, and subject to the lien of this indenture, or upon lines or property of any company of which a majority of the capital stock shall be subjected to the lien of this indenture, only for the following purposes, or some one or more of them, viz: (1) Enlargement and improvement of terminal facilities, including elevation of tracks or other improvement of crossings at Jersey City, Buffalo, and elsewhere, (2) additional wharf facilities at New York or Jersey City, (3) purchasing additional equipment, (4) reducing grades and constructing double track, or to reimburse the railroad company for outlays made subsequent to the date hereof for the purposes aforesaid or some one or more of them.

At any time or times, upon any such resolution, and with the written consent of the voting trustees (under the voting trust authorized in the certificate of incorporation of the railroad company), or the greater number of those then acting as such voting trustees, such prior lien bonds shall be so delivered to the amount specified in every such resolution, not in any one instance exceeding
85 $1,000,000, but in every instance after the first delivery of such bonds, before delivering any additional amount of such bonds, the trustee shall require the railroad company to furnish, in addition to such resolution of the board, the verified certificate or certificates of some person or persons cognizant of the facts, stating—

(a) That all such bonds and the proceeds of all such bonds certified and delivered on or subsequent to the date of the last preceding

resolution, or resolution and verified certificate, as the case may be, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided;

(b) The amount of such bonds so certified and delivered, which, or the proceeds of which, on or subsequently to the date of the last preceding resolution, or resolution and verified certificate (as the case may be), shall have been actually used for any such purpose, or to reimburse the railroad company, as above provided, and specifically indicating each and every such acquisition or construction, and also stating in detail the amount of bonds, or proceeds of bonds, used or expended for each and every such purpose.

(c) That the price paid in bonds or their proceeds for such construction or acquisition was not in excess of the fair value of the work done or property acquired, and that the bonds included in such verified certificate were sold, disposed of, or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting.

(d) That of the expenditures for which such certificate shall state that prior lien bonds or their proceeds have been used, no part has been provided by the use of general lien bonds; and that of the expenditures for which reimbursement shall be claimed, no part has been obtained by the railroad company out of the general lien bonds or their proceeds.

Every such verified certificate shall be accompanied by the written statement of the president or of one of the vice-presidents, and
86 of the auditor or treasurer of the railroad company that they believe such certificate to be true, and that such bonds have been used and the expenditures therein certified have been made only for purposes properly chargeable to capital account of the railroad company, and that no part thereof has been used for ordinary maintenance of the lines of railway or other property owned or in any way controlled by the railroad company or for replacements or other purposes ordinarily treated by railroad companies as a part of their operating expenses.

Such written consent of voting trustees, resolutions, statements, and verified certificates shall be deemed and taken as plenary authority to the said trustee for its certification of such prior lien bonds or of any one or more of them.

B.

Of the bonds authorized to be issued under and secured by this indenture, one hundred and forty million dollars ($140,000,000) shall be general lien bonds.

SEC. 4. Of the general lien bonds authorized to be issued under and secured by this indenture, bonds to the amount of thirty million nine hundred and twenty-seven thousand dollars ($30,927,000) shall be certified by the trustee and shall be delivered to Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas or their survivors or suc-

cessors, the committee named in the certificate of incorporation of the railroad company, immediately upon the execution and delivery of this indenture, or as soon as may be thereafter.

SEC 5. Out of and from the remainder of such authorized issue of general lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of seventy-nine million nine hundred and eighteen thousand dollars ($79,918,-
000), for the purpose of providing for the purchase, redemp-
87 tion, and acquisition by the trustee, as hereinafter provided, of bonds secured by the thirty-six following mortgages (such mortgages being stated and described with substantial accuracy and as generally known):

I.

The first mortgage or charge created by an act of the legislature of the State of New York, passed May 14, 1845, entitled "An act in relation to the construction of the New York and Erie Railroad," to secure an issue of bonds of said New York and Erie Railroad Company, bearing interest at the rate of seven per cent per annum and payable on July 1st, 1867, which bonds have been duly extended until May 1, 1897, at interest at the rate of 7 per cent per annum, and of which $2,482,000 are now outstanding and unpaid.

The second mortgage made by said New York and Erie Railroad Company, dated March 1, 1849, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable March 1, 1859, which bonds have been duly extended until September 1, 1919, at interest at the rate of 5 per cent per annum, payable in gold, and of which $2,149,000 are now outstanding and unpaid.

The third mortgage made by said New York and Erie Railroad Company, dated March 1, 1853, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on March 1, 1883, which bonds have been duly extended until March 1, 1923, at interest at the rate of 4½ per cent per annum, payable in gold, and of which $4,617,000 are now outstanding and unpaid.

The fourth mortgage made by said New York and Erie Railroad Company, dated August 15, 1857, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on October 1, 1880, which bonds have been duly extended until October 1, 1920, at interest at the rate of 5 per cent per annum, payable in gold, and of which $2,926,000 are now outstanding and unpaid.

The fifth mortgage made by said New York and Erie Railroad Company, dated June 1, 1858, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on June 1, 1888, which bonds have been duly extended until June 1, 1928, at interest at the rate of 4 per cent per annum, payable in gold, and of which $709,500 are now outstanding and unpaid.

The mortgage made by the Buffalo branch of the Erie Railway and the Erie Railway Company, dated July 1, 1861, to secure a certain issue of bonds bearing interest at the rate of 7 per cent per
88 annum and payable on July 1, 1891, which bonds have been duly extended until July 1, 1931, at interest at the rate of 4 per cent per annum, payable in gold, and of which $182,600 are now standing and unpaid.

The mortgage made by said Erie Railway Company, dated September 1, 1870, to secure a certain issue of its bonds (commonly called "first consolidated mortgage bonds"), bearing interest at the rate of 7 per cent per annum and payable September 1, 1920, and of which $16,891,000 are now outstanding and unpaid.

Also $3,705,977.10 first consolidated mortgage funded coupon bonds of the New York, Lake Erie and Western Railroad Company, dated September 1st, 1878, bearing interest at the rate of 7 per cent per annum, payable September 1st, 1920, and secured by a pledge of coupons for interest on the first consolidated mortgage bonds of the Erie Railway Company, all of which are now outstanding and unpaid.

The mortgage made by the Newburgh & New York Railroad Company, dated August 1st, 1868, to Jay Gould, as trustee, to secure an issue of bonds of said company and payable January 1st, 1889, which bonds have been duly extended until January 1, 1929, with interest at the rate of 5 per cent per annum in gold, and of which $250,000 are now outstanding and unpaid.

The mortgage made by the Buffalo and Southwestern Railroad Company, dated December 17, 1877, to Elbridge G. Spaulding, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, payable December 1, 1907, of which $1,500,000 are now outstanding and unpaid.

The mortgage made by the Lockport and Buffalo Railroad Company, dated October 1st, 1877, to Matthias H. Arnot, as trustee, to secure bonds bearing interest at 7% per annum, and due October 1st, 1897, of which $140,000 are now outstanding and unpaid.

II.

The mortgage made by the Long Dock Company, dated November 16, 1885, to Anthony J. Thomas and Charles Edward Tracy, as trustees, to secure an issue of gold bonds of said company, bearing interest at the rate of 6% per annum and payable October 1, 1935, of which $7,500,000 are now outstanding and unpaid.

The mortgage made by the Jefferson Railroad Company, dated January 1st, 1889, to the Fidelity Insurance, Trust and Safe Deposit Company, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 5% per annum and payable January 1, 1909, of which $2,800,000 are now outstanding and unpaid.

89 The mortgage made the Jefferson Railroad Company on its Honesdale Branch, dated July 1st, 1867, to John Torrey, Z. H.

Russell, and Coe F. Young, as trustees, to secure an issue of bonds of said company, payable July 1, 1927, of which $204,000, bearing interest at 4½% per annum, are now outstanding and unpaid.

The mortgage made by the Jefferson Railroad Company on its Honesdale Branch, dated January 1st, 1869, to John Torrey, Z. H. Russell, and Coe F. Young, as trustees, to secure an issue of bonds of said company, payable July 1st, 1927, and bearing interest at the rate of 6% per annum, of which $96,000 are now outstanding and unpaid.

The mortgage made by the Buffalo, Bradford and Pittsburgh Railroad Company, dated January 1st, 1865, to Dorman B. Eaton, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 7% per annum, and payable January 1, 1896, which bonds other than those pledged hereunder are now outstanding and unpaid to the amount of $395,000.

The mortgage made by the Bergen County Railroad, dated March 1st, 1881, to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company bearing interest at the rate of 6% per annum and payable April 1, 1911, of which $200,000 are now outstanding and unpaid.

The mortgage made by the New York, Lake Erie and Western Coal & Railroad Company, dated May 15, 1882, to the Metropolitan Trust Company of New York and John Lowber Welsh, of the city of Philadelphia, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 6% per annum, and payable May 1, 1922, which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $1,100,000.

The mortgage made by the New York, Lake Erie and Western Docks & Improvement Company, dated June 1, 1883, to the Farmers' Loan & Trust Company, trustee, as modified by the supplemental contract dated February 8th, 1890, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, and payable July 1, 1913, which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $3,396,000.

The mortgage made by the Suspension Bridge and Erie Junction Railroad Company, dated July 1st, 1870, to Horatio N. Otis, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and payable July 1, 1900, of which bonds, other than those pledged hereunder, $965,000 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated April 24th, 1852, to Theodore Dehon, Alfred S. Fraser, and Watts
90 Sherman, as trustees, to secure an issue of bonds of said company, bearing interest at the rate of 5% per annum, and payable November 1, 1915, of which $239,500 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated October 1st, 1875, to George M. Diven, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum,

and payable October 1, 1905, of which $265,000 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated November 1st, 1876, to Myron P. Bush, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum and payable November 1st, 1896, of which $125,000 are now outstanding and unpaid.

The mortgage made by the Elmira and State Line Railroad Company, dated October 1st, 1875, to Matthias H. Arnot, as trustee, to secure an issue of bonds of said ocmpany, bearing interest at the rate of 7% per annum, and payable October 1, 1905, of which $160,000 are now outstanding and unpaid.

The mortgage made by the Chicago and Atlantic Railroad Company, dated November 1st, 1888, to Central Trust Company of New York, as trustee, to secure an issue of bonds of said company, known as "terminal bonds," bearing interest at the rate of 5% per annum, and payable July 1, 1918, of which $300,000 are now outstanding and unpaid.

The mortgage made by the Chicago and Erie Railroad Company, dated August 21st, 1890, to the Central Trust Company of New York and Edward Daniels, as trustees, to secure an issue of bonds of said company, bearing interest at the rate of 5% per annum, and payable May 1, 1982, of which $12,000,000 are now outstanding and unpaid.

The mortgage made by the Blossburg Coal Company, dated January 1st, 1878, to Amaziah S. Kendall, as trustee, to secure an issue of bonds of said company, payable January 1st, 1893, which bonds have been duly extended until November 1, 1915, with interest at the rate of 5% per annum, payable in gold, and of which $400,000 are now outstanding and unpaid.

The mortgage made by the Buffalo, New York and Erie Railroad Company, dated June 1st, 1876, to John A. C. Gray, as trustee, to secure bonds, bearing interest at 7% per annum, due June 1, 1916, of which $2,380,000 are now outstanding and unpaid.

III.

The mortgage made by the Montgomery and Erie Railroad Company, dated May 1st, 1866, to William Murray, Nathan C. Sanford, and Henry Merriam, as trustees, to secure bonds bearing interest at 5% per annum and due May 1st, 1926, of which $130,000 are now outstanding and unpaid.

91 The mortgage made by the Montgomery and Erie Railroad Company, dated October 1st, 1867, to John M. Quackenbos and Bartow Wright, as trustee, to secure bonds bearing interest at 5% per annum, and due October 1st, 1927, of which $40,500 are now outstanding and unpaid.

The mortgage made by the Goshen and Deckertown Railroad Company, dated July 1st, 1868, to Ambrose S. Murray, Robert H. Berdell,

and John Stewart, as trustees, to secure bonds bearing interest at 6% per annum, due July 1, 1928, of which $186,500 are now outstanding and unpaid.

The mortgage made by the Goshen and Deckertown Railroad Company, dated November 1st, 1869, to Ambrose S. Murray and Robert H. Berdell and John Stewart, as trustees, to secure bonds bearing interest at 6% per annum, due November 1, 1929, of which $60,000 are now outstanding and unpaid.

The mortgage made by the Middletown and Crawford Railroad Company, dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford, as trustees, to secure bonds bearing interest at 4½% per annum, due April 1, 1921, of which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $8,800.

IV.

The mortgage made by the New York, Pennsylvania and Ohio Railroad Company, dated May 5, 1880, to the Farmers' Loan and Trust Company, as trustee, to secure an issue of gold bonds of said company, payable March 1st, 1895, which bonds have been duly extended to March 1st, 1935, at 4½% per annum interest, and of which $8,000,000 are now outstanding and unpaid.

V.

The mortgage made by the Cleveland and Mahoning Valley Railroad Company, dated January 1st, 1888, to Central Trust Company of New York, as trustee, to secure an issue of $3,000,000 bonds of said company, bearing interest at the rate of 5% per annum, and payable January 1st, 1938, and now or hereafter outstanding and unpaid.

The mortgage made by the Sharon Railway Company, dated June 1st, 1889, to Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 4½% per annum, payable June 1st, 1919, of which $164,000 are now outstanding and unpaid.

92 The mortgage made by the Newcastle and Shenango Valley Railroad Company, dated July 1st, 1887, to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, and payable July 1st, 1917, of which $250,000 are now outstanding and unpaid.

SEC. 6. The said $79,918,000 general lien bonds hereby secured and reserved for the redemption, purchase, or acquisition of a like amount of bonds (hereinafter called "old bonds") severally and respectively secured by the mortgages mentioned in the last above section, shall from time to time be issued, certified, and delivered when authorized by resolution of the board of directors of Railroad Company only as follows, viz:

(a) Whenever and as often as the railroad company shall tender or cause to be tendered any such old bonds, or bonds issued in exchange therefor under the provisions of article two, section 2 hereof, together, in either case, with all unmatured interest obligations thereunto belonging, the trustee forthwith shall receive the same, and in exchange therefor shall certify and deliver to the railroad company, or upon its order, a like amount at par of the said bonds hereby secured and reserved.

(b) Whenever and as often as the railroad company, on or after the maturity of any such old bonds, or of bonds issued in exchange therefor, as above, or on or after a date eight months prior to the maturity of such old bonds, or of bonds issued in exchange therefor, as above, shall tender or cause to be tendered cash sufficient to purchase or to pay the same at par (and shall also provide to the satisfaction of the trustee for any interest due upon such bonds or accruing before their maturity), the trustee forthwith shall receive such cash, and in consideration thereof shall certify and deliver to the railroad company or upon its order an equivalent amount at par of the said bonds hereby secured and reserved.

93 All cash so received by the trustee shall be by it held and applied to the purchase at par, or, if such purchase be impracticable, to the payment at par of an equivalent amount of the old bonds, or of bonds issued in exchange therefor, as above, for the purchase or payment of which such cash shall have been deposited.

Each and every old bond, or bond issued in exchange therefor, as above, received by the trustee, shall be by it stamped with the words "Not negotiable, but held in trust for the purposes declared in the first consolidated mortgage deed of the Erie Railroad Company, dated December 10th, 1895," and shall be by it held without extinguishment as additional security for the payment of this mortgage debt until at least ninety-nine per cent of all bonds of the issue of which such bond is one, shall either have been paid and canceled, or shall have been received by the trustee hereunder, whereupon in its discretion it may cancel and surrender to the railroad company all bonds of such issue then in its possession.

Provided, however, that no bond of any of the issues enumerated under II, III, IV, and V of section 5 of this article shall be canceled, unless or until all of the property mortgaged to secure the issue to which such bond belongs, shall have been lawfully vested free from other incumbrance in the railroad company, its successors or assigns, whereupon such property so mortgaged for such issue of old bonds forthwith, ipso facto, and without further conveyance, shall become and be part of the premises hereby mortgaged, and shall be hereby conveyed, as though herein expressly and specifically conveyed, mortgaged, and pledged. Nevertheless, the railroad company, its successors and assigns, may, and shall, execute any and all transfers, assignments, or conveyances from time to time desired by the trustee in order expressly and specifically to subject to the lien of this indenture any property so acquired. Upon every such convey-

94 ance of the property mortgaged for any one of such issues, the trustee may cancel and surrender to the railroad company all of the bonds of such issue then held by it, if not more than one per cent of the total issue shall then remain outstanding and unsatisfied.

If at the time of the maturity of any such bonds, the holder thereof shall decline to sell and to deliver the same at par and accrued interest, but shall require the payment and cancellation thereof, then upon such payment and cancellation the trustee shall certify and deliver to the railroad company, or upon its order, a like amount at par of said bonds reserved hereunder as though said matured bonds had been purchased and had been received by the trustee; but in every such case, if such matured bonds shall be of any one of the issues enumerated in II, III, IV, or V of section 5 of this article, and the railroad company shall not, as above provided, have acquired the property mortgaged to secure such bonds, the railroad company shall take and execute and shall cause the company owning such property to take and execute such action, proceedings, and instruments as in the opinion of the trustee may reasonably be required to subrogate the trustee to all the claim and security of the holder of such bonds, or else the railroad company shall cause to be issued and deposited with the trustee an amount of renewal or other bonds upon the same property at least equivalent thereto at par.

So long as the railroad company shall not be in any default under this indenture in respect of which some request, proceeding, or action herein authorized shall have been made or taken by the trustee or by holders of bonds hereby secured, the trustee shall not collect or be entitled to collect, except with the assent of the railroad company, the interest on any old bond at any time held by it hereunder or on any bond now or hereafter pledged with the trustee under any provision of this indenture. Any sums so collected by it with the assent of the railroad company, unless it shall then be in default as afore-

95 said, shall at once be paid over to the railroad company except as hereinafter expressly otherwise provided.

The railroad company shall provide and maintain books wherein it shall register as the property of the trustee all such old bonds received by the trustee; and except as herein expressly provided no such old bond shall be canceled, unless the holder thereof, at time of maturity, shall require cancellation as a condition of surrender.

SEC. 7. Out of the remainder of the authorized issue hereunder, there shall be reserved, to be executed and to be certified by the trustee, not immediately, but from time to time only when and as called for by resolutions of the board of directors to the effect that the bonds so called for and their proceeds are to be used for such purpose, bonds to the amount of eight million and sixty-three thousand dollars ($8,063,000) for the purchase and acquisition by the railroad company and simultaneous pledge hereunder to the trustee, as hereinafter provided, of valid certificates of shares of stock issued by the follow-

ing companies (other than the shares of some of such companies deliverable to the trustee at the time of execution hereof), viz:

96 Name of company.	Par.	Shares.	Limit of exchange per share.
Buffalo, New York and Erie Railroad Company	$100	700	$150
Montgomery and Erie Railroad Company	10	15,000	7
Goshen and Deckertown Railroad Company	10	9,619	7
Jefferson Railroad Company	50	12	50
Rochester and Genesee Valley Railroad Company	100	4,058	100
Buffalo, Bradford and Pittsburgh Railroad Company	100	965	10
Middletown and Crawford Railroad Company	50	844	10
Suspension Bridge and Erie Junction Railroad Company	100	8	100
Tioga Railroad Company	50	6	10
Elmira State Line Railroad Company	100	292	100
Newcastle and Shenango Valley Railroad Company	50	2,915	5
Sharon Railroad Company	50	9,067	624
Cleveland and Mahoning Valley Railroad Company	100	30,000	225

From time to time as and when the trustee shall receive from the railroad company any such shares, it shall in exchange therefor and when and as called for by resolution of the board of directors of the railroad company certify and deliver to it bonds reserved under this section in an amount not exceeding the value of such shares then so received at the limit of exchange above stated, which shares shall simultaneously be transferred into the name of the trustee.

Whenever it shall make any delivery of bonds reserved as provided in this section, the trustee shall require and receive from the railroad company in addition to such resolution of the board of directors the affidavit of one of its officers cognizant of the facts, stating the
97 amount in bonds actually requisite for the express purpose of enabling the railroad company to acquire such shares then to be received by the trustee. In no event shall any bonds be delivered by the trustee in excess of the amount so stated; but if such amount be less than that in this section limited as the price of such shares, the surplus so left in possession of the trustee may thereafter be by it certified and delivered to the railroad company when and as necessary to enable it so to acquire other shares, above mentioned, at prices exceeding those in this section stated; provided, that such necessity and the reasons therefor shall also be stated in such affidavit of the officer of the railroad company; and that, except as to such surplus bonds, deliveries shall not be made in excess of the limits imposed by this section; and provided further, that the trustee shall not certify or deliver any such bonds in exchange for shares of the Newcastle and Shenango Valley Railroad Company, the Sharon Railroad Company, or the Cleveland and Mahoning Valley Railroad Company until after the railroad company shall have acquired, as provided in section 2 of this article, the New York, Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 8. Out of the remainder of the authorized issue of general lien bonds hereunder there shall be reserved, to be executed and to be

certified by the trustee, not immediately, but from time to time only when and as called for by resolution of the board of directors to the effect that the bonds so called for and their proceeds are to be used for such purpose, bonds to the amount of four million and ninety-two thousand dollars ($4,092,000) for retiring or acquiring, as hereinafter provided, equipment-bonds and equipment-trust certificates, warrants, notes, or obligations, which shall mature as hereinafter set forth, and to reimburse the railroad company for such of them as from time to time hereafter it shall acquire.

98 I.

Equipment trust certificates, warrants, notes, and obligations of or affecting certain equipment formerly of the New York, Lake Erie and Western Railroad Company and now of the Erie Railroad Company, maturing after November 1st, 1898, viz:

Baldwin Locomotive Works	$282,147.72
Car Trust of New York, Series C, D, E, F, and G	1,859,515.00

II.

Equipment trust obligations of and affecting certain equipment of the New York, Pennsylvania and Ohio Railroad Company, viz:

Bonds of the New York, Pennsylvania and Ohio Railroad Company, known as London equipment trust bonds of 1888, of which about £181,400 are now outstanding and unpaid.

Bonds of the New York, Pennsylvania and Ohio Railroad Company, known as equipment trust bonds of 1890, of which about £208,600 are now outstanding and unpaid.

In determining the value of sterling bonds the trustee shall treat one pound sterling as the equivalent of five dollars.

From time to time, and only when and as the trustee shall receive from the railroad company, in addition to such resolution of the board of directors, the certificate of its president or one of its vice-presidents and of its treasurer or auditor, and also (if the trustee so desire) any additional evidence necessary to satisfy the trustee (1) that such equipment bonds, certificates, warrants, notes, or obligations have been paid to the amount specified in such certificate, and (2) that such payment has not been stated or included in any prior certificate hereunder, the trustee shall certify and, upon the written order of the railroad company, shall deliver such reserved bonds at par to an amount equal to the payment of such outstanding obligations shown to have been made, by such certificate or other evidence,

99 if any, required by the trustee; provided, however, that the trustee shall not certify or deliver any such bonds on account of "London equipment trust bonds of 1888" or "equipment trust bonds of 1890" until after the railroad company shall have acquired, as provided in section 2 of this article, the New York,

Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 9. Out of the remainder of the authorized issue hereunder, there shall be reserved, to be executed, and to be certified by the trustee, not immediately but only when and as called for by resolution of the board of directors as next hereinafter provided, bonds to the amount of seventeen million dollars ($17,000,000), which from time to time, on and after January 1st, 1898, the trustee shall certify upon resolutions of the board of directors of the railroad company, stating that such bonds, to the amount stated in such resolutions, or the proceeds thereof, are to be set aside separate and apart from all other assets and funds of the railroad company, and are to be used only for the construction or acquisition of branch lines or extensions subsequent to December 31st, 1897, or for the acquisition of stocks or bonds thereof, subsequent to said date; or for the purchase or construction of rolling stock subsequent to said date; or for construction or betterments, subsequent to said date, or for purchase of additional property subsequent to said date, all such construction, betterments, or property purchased to be upon, along, or appurtenant to lines of railway of the railroad company, at the time of such use subject to the lien of this indenture, or upon, along, or appurtenant to the lines of railway or the terminal properties of some one or more of the companies mentioned in the schedule of stocks in the granting clauses hereof (other than the Buffalo Creek Railroad Company, the Hillside Coal and Iron Company, the Northwestern Mining and Exchange Company, or the Blossburg Coal Company), or of other companies of whose capital stock, at least a majority in amount at the time of such use shall be pledged hereunder; or to reimburse the railroad company for outlays made subsequent to the thirty-first day of December, eighteen hundred and ninety-seven, for the purposes aforesaid or some one or more of them.

From and out of the $17,000,000 general lien bonds reserved under this section, the trustee shall certify and deliver to the railroad company, or upon its order, bonds as follows, viz:

Upon January 1, 1898, or upon any day thereafter, but prior to December 31st, 1898, upon such resolution or resolutions of the board of directors of the railroad company, such amount of such general lien bonds not exceeding $1,000,000 bonds, par value, as specified in such resolution, shall be so certified and delivered.

In each and every calendar year after December 31, 1898, there shall be so certified and delivered such additional amount of such general lien bonds, not exceeding $1,000,000 par value in any calendar year, as from time to time shall be specified in similar resolutions; but in every instance, before certifying and delivering any of the $17,000,000 general lien bonds reserved under this section (except the $1,000,000 deliverable in the year 1898), the trustee shall require the railroad company to furnish, in addition to such resolution of the board, the verified certificate or certificates of some person or persons cognizant of the facts, stating

(a) That all such general lien bonds and the proceeds of all such general lien bonds certified and delivered on or subsequent to the date of the last preceding resolution, or resolution and verified certificate, in respect of general lien bonds, as the case may be, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided;

(b) The amount of such general lien bonds so certified and delivered, which, or the proceeds of which, on or subsequently to
101 the date of such last preceding resolution, or resolution and verified certificate (as the case may be), shall have been actually used for any such purpose, or to reimburse the railroad company, as above provided, and specifically indicating each and every such acquisition or construction of any railroad, track, structure, betterment, rolling stock, or other property, and each and every acquisition of the bonds or stock of any company owning or controlling any railroad or other property (which stock shall be acquired only when a majority of the total capital stock of such company can and shall have been or shall be thereby obtained unless such majority shall theretofore have been acquired and pledged hereunder) and also stating in detail the amount of bonds, or proceeds of bonds, and cash used or expended for each and every such purpose;

(c) That the price paid in general lien bonds or their proceeds for such construction or acquisition was not in excess of the fair value of the work done or property acquired, and that the bonds included in such verified certificate were sold, disposed of or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition or accounting;

(d) That of the expenditures for which such certificate shall state that general lien bonds or their proceeds have been used, no part has been provided for by the use of prior lien bonds; and that of the expenditures for which reimbursement shall be claimed no part has been obtained by the railroad company out of prior lien bonds or their proceeds.

No new property shall be acquired by the use of any such general lien bonds or their proceeds in any one calendar year upon which property there shall be any lien or charges prior to this indenture (excepting any of the mortgages specified in sections 5 and 8 of this article which may attach thereto and any undetermined liens or charges incidental to construction and ordinary operating accounts) in excess of one million dollars; and, in case of the acquisition hereunder of any new property, every such verified certificate shall
102 further state whether the property so acquired is known or believed to be subject to any lien or charge prior to this indenture (excepting any of the mortgages specified in sections 5 and 8 of this article, and any undetermined liens or charges incidental to construction and ordinary operating accounts), and shall specify the amount of any such prior lien or charge (other than as aforesaid) known or believed to exist; and in case any bonds or any shares of the capital stock of any other company shall have been acquired by the

use of such bonds or their proceeds, every such verified certificate shall state whether the property of such other company whose bonds or stock shall have been so acquired is known or believed to be subject to any lien or charge prior to that securing such bonds of such company, and whether the company, whose capital stock shall have been so acquired, is known or believed to be indebted (except to the railroad company) in any amount (except for ordinary operating accounts) and whether its property is known or believed to be subject to any lien, charge or indebtedness, and in each instance specifying the amount of any such debt, lien or charge known or believed to exist. In every case of any such lien, charge or indebtedness, (except indebtedness to the railroad company or undetermined liens or charges incidental to construction or the lien of any of the mortgages for which a reservation of bonds is made in sections 5 and 8 of this article or for ordinary operating accounts), and during the continuance of such lien, charge or indebtedness, the railroad company shall, by appropriate instrument or instruments, reserve out of the $17,000,000 general lien bonds set apart by this section an amount at par equivalent to all such liens, charges or indebtedness (except as aforesaid) affecting such property hereafter acquired, and the bonds so reserved shall be taken from the $1,000,000 bonds deliverable under this section in such calendar year, or in the next succeeding calendar year, and shall be executed, certified, delivered and used only for the retirement or acquisition of such liens, charges or indebtedness in amounts
103 equivalent at least to the par of the bonds delivered therefor, and all the liens, charges or indebtedness so retired or acquired shall be canceled or held by the trustee as, in its judgment, shall best protect the holders of the bonds hereby secured.

Every such verified certificate shall be accompanied by the written statement of the president or of one of the vice-presidents, and of the auditor or treasurer, of the railroad company that they believe such certificate to be true, and that such bonds have been used and the expenditures therein certified have been made only for purposes properly chargeable to capital account of the railroad company, and that no part thereof has been used for ordinary maintenance of the lines of railway or other property owned or in any way controlled by the railroad company or for replacements or other purposes ordinarily treated by railroad companies as a part of their operating expenses. Together with such statements and verified certificates, there shall be delivered to the trustee certificates for all shares of stock and all bonds so acquired, and such further instruments and conveyances as may be necessary to vest in the trustee all new property so acquired, and, so far as may be, any and all obligations taken up or acquired with, or by, the said bonds or their proceeds; and also the written opinion of counsel for the railroad company to the effect that such instruments and conveyances are sufficient for that purpose, or that no additional instrument or conveyance is necessary. The certificates for all shares of stock so acquired shall be

duly transferred into the name of the trustee, and any bonds so acquired shall, if practicable, be transferred in like manner, or, if not susceptible of such transfer, they shall be plainly endorsed as the property of the trustee hereunder. Such resolutions, statements, verified certificates and opinion shall be deemed and taken as plenary authority to the said trustee for its certification of such general lien bonds or of any one or more of them.

Except to retire or acquire liens, charges or indebtedness
104 for which bonds so used shall have been reserved as hereinbefore provided, general lien bonds in excess of an aggregate amount of $1,000,000 shall not be issued or certified under this section in any one calendar year; provided, however, and the appropriation of such $17,000,000 bonds in and by this section 9 is in all respects subject to the condition, and it is hereby expressly declared, that if the before-mentioned Charles H. Coster, Louis Fitzgerald and Anthony J. Thomas, jointly but not severally, the survivors or survivor of them, from time to time, on or before January 1, 1898, by writing addressed to the railroad company and to the trustee, shall require the delivery to them jointly, or upon their joint order or orders, of the whole or any part of $2,000,000 of said bonds, the railroad company shall execute, and the trustee shall certify and deliver to them jointly, or upon their joint order or orders, bonds to the amount certified in such several requisitions to an aggregate amount not exceeding $2,000,000 of such bonds; but no such delivery shall impair the preceding provision for delivery of the residue of the $17,000,000 of bonds to the railroad company at various dates subsequent to December 31st, 1897, and shall be in addition to any deliveries under the foregoing provisions of this article.

C.

SEC. 10. The railroad company shall not and will not issue, negotiate, sell or dispose of any bonds hereunder, in any manner other than in accordance with the provisions of this indenture, and the agreements in that behalf herein contained, and in issuing, selling, negotiating or otherwise disposing of such bonds, from time to time, it shall and will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for purposes herein prescribed, and to and for no other or different purpose.

105 SEC. 11. The railroad company will make all lawful effort to pledge with the trustee hereunder the bonds above specified in section 5, III and V, at the several dates when the same shall respectively mature: Provided that it shall not be required to pay more than par for any such bonds.

SEC. 12. Nothing in this indenture, expressed or implied, is intended or shall be construed to confer upon, or to give to, any person or corporation, other than the parties hereto and the holders of bonds issued under and secured by this indenture, any right, remedy, or

claim upon, under, or in respect of this indenture, or any covenant, condition, or stipulation thereof; all its covenants, conditions, and stipulations being intended to be, and being for the sole and exclusive benefit of the parties hereto and of the holders of bonds hereby secured.

SEC. 14. Whenever any coupon bond or bonds amounting to $1,000 or to any multiple of $1,000, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds without coupons, the railroad company shall issue, and the trustee shall thereupon certify and deliver in exchange for such coupon bond or bonds, a like amount of registered bonds (without coupons), which registered bonds shall be for $500, or such convenient multiples thereof as the railroad company from time to time may establish, and shall bear interest at the same rate as the coupon bonds surrendered and from the date of the last matured coupon thereof. In every such case the trustee shall forthwith cancel the bond or bonds and coupons surrendered and deliver the same to the railroad company. The interest on such registered bonds without coupons shall be paid only to the several registered holders of such bonds, or upon their written orders.

Whenever any such registered bonds shall be surrendered for
106 transfer, the railroad company shall issue, and the trustee shall certify and deliver to the transferee, a like amount of new registered bonds, upon surrender and cancellation of the bond or bonds transferred. For any such transfer of registered bonds without coupons the railroad company, at its option, may make a charge not exceeding one dollar for each new registered bond issued in exchange for any surrendered bond or bonds.

In case any bond issued hereunder shall become mutilated or shall be destroyed, upon the surrender of any such mutilated bond to the trustee, or upon filing with the trustee satisfactory evidence of such destruction, the railroad company upon receiving indemnity satisfactory to it, may in its discretion, issue, and the trustee in its discretion may certify, a new bond, bearing the same serial number, in lieu, substitution or exchange for, and upon cancellation of, the bond so mutilated, or in lieu of the bond destroyed.

SEC. 15. Any act or proceeding required or provided by any term of this indenture or of any bond or resolution herein recited, to be done or performed by any board or officer of the railroad company, shall and may, in event of any change in its existence, be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time be lawful sole successor of the railroad company.

ARTICLE TWO.

SECTION 1. The railroad company will well and truly pay and discharge, or will acquire and pledge hereunder, all of the old bonds mentioned in article one, section 5, I, II, and IV, and section 8, I

and II, at or before the several dates of maturity thereof, provided it shall then be lawfully authorized to issue bonds hereunder for that purpose as provided in article one hereof, and it will duly, punctually and regularly pay the interest on all such old bonds until the
107 same shall be paid and discharged or acquired and pledged hereunder, excepting, however, that the payment of the bonds of the New York and Erie Railroad Company, secured by the mortgage or charge created by the act of the legislature of the State of New York passed May 14, 1845, and amounting to the principal sum of $2,482,000, may be extended or renewed by the railroad company at or before maturity without impairment of the lien or the security of said bonds for any period or periods at not over four per cent per annum interest, principal and interest payable in gold, and that the lien hereof on the property embraced in the mortgage securing such bonds shall be subordinate to the lien of such bonds as so extended; and excepting further, that neither the covenants nor restrictions of this section shall apply in respect of any bonds now or hereafter issued by the New York, Pennsylvania and Ohio Railroad Company, or of any corporation (other than the railroad company) successor to said company, unless or until the railroad now of said company or securities of said company or of a successor company shall have been acquired and subjected to the lien hereof pursuant to the provisions of article one, section 2, hereof.

SEC. 2. As and when, but no further than, expressly required by the terms of any of the old mortgages, the railroad company will from time to time cause to be issued thereunder bonds for delivery in exchange for other old bonds for which reservation is made in article one, section 5; but no issue shall be made thereunder that shall increase the aggregate old indebtedness of $79,918,000, or that, except for such exchange, shall increase the indebtedness as stated in said article one, section 5, secured by any one or more of said old mortgages; provided, however, that neither the covenants nor the restrictions of this paragraph shall apply in respect of any bonds now or hereafter issued by any of the companies enumerated in article one, section 5, III and V, unless all the stock of any such company
108 shall have been duly pledged hereunder, and then only in respect of the company of which all the capital stock shall have been so pledged.

SEC. 3. Having possession of the railroad now of the New York, Pennsylvania and Ohio Railroad as aforesaid, or securities therefor acquired and subjected to the lien hereof pursuant to the provisions of article one, section 2 hereof, the railroad company shall not and will not suffer or permit any default permitting any of the several lessors to terminate any of the existing leases of the Cleveland and Mahoning Valley Railroad, the Charon Railroad, the Westerman Railroad or the Newcastle and Shenango Valley Railroad, or any lease hereafter made to it, or for its benefit, of any franchises or property now or hereafter belonging to any of the said railroad companies.

In case and whenever it shall make default in paying any sum stipulated to be paid in any such present or future lease of any of the said railroads, the trustee, without affecting any of its rights hereunder, from time to time, in its discretion, may itself pay any sum so in default, and thereupon shall have and forthwith may assert a lien for such advances upon the premises hereby mortgaged and the proceeds thereof, which lien shall be entitled to priority in rank and payment from the income and profits of the mortgaged premises over any bonds hereby secured.

SEC. 4. The railroad company will (excepting as otherwise provided in its Buffalo and Southwestern second lien mortgage in respect of that railroad) duly and punctually pay all lawful claims and demands not hereinbefore enumerated, which, if unpaid, might take precedence over this indenture, and each and every company (except the Buffalo Creek Railroad Company), of whose capital stock the greater part is now pledged hereunder or hereafter shall be acquired and pledged hereunder as provided in section 9 of article one, at all times during the continuance of such pledge, will duly and
109 punctually pay all lawful claims and demands, which, if unpaid, might take precedence of any mortgage securing bonds of such company, or which might, in any wise, impair the value of such capital stock of such company if pledged hereunder; and the railroad company will enforce any and all of its claims and demands against any such company only in such manner as not to prejudice or affect the bonds secured by this indenture.

The railroad company will also at all times take all such action as from time to time may be proper to preserve the corporate existence and corporate rights of every company of whose capital stock the greater part shall be pledged hereunder.

SEC. 5. The railroad company shall and will, from time to time pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the lines of railroad and other premises hereby mortgaged, or upon any part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this indenture shall be fully preserved; and if any company of whose capital stock the greater part is now pledged hereunder or hereafter shall be acquired and pledged hereunder as provided in section 9 of article one (excepting the Buffalo Creek Railroad Company or any coal company in respect of lands upon which mining shall have been abandoned) shall, at any time during the continuance of any such pledge, fail to pay all such taxes, assessments, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, it will itself pay and discharge the same.

SEC. 6. Except as herein otherwise expressly provided, the railroad company will not sell any bond or share of stock now or hereafter pledged by it under this indenture nor pledge or agree to pledge or hypothecate the same, except subject to the prior lien hereof; it

will not by any voluntary act part with the ownership and title of such bonds or stock, or of any part of such bonds or stock, or its
110 equity of redemption therein or the voting power thereof; it will, subject to the lien hereof, hold all and singular such stock (other than the shares of the Buffalo Creek Railroad Company) of any company of whose capital it may control the major part, and exercise its voting power thereon in such manner that it shall retain in itself the rights and powers of a majority shareholder in the capital stock of every such company; and as such holder of such stock it will not by affirmative vote, or by abstaining from voting, sanction or permit any increase of the capital stock of any such company or the creation of any mortgage or other lien upon the railroad or property of any such company, unless effective provision be made that all bonds secured by any such additional mortgage and all additional shares of such stock (which shares shall be fully paid and nonassessable) shall, at the time of their issue, be delivered and pledged to the trustee, to be by it held, subject to all the trusts of this indenture, with the same effect as if such bonds and shares had been delivered and pledged to it herein and at the time of the making hereof. This provision, however, shall not apply to any increase of stock or to the creation of mortgages or other liens by the Buffalo Creek Railroad Company. But nothing herein contained shall prevent the extension at maturity of any bonds now or hereafter pledged to or held by the trustee under this indenture, and at the time of such pledge secured by any mortgage of any company, or prevent the issue and substitution therefor of other bonds for equivalent amount, adequately secured by similar mortgage; it being distinctly understood that the time for the payment of the principal of any bonds so pledged hereunder may, at or before their maturity, be extended by the railroad company (not then being in default hereunder), with the consent of the company which, at the time of such consent, shall own or control the property upon which such bonds so to be extended may be a lien, and also that
111 other bonds for an equivalent amount, adequately secured by similar mortgages, may be issued in substitution therefor, and that in every such case such new bonds shall forthwith ipso facto come under the lien and grant of this indenture, and shall forthwith be delivered to the trustee.

Article three.

Section 1. The railroad company shall and will well, duly, and punctually pay, or cause to be paid, to every holder of any bond issued hereunder and secured hereby, the principal and interest accruing thereon, at the dates and rates and in the manner mentioned therein, or in the coupons thereto belonging, according to the true intent and meaning thereof; without deduction from either principal or interest for any tax or taxes which it may be required to pay or retain therefrom under or by reason of any present or future law;

and it shall and will pay every such tax. All coupons when paid shall forthwith be cancelled.

SEC. 2. All lines of railway and property of every kind, and all interest therein, when and as and to the extent hereafter acquired, as above provided, out of, or from bonds, or the proceeds of bonds, secured by this indenture, or otherwise pursuant to the provisions hereof, shall, without any further conveyance or assignment, immediately upon such acquisition, and subject to the terms and conditions of such acquisition, become and be subject to the lien of this indenture as fully and completely as though now owned by the railroad company, and expressly and specifically conveyed by, and embraced in, the granting clauses of this indenture; and the railroad company at all times will execute and deliver any and all such further assurances or conveyances as the trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

112 SEC. 3. Upon demand of the trustee from time to time the railroad company will grant, convey, confirm, assign, transfer, and set over unto the trustee all real and personal estate, corporate rights and franchises which in any way or manner it shall acquire as appurtenant to, or in, or for use upon, or for the business of, any railroad hereby mortgaged, or as appurtenant to, or in, or for use upon, or for the business of, any leasehold estate hereby mortgaged (including all railroads and leasehold estates which shall hereafter become subject to the lien of this mortgage), or of any railroad of which any stocks or bonds are or shall be pledged hereunder; and it shall and will also make, do, seal, execute, acknowledge, and deliver, or cause to be made, done, sealed, executed, acknowledged, and delivered all and every such further acts, matters, things, deeds, conveyances, bills of sale and transfers, and assurances in the law, for the better assuring, conveying, and confirming unto the trustee all and singular the hereditaments and premises, estates, and property hereby conveyed, or intended so to be, or which are hereby covenanted and agreed hereafter to be conveyed to the trustee, as it, or its counsel learned in the law, shall reasonably require for better effectuating and carrying out the provisions, objects, and purposes of this indenture, and for securing payment of the principal and interest of the bonds intended to be hereby secured; all which estates shall be held by the trustee in, under, and upon the trusts, and for the uses and purposes, and subject to the powers herein mentioned, declared, given, implied, or expressed; and it will endeavor to procure from all companies, of which the capital stock or bonds or any part of either is or shall be pledged hereunder, all conveyances or assurances in law necessary to bring under the lien of this indenture any and all property connected with or appurtenant to the property of any such company, that shall have been constructed or acquired with the proceeds of any of the bonds set apart by article one, section 3 and section 9.

But nothing expressed or implied in this indenture is
113 intended, or shall be construed, to limit the right or power of the railroad company, hereby distinctly reserved, by the use of its credit or in any manner other than by the use of such reserved bonds, to construct or acquire other lines of railway, branches, or extensions, or interests therein, free from the lien hereof.

SEC. 4. The railroad company shall and will, at its office or agency in the city of New York, keep a sufficient register or registers of bonds issued hereunder, which registers at all reasonable times shall be open to the inspection of the trustee; and, upon presentation for such purpose, it will register therein any coupon bonds issued under the provisions hereof; and it shall and will register therein all bonds without coupons issued under the provisions hereof. As to all bonds so registered, the person in whose name the same shall be registered shall for all purposes be deemed and regarded as the owner thereof, and thereafter payment of or on account of the principal sum in such bond mentioned shall be made only to such registered holder or upon his order, but such registration may be changed as hereinafter provided. All such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

Upon presentation of any coupon bond which shall have been registered as aforesaid, with the order or assignment of the registered holder, the same shall be transferred upon such register to the person named in such written order or assignment, and thereafter such transferee or transferees of such bond shall be held to be the owner or owners thereof with all incidental rights and powers, and from time to time such transfers may be made as the registered holder of any such bond for the time being may direct as aforesaid. The registered holder of any such coupon bond shall also have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the prin-
114 cipal thereof shall be payable to any person presenting the same. Any holder of a coupon bond registered to bearer may cause such bond to be registered in the name of such holder with the same effect as a first registration thereof; and successive registrations as aforesaid may be made from time to time as desired. Such registration of any coupon bond shall not restrain the negotiability of any coupon thereto belongin[illegible]ut every such coupon shall continue to pass by delivery merely.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured nor any interest obligation in respect of any registered bond which in any way on or after maturity shall be transferred or pledged separate and apart from its bond, shall be entitled to any benefit of or from this indenture, except after the prior full payment of the principal of all bonds issued hereunder and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. Until default shall have been made in the due and punctual payment of any interest, or in the due and punctual payment of any principal sum, of any bond hereby secured, or in the due and punctual performance and observance of any covenant or condition hereof obligatory upon the railroad company, and until any such default continuing beyond the period of grace, if any, herein provided in respect thereof shall have become the subject of some action hereunder by the trustee or by the bondholders as hereinafter authorized, or until a receiver shall have been appointed, or until the railroad company voluntarily shall have surrendered possession to the trustee as hereinafter permitted, the railroad company, its successors and assigns, shall be suffered and permitted in any manner, and to
115 any extent, not affecting the lien of this indenture, to retain actual possession of all and every the premises hereby mortgaged (other than bonds and certificates of stock) and the same and every part thereof, with the rights and franchises appertaining thereto, and the tolls, income, rents, issues, and profits thereof, to manage, operate, collect, receive, use, and enjoy in the same manner and to the same extent as if this indenture had not been made.

SEC. 3. In case default shall be made in the payment of any interest on any prior lien bond or on any general lien bond at any time issued under and secured by this indenture, or on any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8, and such default shall continue for a period of six months; or in case default shall be made in the due and punctual payment of the principal of any prior lien bond or of any general lien bond secured hereby, or when and as the same shall be demanded in the due and punctual payment of the principal of any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8; or in case default shall be made by the railroad company in the payment of any tax, assessment or other governmental charge lawfully imposed or levied upon any part of the mortgaged property and premises, or the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured; or in case the railroad company shall make default in the due observance and performance of its covenant of further assurance, or any other covenant, promise, or condition herein contained, and any such default shall continue for a period of six months after written notice thereof from the trustee or from the holders of five per cent in amount of the bonds hereby secured; then, and in each
116 and every such case of default (provided, however, in respect of each of the three cases so indicated that it shall have continued for six months as aforesaid), the trustee personally, or by its agent or agents, attorney or attorneys, may enter into and upon all or any part of the railways, property, and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and may exclude the railroad company, its

agents and servants, wholly therefrom, and having and holding the same may use, operate, manage, and control said railways and other premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents, and servants or attorneys, to the best advantage, as well of the public as of the holders of the bonds hereby secured in accordance with law and with any statute relating to said railways and other premises or any part thereof, or to the operation thereof; and, upon every such entry, the trustee, at the expense of the trust estate, from time to time, by either purchase, repairs, or construction, may maintain and restore, and insure or keep insured, the rolling stock, tools and machinery and other property, buildings, bridges, and structures erected or provided for use in connection with said railways and other premises, and whereof it shall become possessed, as aforesaid, in the same manner and to the same extent as is usual with railway companies, and likewise from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals, and replacements and useful alterations, additions, betterments, and improvements thereto and thereon, as well in respect of the rolling stock or equipments as in respect of the railways and appurtenances and other subject matters as to it may seem judicious; and it may collect and receive all tolls, freights, incomes, rents, issues, and profits of the same and every part thereof,
117 and also the income from stocks and bonds pledged hereunder, and after deducting the expenses of operating said railways, and other premises and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the prior lien bonds hereby secured shall not have become due, to the payment of the interest remaining in default in the order of the maturity of the installments of such interest, first, upon any and all " prior lien bonds," and, after satisfaction thereof, then upon any and all "general lien bonds," and next, if the principal of the general lien bonds shall have become due by declaration or otherwise, to the payment of the principal of all general lien bonds; such payments in every instance to be made ratably to the persons or parties entitled thereto without discrimination or preference; but

In case the principal of the prior lien bonds shall have become due by declaration or otherwise, first, to the payment of the accrued interest in the order of the maturity of the installments thereof, upon any and all prior lien bonds, and next to the payment of the principal

of all prior lien bonds, and, after satisfaction thereof, to the payment in like manner of the interest accrued upon any and all general lien bonds, and finally to the payment of the principal of all general lien bonds; in every instance such payments to be made ratably to the persons or parties entitled to such payment, without any discrimination or preference;

118 These provisions, however, not being intended in any wise to modify the provisions of section 1 of this article.

Upon and during such continuance of any such default, either with or without entry, the trustee shall have, exercise, and enjoy the right to vote on all shares of stock pledged or agreed to be pledged hereunder, and for the benefit of the holders of bonds hereby secured to receive and collect all interest moneys and dividends maturing or payable upon all pledged bonds and stocks, and as holders of such shares of stock and of such bonds pledged or agreed to be pledged in this indenture, to perform any and all acts, or to make or execute any and all requests, requisitions, or other instruments.

SEC. 4. In case default shall be made by the railroad company in the payment of any interest on any prior lien bond, and such default shall continue for a period of six months, then and in every such case of continuing default, upon the written request of the holders of twenty-five per cent in amount of the prior lien bonds hereby secured then outstanding, the trustee shall, by notice in writing delivered to the railroad company, declare the principal of all prior lien bonds hereby secured then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in anywise notwithstanding.

In case default shall be made by the railroad company in the payment of any interest on any prior lien bond or any general lien bond hereby secured at any time issued and outstanding, and such default shall cotinue for a period of six months, then and in every such case of continuing default, upon the written request of the holders of twenty-five per cent in amount of the general lien bonds hereby

119 secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all general lien bonds hereby secured, then outstanding, to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in anywise notwithstanding.

Each and every provision of this section is, however, subject to the condition (as to each of said two issues of bonds, respectively), that if at any time after the principal of either of said two issues shall have been so declared due and payable, all arrears of interest upon all bonds of such issue shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every

such case the holders of a majority in amount of the bonds of such issue hereby secured then outstanding, by like written notice to the railroad company and to the trustee, may waive such default and its consequences as to such issue; but no such waiver shall extend to or affect any bonds of the other issue or any subsequent default as to either issue, or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other lawful reason, or shall have been determined adversely to the trustee, then and in every such case the railroad company shall be restored to its former position and rights in respect of the mortgaged premises and the shares of stock and bonds and other property herein pledged or agreed to be pledged; and, upon the written request of the railroad company, the trustee shall do, make, execute, acknowledge, and deliver such acts, deeds, instruments, and assurances in the law as may be required to effectuate such purpose; but, nevertheless, all rights, remedies, and powers of the trustee shall survive and continue as though no such proceedings had been taken.

SEC. 5. In case default shall be made by the railroad company in the payment of any interest on any prior lien bond or on any general lien bond secured by this indenture, or on any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8, and such default shall continue for a period of six months; or in case default shall be made by the railroad company in the due and punctual payment of the principal of any prior lien bond or of any general lien bond secured hereby, or when and as the same shall be demanded in the due and punctual payment of the principal of any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8; or in case default shall be made by the railroad company in the payment of any tax, assessment or other governmental charge lawfully imposed or levied upon any part of the mortgaged property and premises or the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured; or in case the railroad company shall make default in the due observance and performance of its covenant of further assurance, or any other covenant, promise, or condition herein contained, and any such default shall continue for a period of six months after written notice thereof from the trustee or from the holders of five per cent in amount of the bonds hereby secured; then, and in each and every such case of default (provided, however, in respect of each of the three cases so indicated, that it shall have continued for six months as aforesaid), the trustee, with or without entry, personally or by attorney, in its discretion (a) may sell to the highest and best bidder, in one lot and as an entirety, all and singular the mortgaged property and premises, bonds

121 and stocks, rights, franchises and interests, lands and appurtenances, and all right, title and interest, claim and demand therein, and right of redemption thereof; which sales shall be made at public auction at such place in the city of Elmira, in the State of New York, or at such other place on the railroad hereby mortgaged, at such time and upon such terms, as may be specified in the notice of sale to be given as herein provided; or (b) may proceed to protect and enforce the rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and to enforce any of its rights or duties hereunder.

Upon either (c) the written request of the holders of twenty-five per cent in amount of the general lien bonds, in case of any such continuing default, or (d) the written request of the holders of twenty-five per cent in amount of the prior lien bonds at the time outstanding, in case of any such continuing default other than in the payment of the principal or interest of the general lien bonds, it shall be the duty of the trustee upon being indemnified as hereinafter provided to take all needful steps for the protection and enforcement of its rights and the rights of the bondholders secured hereby, and to exercise the powers of entry and sale herein conferred, or both, or to take appropriate judicial proceedings according to such request, or in default of specific instructions by such bondholders to proceed by action, suit or otherwise, as the trustee being advised by counsel learned in the law shall deem most expedient in the interest of the holders of the bonds hereby secured.

Provided, nevertheless, that no foreclosure of this mortgage
122 or sale of the mortgaged premises pursuant to judicial proceedings or under the powers of sale conferred upon the trustee hereunder, shall affect any right or lien of the holders of the prior lien bonds or accelerate or precipitate the maturity thereof, unless such foreclosure or sale be had upon the written request of the holders of twenty-five per cent in amount of the prior lien bonds then outstanding; it being the intention that the lien and rights of such prior lien bonds shall continue unaffected by any sale or foreclosure hereunder unless made upon such request of holders of prior lien bonds; but that in case of any default the trustee, in its discretion, may make, and such holders of twenty-five per cent in amount of general lien bonds may require, a sale or foreclosure subject to the prior lien bonds, and not otherwise, unless a sale or foreclosure shall have been requested by the holders of twenty-five per cent in amount of the prior lien bonds as above authorized.

Notice of any sale pursuant to any provision of this indenture shall state the time and place, when and where, and the terms upon which the same is to be made, and shall contain a brief description

of the property to be sold, and shall be sufficiently given if published once in each week for six successive weeks prior to such sale in one newspaper at that time published in each of the cities of New York, N. Y., Buffalo, N. Y., Newark, N. J., Susquehanna, Pa., Cleveland, O., Indianapolis, Ind., and Chicago, Ill.

Upon the completion of any sale or sales under this indenture the trustee shall make, execute, and deliver to the accepted purchaser or purchasers a good and sufficient deed, or good and sufficient deeds of conveyance, for the property and franchises sold.

In case the mortgaged and pledged premises shall be sold upon a default hereunder and such sale shall be made not subject to the lien of the prior lien bonds hereby secured, the whole of the principal sum of all the bonds of both issues hereby secured, if not
123 previously declared due, shall at once become due and payable, anything in said bond or bonds or herein contained to the contrary notwithstanding.

In case of any sale or sales made subject to the lien of the prior lien bonds, the whole of the principal of all the general lien bonds, if not previously declared due, shall at once become due and payable, anything in said bond or bonds or herein contained to the contrary notwithstanding; but no such sale made subject to the lien of the prior lien bonds, shall in anywise affect the maturity or lien of the prior lien bonds or any right or remedy in respect thereof.

SEC. 6. None of the remedies provided in the preceding sections 3 and 5 shall apply, nor shall they be enforced by reason of any default in respect of any of the old bonds or obligations specified in article one, section 5, IV, and section 8, II, until after the railroad company shall have acquired, as provided in section 2 of article one, the New York, Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 7. For all purposes and within the meaning of the preceding sections 3, 4, and 5, and also of sections 13 and 16 of this article, any default in payment of principal or interest of any prior lien bonds shall constitute a default entitling the holders of general lien bonds to all rights and remedies hereunder as though such default were in respect of general lien bonds.

SEC. 8. Any sale or sales completed under or by virtue of this indenture shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company of, in, and to the premises hereby mortgaged, and shall be a perpetual bar both at law and in equity against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the mortgaged premises, or any part or parcel
124 thereof, by, from, through, or under the railroad company, its successors and assigns, or any of them; provided, however, that in case of a foreclosure or sale hereunder made subject to the lien of the prior lien bonds, then and in such event the lien of the prior lien bonds shall continue unimpaired and the holders thereof,

through the trustee or otherwise as in this indenture provided, shall have and may thereafter assert all their rights and remedies to the same extent as though there had been no foreclosure or sale hereunder.

Any sale pursuant to any provision hereof, because of any default of the railroad company, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or some judgment or decree of foreclosure and sale made by any court of competent jurisdiction, shall be made subject to the lien of any mortgage or mortgages prior to this indenture upon any property hereby conveyed to the extent of such lien or liens, respectively.

SEC. 9. The trustee may, from time to time, adjourn any sale to be made by it under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and, so adjourning such sale, it may without further notice or publication make sale of the mortgaged premises at the time and place to which the same shall be so adjourned.

SEC. 10. The receipt of the trustee shall be sufficient discharge to the purchaser or purchasers of the property, sold as aforesaid, for the purchase money, and no such purchaser or purchasers, or his, their, or its representatives, vendees, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money, or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 11. The proceeds or avails of any sale under any provision of this indenture, and the purchase money paid thereon, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances made and incurred by the trustee in managing and maintaining the property hereby conveyed or so intended to be, and of all taxes, assessments, or liens prior to the lien of these presents, except any taxes, assessments, or other superior liens to which such sales shall have been made subject.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of section 1 of this article; provided, that the prior lien bonds shall be first paid in full as to both principal and interest, before any payment shall be made on the general lien

bonds, unless such sale shall have been made subject to the continuing lien and rights of the prior lien bonds, in which event any arrears of interest in default on the prior lien bonds shall first be paid under this second paragraph, and with this exception the entire payment under this second paragraph shall go to the holders of the "general lien bonds" or the coupons thereof, as above provided.

126 Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 12. The railroad company shall not and will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force in any locality where the mortgaged premises, or any part thereof, may or shall be situate, nor will it claim, take, or insist on any benefit or advantage from any law now or hereafter in force, providing for the valuation or appraisement of the mortgaged premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by the Congress of the United States or by the legislature of any State to redeem the property so sold, or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws; and it agrees that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SEC. 13. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, without first giving to the trustee written notice of the fact that default has occurred and continued as hereinbefore provided, nor unless also the holders of twenty-five per cent in amount of the issue of bonds hereby secured and affected by such default and then outstanding, in respect of which such holder

127 requests action, shall have made written request of the trustee, and shall have afforded to it reasonable opportunity either itself to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name, nor unless also they shall have offered to the trustee adequate security and indemnity against the cost, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared in every such case at the option of the trustee to be conditions precedent to the execution of the powers and trusts of this indenture and to any action, or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any man-

ner whatever to affect, disturb, or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, but that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons according to the tenor and terms of the two issues of bonds hereunder issued and hereby secured. A default in the payment of interest upon general lien bonds only shall not be deemed a default affecting prior lien bonds.

SEC. 14. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee or to the holders of bonds secured hereby is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or existing at law or in equity or by statute.

SEC. 15. The personal property and chattels hereby conveyed, or intended so to be, shall be real estate for all the pur-
128 poses of this indenture, and shall be held and taken to be fixtures and appurtenances of the said railroads and part thereof, and are to be used and sold therewith and not separate therefrom.

SEC. 16. Upon proper indemnity to the trustee, the holders of a majority in amount of each of the two issues of bonds hereby secured and then outstanding (the holders of each issue being considered and counted as a separate class), in case of any subsisting default other than in the payment of the interest on or principal of the general lien bonds, or the holders of a majority in amount of general lien bonds if such default be only as to interest upon or principal of those bonds, anything in this indenture contained to the contrary notwithstanding, from time to time, shall have the right to direct and control any and all proceedings theretofore instituted for any sale of the premises hereby conveyed and pledged, or agreed or intended so to be, or for the foreclosure of this indenture, or for the appointment of a receiver, or any other proceedings hereunder, and for that purpose to instruct the trustee to continue or to discontinue any such proceedings hereunder; and no such action by the trustee or by such majority shall extend to, or be taken to affect, any subsequent default or to impair any right resulting therefrom. But nothing herein is intended to limit any power of the trustee to exercise any right or to apply or enforce any remedy under any of the provisions of this indenture, unless the trustee be otherwise expressly directed, as in this section provided, by the requisite number and class of holders of bonds hereby secured.

SEC. 17. In case of any sale hereunder, any and all purchasers in making settlement or payment shall be entitled to turn in any bonds and any matured and unpaid coupons hereby secured, estimating the value of such bonds and coupons for that purpose at the sum
129 payable out of the net proceeds of such sale to the holder or holders of such bonds and coupons as his or their ratable share of such net proceeds, after allowing for the proportion of the total

payment required to be made in cash for the cost and expenses of the sale or otherwise; and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, such purchaser or purchasers may make such settlement by receipting on each bond the amount to be credited thereupon; and at any and every such sale any or all of the bondholders may bid for and purchase such property, and upon compliance with the terms of sale may hold and retain and dispose of such property without further accountability therefor.

SEC. 18. Any request in writing or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent instruments of similar tenor and date, and may be signed or executed by such bondholders in person or by attorney in fact. Proof of the execution of any such request or other instrument, and of the holding by any person of any of said coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, if made in the following manner:

The fact and date of the execution by any person of any such request or other instrument may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as the holder of bonds, and the amounts and issue numbers of the bonds held by such person, and the date of his holding the same, may be proved by a certificate in writing executed by any trust company, bank, bankers or other depositary (wherever situated) whose cer-
130 tificate shall be deemed by the trustee to be satisfactory, showing that such person had on deposit with such depositary the bonds described in such certificate at the date therein mentioned. Such proof shall be conclusive in favor of the trustee with regard to any action taken by it under such request or other instrument.

SEC. 19. Upon filing a bill in equity, or upon commencement of any other judicial proceedings to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein and hereby conferred and provided to be exercised by the trustee upon the occurrence and continuance of default as hereinbefore provided, and as matter of right, the trustee shall be entitled to the appointment of a receiver or receivers of the premises hereby mortgaged, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer.

SEC. 20. No delay or omission of the trustee or of any holder of bonds hereby secured to exercise any right or power arising from any default continuing as aforesaid shall exhaust or impair any such right or power, or be construed to be a waiver of any such default, or an acquiescence therein.

SEC. 21. The railroad company at any time hereafter before full payment of the bonds secured hereby, and whenever it shall deem expedient for the better security of such bonds, although there be then no default entitling the trustee to enter into possession, may surrender and deliver to the trustee full possession of the whole or any part of the property, premises, and interests hereby conveyed, or intended so to be, for any period fixed or indefinite. Upon such surrender and delivery the trustee, at its option, may enter into and upon the premises so surrendered and delivered, and may take and receive possession thereof, for such period fixed or indefinite,
131 as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon and to maintain such possession, though beyond the expiration of any prescribed period. Upon any such voluntary surrender and delivery of said property and premises, or of any part thereof, the trustee, from the time of its entry, shall and will work, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall and will receive and apply the income and revenues thereof as provided in section 3 of this article. Upon application of the trustee, and with consent of the railroad company if there be then no subsisting default hereunder, and without such consent if there shall then be a subsisting default, a receiver or receivers may be appointed to take possession of and to operate and manage the whole or any part of said property, with all the rights, powers, and duties by this section conferred upon the trustee, and in every case when a receiver of the whole or any part of the said property shall be appointed under this section or otherwise the trustee shall be entitled to receive all the income and profits of such property for the benefit of the holders of bonds hereby secured.

SEC. 22. In the event of any sale, pursuant to any provision hereof, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale made by any court of competent jurisdiction, the whole of the property hereby mortgaged and pledged shall be sold in one parcel and as an entirety, including all the rights, titles, estates, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature; and this provision shall bind the parties hereto and each and every of the holders of the bonds and coupons hereby secured or intended so to be. And the trustee and its successors are hereby appointed the true and lawful attorney or attorneys, irrevocable, of the railroad com-
132 pany, in its name and stead to make all necessary deeds and conveyances of property and all necessary transfers of the shares of stock or bonds or other obligations thus sold, and for that purpose it and they may execute all necessary acts of assignment and transfer, and may substitute one or more persons with like power, the

railroad company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof.

SEC. 23. Until default shall be made by the railroad company in the payment of either the principal or interest of the bonds hereby secured, or otherwise, as set forth in sections 3 and 5 of this article or either of them, and until the trustee, as herein authorized, shall have taken some proceeding in respect thereof, or until a receiver shall have been appointed as hereinbefore permitted, the railroad company shall be entitled to receive all interest payable, and dividends declared, in respect of any bonds or stocks by or pursuant to this indenture pledged or transferred to the trustee as collateral security for the payment of the bonds issued hereunder, the coupons for such interest from time to time to be delivered by the trustee to the railroad company for such purpose, and immediately upon such delivery to be collected and canceled to the satisfaction of the trustee; suitable orders, in favor of the railroad company, or its nominee, for the payment of such dividends from time to time to be executed and delivered by the trustee to the railroad company.

SEC. 24. Until default be made as aforesaid, and some action in respect thereof shall have been taken by the trustee, or by bondholders, as herein authorized, the railroad company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions or purposes of this indenture and with the same force and effect as though such pledge
133 had not been made. From time to time the trustee shall give to the railroad company, or its nominee, suitable proxies for such purposes.

SEC. 25. The trustee may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any and all companies whose shares are pledged hereunder, and for such purposes from time to time it may sell or assign, transfer, and deliver so many shares of the stocks of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; provided, however, that no transfer under this provision shall be made which shall impair the trustee's control of any corporation whose shares shall be so transferred; and subject to this limitation, the trustee may make such other arrangements as it shall deem necessary for the protection of the trust hereunder.

SEC. 26. If at any time the obligors in any of the bonds at any time pledged hereunder shall fail to make payment of either the principal or interest thereof, according to the tenor of such bonds, then, unless the trustee shall hold hereunder more than a majority of the stock of such obligor, (1) in any case where the trustee holds more than eighty-five per cent in amount of any one or more issues of the bonds of such obligor, and (2) in other cases according to its discretion, the trustee, upon the written request of the railroad company, and not otherwise, shall cause proper and apt proceedings to be instituted

and prosecuted in some court of competent jurisdiction to foreclose the mortgage, or mortgages, by which such bonds shall be secured, and if the property covered by such mortgage, or mortgages, shall be sold under foreclosure, it shall, if it hold more than eighty-five per cent in amount of the bonds thereby secured, cause such property to be purchased for and in the name or in behalf of the railroad company, if the amount bid at such sale shall not exceed the
134 full amount due on the entire issue of such bonds, and the cost and expenses of such suit and sale, and the railroad company shall furnish the necessary cash to pay such cost and expenses, any claims having priority of lien or in equity over the mortgage foreclosed and the dividends accruing from such sale on any bonds not held by the trustee. If such property shall not be bought by the trustee, the trustee shall receive out of the proceeds of such sale the dividend accruing on the bonds held by it, and shall apply the same as herein provided. When any railroad or railroad property shall be purchased by the trustee, for and in the name of the railroad company, as above provided, the lien of this indenture immediately and ipso facto shall attach to and bind the property so purchased.

If at any time the obligors in any of the bonds at any time pledged hereunder shall fail to make payment of either the principal or interest thereof, according to the tenor of such bonds, and by reason thereof foreclosure or other proceedings shall be taken, otherwise than at the instance of the trustee, the trustee shall take such steps as in its discretion shall be best calculated to protect its interests hereunder in respect of such bonds, and for this purpose it may join in any plan or agreement of reorganization, and may accept its share of new securities under such plan.

No such action of the trustee shall relieve the railroad company from any liability hereunder by reason of such default, nor from any of the consequences thereof.

When the trustee shall receive moneys arising from the foreclosure of any mortgage executed to secure the payment of bonds pledged hereunder, or from any sale of any railroad mortgaged to secure any such bonds, it shall apply such moneys, whether principal or interest, in the manner provided in section 29 hereof, for the application of money arising from the release of real property mortgaged hereunder.

In the event of the dissolution of any corporation of whose capital stock the greater part shall be held hereunder by the
135 trustee, such action may be taken and such power be exercised with reference thereto as the trustee in its discretion shall deem most expedient for the conservation of the interest of the trust estate in such property, either through the agency of a successor corporation or otherwise.

SEC. 27. No assignment or pledge hereunder of any shares of stock of any company or companies now or hereafter deposited hereunder shall prevent the consolidation or merger of any one or more of said companies with, or its sale to, the railroad company, but such consolidation, merger, or sale may be made under any laws to which such

companies may then be subject, anything in this indenture contained to the contrary notwithstanding: Provided, however, that such consolidation, merger, or sale shall be made only upon such terms as shall be approved by the trustee or by the holders of a majority in interest of the bonds secured by this indenture. In the event of consolidation or merger of any one or more of the said companies with, or its sale to, the railroad company, this indenture immediately shall become and be a lien upon the property of the company so consolidated or merged with, or sold to, the railroad company, with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured shall always have as full and complete a lien upon such property as that herein created by the pledge of the stock and bonds of such constituent companies to the trustee hereunder.

Neither shall the assignment or pledge hereunder of any capital stock of any company or companies prevent the consolidation or merger of any such companies with each other; but such consolidation or merger may be made under any laws to which such companies may then be subject, anything in this indenture contained to the contrary notwithstanding: Provided, however, that such consolidation or merger shall be made only upon such terms as shall be approved by the trustee or by the holders of a majority in amount of
136 the bonds secured by this indenture; and that the portion of the capital stock of any such consolidated or merging company (but never less than a majority thereof), issued for and in lieu of any stock previously pledged hereunder, shall always bear to the total capital stock a proportionate relation at least as high as that borne by such previously pledged stock to the total capital stock of such constituent companies. Such portion of such stock of such consolidated or merging company shall be assigned to and deposited with the trustee, and shall become and be subject to the lien of this indenture with the same force and effect as if expressly pledged by this indenture; and the holders of the bonds hereby secured shall always have a lien upon such portion of such stock of such consolidated or merging company as full and complete as upon the stock and bonds of such constituent companies by reason of the pledge thereof hereunder.

The trustee may do any and all things proper to carry into effect the purposes of this section, and in order to facilitate the merger in whole or in part, as authorized by law, of any railroad the trustee may transfer into the name of the railroad company, under such restrictions as it may deem sufficient for the protection of the holders of the bonds secured hereby, the shares of any company about to be so merged, but the certificates in the name of the railroad company shall be forthwith delivered to and held by the trustee hereunder, and the railroad company shall simultaneously execute such irrevocable instruments as the trustee shall deem necessary in order to enable it to transfer such shares back into its own name if at any time it

shall deem such a course expedient for the protection of the holders of the bonds hereby secured.

SEC. 28. In case of any default hereunder, if in order to preserve the franchises of the railroad company and to avoid foreclosure and sale involving the organization of a successor company, any plan of reorganization shall be proposed with provisions for the modi-
137 fication of this mortgage, so far as to authorize and require the creation of new liens upon the mortgaged premises prior and superior to the lien hereof; then and in every such case registered holders of four-fifths in amount of all outstanding bonds hereby secured, by writing may direct the trustee in behalf of all the holders of all bonds then or thereafter issued hereunder to acquiesce in the provisions of such plan; which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to amount or date of payment of principal or rate or dates of payment of interest. Thereupon, but not otherwise, the trustee shall by writing acquiesce in such provisions of such plan, and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in New York County, New York; Passaic County, New Jersey; Susquehanna County, Pennsylvania; Marion County, Ohio; Huntington County, Indiana; Cook County, Illinois, and thenceforth shall be deemed to be part of this indenture, and thereafter the lien of this indenture, and of the bonds hereby secured, shall be deemed to be and shall be subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement; provided that the consent of the holders of four-fifths of the prior lien bonds shall be requisite to the creation of any new lien or charge in priority to the prior lien bond.

Registration for any purpose of this section shall be suf-
138 ficient if then or theretofore made and then continuing in any manner permitted by section 14 of article one of this indenture.

SEC. 29. Provided there shall then be no continuing default in respect of which the trustee shall have taken some proceedings herein authorized, the trustee, upon request of the railroad company, at any time or times, in its discretion, may release from the lien and operation of this indenture and of the bonds hereby secured, any premises acquired, held, or used by the railroad company for the purpose of stations, depots, shops, or other buildings or erections, or for other uses not connected with the maintenance or operation of some part of the lines of railway then subject to the lien of this indenture, or any

premises which may have been acquired or held for the supply of gravel, fuel, and other materials for the purposes of such lines of railway; provided that in the judgment of the trustee at the time of such release such premises shall no longer be requisite for the purposes for which the same shall have been so acquired or used, or necessary or expedient to be retained for use in connection with such lines of railway, and likewise it may release any parts of the line of track or roadway, or of the depot grounds, buildings, or accommodations connected therewith, which at the time of such release may have been thrown out of use and have ceased to form part of such lines of railway by reason of the straightening, alteration, or abandonment of such part of the lines of railway; but the power of release given by this article is to be exercised only in case the railroad company shall sell or contract to sell the property so to be released, because no longer required for the uses or purposes of such railways, and shall require the same to be released, in order to give good title to the purchaser or purchasers thereof. The proceeds of any and all such sales shall, unless some other disposition thereof be required by some prior mortgage, be invested in the purchase of other property, real or personal, which
139 shall be conveyed in trust by the railroad company to the trustee, subject to all the trusts hereby declared, or in the purchase of bonds hereby secured (which bonds shall forthwith be canceled and delivered to the trustee); or in betterments or improvements, or in some other way, to the benefit of the mortgaged premises, and satisfaction of the trustee. When such released premises shall have been thrown out of use or shall have ceased to be required, by reason of changes of the line of the road, on or along the routes aforesaid, or any of them, or change of depot grounds, buildings, or other accommodations, the substitutes therefor acquired by the railroad company, ipso facto, shall become and be subject to the lien of this indenture, the same as though specifically mortgaged hereby, and as a condition of such release they shall be conveyed to the trustee by appropriate deeds upon the trusts and for the purposes of this indenture. The railroad company, from time to time, shall also have full power, according to its discretion, to dispose of such portion of the machinery, equipments, and implements, at any time held or acquired for the use of any lines of railway, as may have become unfit for such use, replacing the same by new machinery, equipment, or implements, which shall become subject to the operation of this indenture.

In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article of this indenture be required to see to the application of the purchase money.

SEC. 30. In case at any time it shall become necessary, or in the judgment of the trustee be for the interest of the bondholders hereby secured, or for the benefit of the mortgaged property, that the railroad company shall make changes or alterations in, or substitutions of, any leases, contracts, or trackage rights by which the railroad company now secures access to any point or points, the railroad

140 company, with the written consent of the trustee, may make any such changes, alterations, or substitutions.

The railroad company, with the written consent of the trustee, may make, or to cause to be made, executed, and delivered, all such instruments in writing as may be proper and necessary to carry out and perfect any and all changes, alterations, or substitutions authorized in this section when and as the same may be made.

At the same time, ample provision shall be made by apt and sufficient instruments in writing, so that such modified, altered, or substituted leases, contracts, or trackage rights shall be, and forthwith become bound by and subject to the terms of this indenture in the same manner as the then existing leases, contracts, and trackage rights.

SEC. 31. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney be selected with reasonable care; or for anything whatever in connection with this trust, except misconduct or gross negligence. The trustee shall not be personally liable for any debts contracted by it or for damages to persons or property carried or injured, or for salaries or non-fulfillment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. The trustee shall not be under any obligation to take any action towards the execution or enforcement of the trust hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder or to take any action in respect thereof except after written notice of such default from one or more of the holders of the

141 bonds hereby secured, together with tender of the indemnity aforesaid, any thing herein contained to the contrary notwithstanding; neither shall the trustee in any event be responsible for the proper recording of this indenture or for the filing of the same as a chattel mortgage.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

SEC. 32. The terms or words "the trustee," "said trustee," and "the said trustee," or any other equivalent term, as used in this indenture (except when otherwise clearly indicated), shall be held and construed to mean the trustee or trustees for the time being, whether original or successor, and the words "trustee," "bond," "bondholder," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," whether or not so expressed.

SEC. 33. The trustee, or any trustee hereafter appointed, may resign and be discharged of the trusts created by this indenture by giving notice thereof to the railroad company and to the bondholders, by publication, at least twice a week, for six successive weeks, in one of the newspapers at that time published in each of the cities of New

York, N. Y., and London, England, and by due execution of the conveyance herein required.

The trustee may be removed at any time by an instrument in writing under the hands and seals of three-quarters in amount of the holders of the bonds secured hereby and then outstanding.

SEC. 34. In case a trustee shall die, or shall resign or be removed as herein provided, a majority in amount of holders of the bonds then outstanding hereunder shall have the right and power by instrument in writing under their hands and seals to appoint a new trustee to fill such vacancy, and, until such appointment be so made by a majority of the bondholders, the board of directors of the railroad
142 company may appoint a new trustee to fill such vacancy for the time being, and in every such case the new trustee so appointed, while he or it continues as such, shall have and possess and be subject to the like rights, powers, estates, and duties as though originally trustee hereunder. Should any vacancy be filled by the railroad company under the foregoing provision in that behalf it shall be competent for any judge of the United States in and for the Second Circuit, or for any court of competent jurisdiction in the premises, upon the application of a majority in amount of the bondholders, to annul such appointment, and to appoint as trustee the nominee of such majority.

SEC. 35. If at any time or times, in order to conform to any law of any State in which the railroad company now holds or at any time hereafter shall hold any property, the railroad company shall so request, the trustee shall unite with the railroad company in the execution, delivery, and performance of all instruments and agreements necessary or proper to constitute an additional trustee or trustees to have, enjoy, and exercise in association and equally with the trustee originally named herein or its successor appointed as hereinbefore provided, any and all powers, rights, and estates hereunder, excepting only those specified in article one and in article four, sections 23, 24, 25, and 27, and the custody of the securities therein mentioned, which powers, duties, and estates shall be possessed and exercised, and such custody retained by said original trustee or such successor, notwithstanding the appointment under this section of any co-trustee or co-trustees.

SEC. 36. Should any deed, conveyance, or instrument in writing, from the railroad company or from any resigning or removed trustee, be required by any new trustee, for more fully and certainly vesting in and confirming to him or it such estate, rights, powers, and duties, any and all such deeds, conveyances, and instru-
143 ments in writing shall, on request, be made, executed, acknowledged, and delivered by the party from whom they may be required.

ARTICLE FIVE.

No recourse under any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, shall be had

against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly or through the railroad company, by the enforcement of any assessment, or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this mortgage and the obligations hereby secured are solely corporate obligations and that no personal liability whatever shall attach to, or be incurred by the incorporators, stockholders, officers, or directors of the railroad company, or of any successor corporation, or any or either of them, under or by reason of any or either of the obligations, covenants, or agreements in this indenture, or in any of the bonds or coupons hereby secured, expressed, and contained or implied therefrom, and that any and all personal liability of every name and nature, either at common law or in equity, or by statute, of every such incorporator, stockholder, officer, or director is hereby expressly waived as a condition of, and consideration for, the execution and issue of this mortgage and such obligations.

ARTICLE SIX.

If the said railroad company shall well and truly pay, or cause to be paid, the principal and interest of all bonds hereby secured at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case all property, rights, and interests hereby conveyed or pledged shall revert to the railroad company, and the estate, right, title, and interest of the trustee shall thereupon
144 cease, determine, and become void; otherwise the same shall be, continue, and remain in full force and virtue.

ARTICLE SEVEN.

All the covenants, stipulations, promises, and agreements in this indenture contained by or in behalf of the railroad company shall bind and be binding upon its successors and assigns, whether so expressed or not.

Nothing contained in this indenture or in any bond hereby secured shall prevent the consolidation or merger of the railroad company with any other corporation; provided, however, that such consolidation or merger shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that upon any such consolidation or merger the due and punctual payment of the principal and interest of all of said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture shall be assumed by the company formed by such consolidation or merger. In case the railroad company shall be consolidated or merged with any other corporation, the successor corporation formed

by such consolidation or into which the railroad company shall have been merged, shall succeed to and be substituted for the railroad company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part, and such successor corporation may cause to be signed and may issue in the name of the Erie Railroad Company any or all of such bonds as shall not theretofore have been signed by the Erie Railroad Company and delivered to the trustee, and the trustee shall certify and deliver, upon the order of said successor corporation and subject to all the terms, conditions, and restrictions herein prescribed any of such bonds which shall have been previously signed by the officers
145 of the railroad company and delivered to the trustee for certification, and any of such bonds as such successor corporation shall thereafter cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall in all respects have the same legal rank and security as the bonds of like issue, viz, prior lien or general lien, as the case may be, theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

And it is also expressly understood and agreed that for every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the terms "railroad company" and "Erie Railroad Company" include and mean not only the New York corporation, but also any sole successor railroad corporation, formed by consolidation or otherwise under the laws of New York or of any State or States; and every such successor railroad corporation shall possess and from time to time may exercise each and every right and power hereunder of the Erie Railroad Company, in its name or otherwise.

ARTICLE EIGHT.

The Farmers' Loan and Trust Company, trustee, the party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

ARTICLE NINE.

In order to facilitate the record of this indenture the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

In witness whereof the Erie Railroad Company, the party
146 hereto of the first part, has caused this indenture to be signed and acknowledged or proved by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Farmers' Loan and Trust Company, the party of the second part, has caused its corporate seal to be hereunto

affixed and attested by its secretary, and these presents to be signed and acknowledged or proved by its vice-president the day and year first above written.

ERIE RAILROAD COMPANY,
[L. S.] By E. B. THOMAS, *President.*
Attest:
J. A. MIDDLETON, *Secretary.*

THE FARMERS' LOAN AND TRUST COMPANY,
[L. S.] By R. G. ROLSTON, *President.*
Attest:
E. S. MARSTON, *Secretary.*

Signed, sealed, and delivered in the presence of—
As to Erie Railroad Company,
EDWARD R. GREENE.
GEO. H. COREY.

Signed, sealed, and delivered in the presence of—
As to Farmers' Loan and Trust Company,
EDWARD R. GREENE.
GEO. H. COREY.

147 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, and I do certify, that on this 16th day of December, in the year one thousand eight hundred and ninety-five, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the city and county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Eben B. Thomas and James A. Middleton, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the tenth day of December, 1895, as president and secretary, respectively, of Erie Railroad Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of Erie Railroad Company, the within-named grantor, and one of the corporations described in and which executed the said mortgage deed at my office, and in the said city and county of New York, for themselves and on behalf of said Erie Railroad Company, and being by me informed of the contents of said mortgage deed they, on this day, severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and

148 voluntary act and deed individually and as such president and secretary, respectively, and as the free and voluntary act and deed of the said Erie Railroad Company for the uses and purposes therein contained and set forth, and the said Eben B. Thomas and James A. Middleton, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Eben B. Thomas in the city of New York and the said James A. Middleton in the city of New York, both in the State of New York; that the said Eben B. Thomas is the president and the said James A. Middleton is the secretary of the said Erie Railroad Company; that their names, respectively signed in attestation of the foregoing mortgage deed, are in the said deponent's own proper handwriting, respectively; that they know the corporate seal of the said Erie Railroad Company, the grantor in the foregoing mortgage deed named; that the seal affixed to the foregoing instrument is the common or corporate seal of the said Erie Railroad Company, and was thereto affixed by authority of the board of directors and by order of said Erie Railroad Company, as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, of said company; and the said James A. Middleton did further depose and say that he was personally present and saw said Eben B. Thomas, as such president, sign the said mortgage deed and affix the common or corporate seal of the said Erie Railroad Company thereto, and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Erie Railroad Company by order of the said board of directors, and that thereupon he, the said James A. Middleton, signed his name thereto at the same time as a subscribing witness.

149 In witness whereof I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, City and County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

150 STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the supreme court of said city and county, the

same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 16th day of December, 1895.

[L. S.] HENRY D. PURROY, *Clerk*.

151 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered and I do certify that on this 16th day of December, in the year one thousand eight hundred and ninety-five, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the city and county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, and Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Roswell G. Rolston and Edwin S. Marston, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the tenth day of December, 1895, as president and secretary, respectively, of The Farmers' Loan and Trust Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of The Farmers' Loan and Trust Company, the within-named grantee, and one of the corporations described in and which executed the said mortgage deed, at my office and in the said city and county of New York, for themselves, and on behalf of said The Farmers' Loan and Trust Company, and being by me informed of the contents of said mortgage deed they on this day severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged
152 that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed, individually and as such president and secretary, respectively, and as the free and voluntary act and deed of said The Farmers' Loan and Trust Company, for the uses and purposes therein contained and set forth, and the said Roswell G. Rolston and Edwin S. Marston, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that

they reside, the said Roswell G. Rolston in the town of Babylon, and the said Edwin S. Marston in the city of Brooklyn, both in the State of New York; that the said Roswell G. Rolston is the president, and the said Edwin S. Marston is the secretary of said The Farmers' Loan and Trust Company; that their names respectively signed in attestation of the foregoing mortgage deed are in the said deponent's own proper handwriting, respectively; that they know the grantee in the foregoing mortgage deed named, that the *the* corporate seal of said The Farmers' Loan and Trust Company seal affixed to the foregoing instrument is the common or corporate seal of said The Farmers' Loan and Trust Company, and was thereto affixed by authority of the board of directors and by order of said The Farmers' Loan and Trust Company as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority as president and secretary, respectively, as said company; and the said Edwin S. Marston did further depose and say that he was personally present and saw said Roswell G. Rolston as such president sign the said mortgage deed and affix the common or corporate seal of said The Farmers' Loan and Trust Company thereto, and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of said The Farmers' Loan and Trust Company by order of the said board of directors, and that thereupon he, the said Edwin S. Marston, signed his name thereto at the same time as a subscribing witness.

153 In witness whereof I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, City and County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

154 STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court for said city and county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in

and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 16th day of December, 1895.

[L. S.] HENRY D. PURROY, *Clerk.*

155 NEW YORK.

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 1, Liber 33, page 50, and indexed under blocks number 2, 36, 130, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] FERDINAND LEVY, *Register.*

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 3, Liber 45, page 1, and indexed under blocks number 663, 668, 685, 694, 695, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] FERDINAND LEVY, *Register.*

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 4, Liber 62, page 1, and indexed under blocks number 1088 and 1108 on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] FERDINAND LEVY, *Register.*

156 Recorded in the office of the clerk of the county of Allegany on the 21st day of December, 1895, in Liber 78 of mortgages, p. 89.

Witness my hand and official seal.

[L. S.] GEORGE A. GREEN,
Clerk of Allegany County.

Recorded in the office of the clerk of the county of Broome on the 21st day of December, 1895, in Liber 102 of mortgages, p. 82.

Witness my hand and official seal.

[L. S.] F. B. NEWELL,
Clerk of Broome County.

Recorded in the office of the clerk of the county of Cattaraugus, on the 21st day of December, 1895, in Liber 130 of mortgages, p. 19.
Witness my hand and official seal.
[L. S.] H. S. MERRILL,
Clerk of Cattaraugus County.

157 Recorded in the office of the clerk of the county of Chautauqua, on the 20th day of December, 1895, in Liber 153 of mortgages, p. 299.
Witness my hand and official seal.
[L. S.] V. A. ALBRO,
Clerk of Chautauqua County.

Recorded in the office of the clerk of the county of Chemung, on the 20th day of December, 1895, in Liber 94 of mortgages, p. 464.
Witness my hand and official seal.
[L. S.] DAVID N. HELLER,
Clerk of Chemung County.

Recorded in the office of the clerk of the county of Erie, on the 19th day of December, 1895, in Liber 773 of mortgages, p. 484.
Witness my hand and official seal.
[L. S.] R. L. KIRTLAND,
Deputy Clerk of Erie County.

158 Recorded in the office of the clerk of the county of Delaware, on the 20th day of December, 1895, in Liber 76 of mortgages, p. 127.
Witness my hand and official seal.
[L. S.] J. K. HOOD,
Clerk of Delaware County.

Recorded in the office of the clerk of the county of Genesee, on the 19th day of December, 1895, in Liber 102 of mortgages, p. 403.
Witness my hand and official seal.
[L. S.] CARLOS A. HULL,
Clerk of Genesee County.

Recorded in the office of the clerk of the county of Livingston, on the 23rd day of December, 1895, in Liber 111 of mortgages, p. 23.
Witness my hand and official seal.
[L. S.] WM. E. HUMPHREY,
Clerk of Livingston County.

159 Recorded in the office of the clerk of the county of Monroe on the 20th day of December, 1895, in Liber 394 of mortgages, p. 264.
Witness my hand and official seal.
[L. S.] K. P. SHEDD,
Clerk of Monroe County.

Recorded in the office of the clerk of the county of Niagara on the 20th day of December, 1895, in Liber 243 of mortgages, p. 446.
Witness my hand and official seal.
[L. S.]
JAMES COMPTON,
Clerk of Niagara County.

Recorded in the office of the clerk of the county of Orange on the 24th day of December, 1895, in Liber 358 of mortgages, p. 293.
Witness my hand and official seal.
[L. S.]
W. G. TAGGERT,
Clerk of Orange County.

160 Recorded in the office of the clerk of the county of Rockland on the 20th day of December, 1895, in Liber 142 of mortgages, p. 370.
Witness my hand and official seal.
[L. S.]
CYRUS M. CRUM,
Clerk of Rockland County.

Recorded in the office of the clerk of the county of Steuben on the 23d day of December, 1895, in Liber 133 of mortgages, p. 49.
Witness my hand and official seal.
[L. S.]
J. H. GIFFIN,
Clerk of Steuben County.

Recorded in the office of the clerk of the county of Sullivan on the 26th day of December, 1895, in Liber 76 of mortgages, p. 425.
Witness my hand and official seal.
[L. S.]
GEORGE O. FRASER,
Clerk of Sullivan County.

161 Recorded in the office of the clerk of the county of Tioga on the 21st day of December, 1895, in Liber 70 of mortgages, p. 15.
Witness my hand and official seal.
[L. S.]
F. W. RICHARDSON,
Clerk of Tioga County.

Recorded in the office of the clerk of the county of Wyoming on the 19th day of December, 1895, in Liber 67 of Mortgages, p. 21.
Witness my hand and official seal.
[L. S.]
E. M. JENNINGS,
Clerk of Wyoming County.

NEW JERSEY.

Recorded in the office of the clerk of the county of Bergen on the 19th day of December, 1895, in Liber 94 of mortgages, p. 74.
Witness my hand and official seal.
[L. S.]
JOHN R. RAMSAY,
Clerk of Bergen County.

162 Recorded in the office of the register of the county of Essex on the 18th day of December, 1895, in Liber P 12 of mortgages, p. 364.

Witness my hand and official seal.

[L. S.] WM. RIKER, JR.,
Register of Essex County.

Recorded in the office of the register of the county of Hudson on the 18th day of December, 1895, in Liber 341 of mortgages, p. 510.

Witness my hand and official seal.

[L. S.] GEO. B. FIELDER,
Register of Hudson County.

Recorded in the office of the clerk of the county of Passaic on the 19th day of December, 1895, in Liber X 4 of mortgages, p. 126.

Witness my hand and official seal.

[L. S.] H. D. WINFIELD,
Clerk of Passaic County.

Recorded in the office of the secretary of the State of New Jersey on the 21st day of December, 1895, in Liber K of corporations, p. 61.

Witness my hand and official seal.

[L. S.] HENRY C. KELSEY,
Secretary of State.

163 PENNSYLVANIA.

Recorded in the office of the recorder of deeds of the county of Jefferson, on the 24th day of December, 1895, in mortgage book L, p. 9.

Witness my hand and official seal.

[L. S.] JOHN S. BARR,
Recorder of Jefferson County.

Recorded in the office of the recorder of deeds of the county of McKean, on the 21st day of December, 1895, in Liber 34 of mortgages, p. 201.

Witness my hand and official seal.

[L. S.] GEORGE W. MITCHELL,
Recorder of McKean County.

Recorded in the office of the recorder of deeds of the county of Pike, on the 19th day of December, 1895, in Liber 12 of mortgages, p. 26.

Witness my hand and official seal.

[L. S.] JNO. C. WESTBROOK,
Recorder of Deeds of Pike County.

164 Recorded in the office of the recorder of deeds of the county of Susquehanna, on the 30th day of December, 1895, in Liber 21 of mortgages, p. 411.

Witness my hand and official seal.

[L. S.] SAML. S. WRIGHT,
Recorder of Susquehanna County.

Recorded in the office of the recorder of deeds of the county of Wayne on the 23d day of December, 1895, in Liber 15 of mortgages, p. 535.

Witness my hand and official seal.

[L. S.] STUART O. LINCOLN,
Recorder of Wayne County.

167 *Erie Railroad Company to The Mercantile Trust Company.*

Pennsylvania collateral indenture, dated February 1, 1901, securing $36,000,000 fifty-year 4% Pennsylvania collateral gold bonds. Interest payable February and August.

169 TABLE OF CONTENTS.

Recitals:	Page.
Coupon bonds, form	2
Registered bonds, form	4
Coupons, form	6
Trustee's certificate, form	7
Granting clauses	7–10
Specification of stocks pledged	8

ARTICLE ONE.

Issue and appropriations of bonds:	
Sec. 1. Total authorized issue, $36,000,000	11
Certification by trustee	11
2. Issue for stock pledged, $32,000,000	11
3. Reserve for improvements, &c., $4,000,000	12
4. Reserved bonds issuable at market price	18
5. Registered bonds, exchanges	19
6. Replacement of bonds mutilated or destroyed	20
7. Rights limited to parties and bondholders	20

ARTICLE TWO.

Covenants of railroad company:	
Sec. 1. To pay interest and principle, free from tax, &c	21
To maintain agency in New York City	21
2. To execute further assurances	22
3. To provide for registration	22
4. To create no prior liens upon pledged shares	23
5. To pay taxes and assessments	24
6. To permit no increase of capital, &c., by companies whose stocks are pledged	25
7. To assign to trustee claims against such companies	26
8. To issue and use bonds only as authorized	26
9. To provide for sinking fund	27

170 ARTICLE THREE.

Concerning pledged securities: Page.
Sec. 1. Powers and duties of trustee ... 31
To register in its name pledged bonds ... 31
To transfer into its name pledged stock ... 31
To maintain corporate existence of companies ... 31
2. Collection of dividends and interest ... 31
3. Application of payments ... 34
4. Railroad company votes on pledged stocks ... 34
5. Foreclosure of mortgages ... 35
Purchase of property at judicial sales ... 36
Reorganization in respect of pledged securities ... 37
6. Merger of companies ... 38
7. Extension or renewal of pledged obligations ... 39

ARTICLE FOUR.

Remedies of trustee and bondholders:
Sec. 1. Detached coupons, lien subordinated ... 39
2. After default trustee may collect interest and dividends and may vote on pledged stock ... 39
3. Principal of bonds may be declared payable ... 41
4. Power of sale ... 42
5. Bondholders may direct trustee ... 43
6. Property to be sold as entirety ... 44
7. Notice of sale ... 44
8. Adjournments of sale ... 45
9. Assignments to purchaser ... 45
10. Receipt to purchaser, a discharge ... 46
11. Maturity of principal in case of sale ... 46
12. Distribution of proceeds of sale ... 46
13. Purchaser may pay in bonds ... 47
14. Trustee may recover judgment on default ... 48
15. Waiver of redemption, etc ... 49
16. Trustee entitled to appointment of receiver ... 50
17. Railroad company may surrender right to collect dividends, &c ... 50
18. Bondholders not entitled to sue ... 51
19. Remedies cumulative ... 52
20. Trustee's delay or omission no waiver ... 52

171 ARTICLE FIVE.

Page.
Immunity of officers, directors, and stockholders ... 52

ARTICLE SIX.

Sec. 1. Authentication of bondholders' instruments ... 53
2. Apparent title to bonds ... 54

ARTICLE SEVEN.

Release of property ... 55

ARTICLE EIGHT.

Concerning the trustee:
Sec. 1. Immunities and compensation ... 56
2. Resignation or removal ... 57
3. Appointment of successor trustee ... 58

ARTICLE NINE.

Sec. 1. Possession until default ... 59
2. Possession to revert to railroad company on payment of bonds, &c ... 60

ARTICLE TEN.

Sundry provisions: Page.
Sec. 1. Covenants to bind successors and assigns 61
2. Railroad company may consolidate 61
3. Successor may issue bonds 61
4. Rights and powers of successor 62
5. Authority of officers of successor 63
6. Railway company may surrender powers 63
Trustee's acceptance of trust 63
Definition of certain terms 63
Stamp tax 63
Acknowledgments 65

173 An indenture, dated as of the first day of February, one thousand nine hundred and one, between Erie Railroad Company (hereinafter termed the "railroad company"), a corporation organized and existing under the laws of the State of New York, party of the first part, and The Mercantile Trust Company, of New York (hereinafter termed the "trustee"), a corporation organized and existing under the laws of the State of New York, party of the second part.

Whereas, for the purpose of making payment for shares of the capital stock of the following companies acquired or to be acquired by the railroad company, namely:

Pennsylvania Coal Company, a corporation organized under the laws of the State of Pennsylvania;

Erie and Wyoming Valley Railroad Company, a corporation organized under the laws of the State of Pennsylvania, and

Delaware Valley and Kingston Railroad Company, a corporation organized under the laws of the State of New York;

and for the purpose of providing means for its other corporate purposes and business, the railroad company desires to make and to issue a series of fifty-year four per cent Pennsylvania collateral gold bonds, limited in amount so that the aggregate principal sum of such bonds outstanding at any one time shall never exceed $36,000,000, all of which bonds at any time outstanding shall be equally secured as hereinafter provided; and

Whereas such bonds of the railroad company to be issued under and secured by this indenture, are to be coupon bonds, each for the principal sum of $1,000, numbered consecutively from 1 upwards, and registered bonds, each bearing a distinctive number or designation, of the denomination of $1,000 or such multiples of $1,000 as from time to time the railroad company, by resolution of its board of directors, may authorize; and all such coupon bonds and registered bonds, from time to time, as directed by the board of directors of the railroad company, are to be executed in the name and on behalf of the railroad company under its corporate seal by
174 the president or a vice-president and the secretary or an assistant secretary of the railroad company, and are to be substantially of the following tenor:

(Form of coupon four per cent gold bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company Pennsylvania collateral 4% coupon gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder of this bond one thousand dollars, in gold coin of the United States of America, on the first day of February, 1951, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon at the rate of four per cent per annum from February 1, 1901, payable semiannually, at the said office or agency in like gold coin on the first day of February and the first day of August, in each and every year, until the payment of said principal sum, but only upon presentation and surrender, as severally they shall mature, of the coupons therefor annexed hereto; such United States gold coin in every case to be of the standard of weight and fineness as it existed February 1, 1901.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom under any present or future law of the United States or of any State or county or municipality therein.

This bond is one of a series of four per cent gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding thirty-six million dollars at any one time outstanding, under and in pursuance of, and all equally secured by a collateral indenture, dated February 1, 1901, executed by the railroad company to The Mercantile Trust Company, of New York, as trustee, pledging all of the shares of the capital stock of the Pennsylvania Coal Company and of the Erie and Wyoming Valley Railroad Company and of the Delaware Valley and Kingston Railroad Company, now owned or hereafter ac-
175 quired by the railroad company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company, the certificates for which have been or shall be delivered to the trustee pursuant to said collateral indenture, to which reference hereby is made for a statement of the property pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and of the terms and conditions upon which said bonds are secured and are to be used; the officers, directors and stockholders of the railroad company being expressly exempted, relieved and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

As additional security for the retirement of every bond of this issue, at or before the stated maturity thereof, the Erie Railroad Company annually will appropriate and will pay to a sinking fund the sum of ten cents for every ton of coal sold and delivered during the preceding year from the mines of the Pennsylvania Coal Company; and for the purposes of said sinking fund, this bond may be called in during the month of February or the month of August, in any year, at par, together with a premium of five per cent thereof and all interest then accrued; all as is more fully stated in said collateral indenture.

This bond shall pass by delivery, unless registered in the owner's name on the books of the railroad company, at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the railroad company. After such registration no transfer shall be valid unless made on the railroad company's books by the registered owner and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored, but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery merely.

The holder also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon, in exchange for a registered bond without coupons, as provided in said indenture.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed of the trustee under said indenture.

In witness whereof the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be herunto affixed, and to be attested by its secretary or an assistant secretary, and coupons for such
176 interest, with the engraved signature of its treasurer, to be attached hereto, this first day of February, 1901.

[L. S.] ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

(Form of registered bond without coupons.)

No. ——. $——.

UNITED STATES OF AMERICA.

Erie Railroad Company Pennsylvania collateral 4% registered gold bond.

Know all men by these presents that the Erie Railroad Company, a corporation hereinafter called the "railroad company," for value

received, promises to pay to or assigns, dollars, in the gold coin of the United States of America, on the first day of February, in the year 1951, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon from the first day of February, or the first day of August, as the case may be, next preceding the date hereof, at the rate of four per cent per annum, payable semiannually at said office or agency, in like gold coin, on the first day of February and the first day of August in each year, until the payment of said principal sum; such United States gold coin in every case to be of the standard of weight and fineness as it existed February 1, 1901.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

This bond is one of a series of four per cent gold bonds (coupon and registered) of the railroad company, issued and to be issued,
177 for an aggregate principal sum not exceeding thirty-six million dollars at any one time outstanding, under and in pursuance of, and all equally secured by, a collateral indenture, dated February 1, 1901, executed by the railroad company to The Mercantile Trust Company, of New York, as trustee, pledging all of the shares of the capital stock of the Pennsylvania Coal Company, and of the Erie & Wyoming Valley Railroad Company, and of the Delaware Valley and Kingston Railroad Company, now owned or hereafter acquired by the railroad company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company, the certificates for which have been or shall be delivered to the trustee pursuant to said collateral indenture, to which reference is hereby made for a statement of the property pledged, the nature and extent of the security, the rights of the holders of said bonds under the same and of the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

As additional security for the retirement of every bond of this issue, at or before the stated maturity thereof, the Erie Railroad Company annually will appropriate and will pay to a sinking fund the sum of ten cents for every ton of coal sold and delivered during the preceding year from the mines of the Pennsylvania Coal Company; and for the purposes of said sinking fund this bond may be called in during the month of February or the month of August, in any year, at par, together with a premium of five per cent thereof and all interest then accrued; all as is more fully stated in said collateral indenture.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company

at its office or agency in the city of New York upon surrender and cancellation of this bond, and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said indenture and on payment, if the railroad company shall so require, of the charge therein provided for. This bond also, in the manner prescribed in said indenture and upon payment of the charge therein provided for, is exchangeable for coupon bonds for the same aggregate principal sum.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said indenture.

In witness whereof the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presi-
178 dents, and its corporate seal to be hereunto affixed, and to be attested by the secretary or an assistant secretary, this day of

[L. S.] ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

And whereas there are to be attached to the said coupon bonds at the time of the issue thereof coupons representing the semiannual installments of interest which shall become due thereon to and including the first day of February, 1951, each of which coupons is to be substantially of the following tenor, viz:

(Form of interest coupons, of which the first is to be payable August 1, 1901.)

No. $20.00.

On the first day of Erie Railroad Company will pay to bearer, at its office or agency in the city of New York, N. Y., twenty dollars, gold coin of the standard existing February 1, 1901, without deduction for taxes, being six months' interest then due on its collateral four per cent gold bond No.

Treasurer.

And whereas there is to be endorsed on each of said coupon bonds and registered bonds without coupons a certificate of the trustee that it is one of the bonds issued hereunder, and no bond shall be secured by this indenture or be obligatory for any purpose unless such certificate shall have been executed by the trustee, such trustee's certificate to be substantially of the following tenor, viz:

179 (Form of trustee's certificate.)

This bond is one of a series of bonds described in the within-mentioned indenture, executed by the Erie Railroad Company to the undersigned trustee.

THE MERCANTILE TRUST COMPANY,

By

And whereas each of the coupons to be attached to such coupon bonds is to be authenticated by the engraved facsimile of the signature of the present treasurer, or of any future treasurer, of the railroad company, and the railroad company may adopt and use for that purpose the engraved signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer at the time when such bonds shall actually be certified and delivered; and

Whereas the execution and delivery of this indenture, and the execution and issue of said bonds, have been duly and unanimously authorized by all the stockholders and by the board of directors of the railroad company, and in pursuance of such authority and of all and every legal power and authority in it vested, the railroad company proposes to make and execute, and from time to time to issue, the bonds secured hereby;

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture and the performance of all the covenants and conditions herein contained, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged;

The railroad company, party of the first part, has sold, assigned, and transferred, and by these presents does sell, assign, and transfer, unto the trustee, party of the second part, its successors and
180 assigns forever, the following shares of stock, the certificates for which in the name of the Erie Railroad Company, but by it endorsed in blank, have been delivered to the trustee, namely:

98,212 shares, of the aggregate par value of $4,910,600, of the capital stock of the Pennsylvania Coal Company, out of the total outstanding capital stock of said company, consisting of 100,000 shares of the par value of $50 each;

30,000 shares, of the aggregate par value of $1,500,000, of the capital stock of the Erie and Wyoming Valley Railroad Company, being all the outstanding capital stock of said corporation;

2,500 shares, of the aggregate par value of $250,000, of the capital stock of the Delaware Valley and Kingston Railroad Company, being all the outstanding capital stock of said corporation;

66,300 shares of the preferred stock and 66,300 shares of the common stock of the New York, Susquehanna and Western Railroad Company (a corporation existing under the laws of the State of New Jersey), such shares being of the par value of $100 each, and together constituting fifty-one per cent of the outstanding capital stock of said company;

The railway company covenants and agrees that any and all additional shares of the capital stock of the said Pennsylvania Coal Com-

pany, the Erie and Wyoming Valley Railroad Company, or of the Delaware Valley and Kingston Railroad Company, and other property of any kind or description whatsoever, which hereafter shall be acquired by the railway company or by the trustee, and which by any covenant or provision of this indenture the railway company has subjected or has agreed to subject to the lien hereof, immediately upon such acquisition, but subject to the terms and conditions of such acquisition thereof, and without any further assignment, transfer, or conveyance, shall become and be subject to the lien of this indenture as fully and completely as though expressly and specifically assigned, transferred, and conveyed to the trustee under this indenture; but the railroad company covenants and agrees that at any and all times it will execute and will deliver to the trustee any and all further assignments, transfers, or conveyances and instruments of
181 further assurance as the trustee may reasonably direct or require for the purpose of expressly and specifically subjecting such additional shares, bonds, certificates of indebtedness, and other property to the lien of this indenture, and will deliver to the trustee the certificates for any such shares of stock, and such bonds or certificates of indebtedness.

It is further covenanted and declared that any other or additional property of any kind, including bonds and other securities, claims, and stocks, from time to time hereafter, may be conveyed, assigned, transferred, or delivered by the railroad company, or by anyone in behalf of the railroad company with its written consent or approval, to the trustee hereunder, as and for additional security for the bonds issued and to be issued hereunder, and the trustee shall receive, hold, and apply any and all such property subject to the trusts of this indenture; but any such conveyance, assignment, transfer, or delivery, pursuant to the provisions of this clause, as and for additional security, may be made subject to any reservations, limitations, conditions, and provisions which shall be set forth in an instrument in writing, then executed by the trustee and by the railroad company, respecting the use, management, and disposition of such additional property and the proceeds thereof.

But it is hereby expressly declared that there is reserved to and by the railroad company the right to acquire any properties (including stocks, bonds, and other securities), and to hold and to dispose of the same free from the lien of this indenture, provided that neither any bonds hereby secured and reserved under section 3 of article one hereof nor the proceeds of any such bonds so reserved, and no bonds, stocks, or other property or moneys held by the trustee hereunder shall be used for such acquisition or to reimburse the railroad company in respect thereof.

182 To have and to hold the said shares of stock hereby assigned and transferred, and also all additional property of any kind, including shares of stock, bonds, and other securities, certificates of indebtedness and claims which hereafter shall become subject to this indenture unto the trustee, its successors and assigns forever.

But in trust, nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and interest obligations, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture, without any preference, priority, or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or negotiation thereof; so that each and every bond issued and to be issued as aforesaid shall have the same right, lien, and privilege under this indenture, and that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby as if all had been made, issued, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale, or disposition of said bonds as though upon such day all of said bonds were actually issued, sold, and delivered to holders for value.

And it is hereby covenanted and declared that the property subject to this indenture is to be held by the trustee, and that all such bonds, with the coupons for interest thereon, are to be issued and received subject to the further covenants, conditions, and trusts hereinafter set forth, to wit:

183 ARTICLE ONE.

SECTION 1. From time to time the bonds to be secured hereby shall be executed by the railroad company, and by it shall be delivered for certification to the trustee, and thereupon, as provided in this article, and not otherwise, the trustee shall certify and shall deliver the same at the option of the railroad company from time to time.

Any of such bonds may be executed, certified, and delivered originally either as coupon bonds or as registered bonds.

The amount of bonds hereby secured which may be executed by the railroad company, and which may be certified by the trustee, is limited, so that never at any time shall there be outstanding bonds hereby secured for an aggregate principal sum exceeding thirty-six million dollars ($36,000,000).

Before certifying or delivering any coupon bond hereby secured the trustee shall detach and shall cancel all coupons thereof then matured; and every registered bond shall be dated on the day of the actual certification thereof.

Only such bonds as shall bear thereon a certificate, substantially in the form hereinbefore recited, duly executed by the trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. Every such certificate of the trustee upon any bond executed by the railroad company shall be the conclusive and the only

evidence that the bond so certified was duly issued hereunder and is entitled to the benefit of the trust hereby created.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture, bonds for the aggregate principal sum of $32,000,000 shall be certified by the trustee and returned to the railroad company, or upon the order of its president, immediately upon the execution of this indenture, or as soon thereafter as may be, the railroad company hereby covenanting that it will use and issue such $32,000,000 bonds only in payment on account of the acquisition of shares
184 of stock of the Pennsylvania Coal Company or of the Erie and Wyoming Valley Railroad Company or the Delaware Valley and Kingston Railroad Company, all of which shares as and when acquired shall be pledged hereunder, and the certificates therefor delivered hereunder to the trustee, which, however, shall not be bound to see to such application or use of such bonds.

SEC. 4. Four million dollars ($4,000,000) par value of the bonds authorized to be issued under and secured by this indenture, shall be reserved to be executed by the railroad company, and to be certified and delivered by the trustee from time to time for some one or more of the following purposes, but only as hereinafter provided and subject to the restrictions hereinafter stated:

I. The purposes for which such $4,000,000 of bonds shall be executed, certified, and delivered, and for which such bonds or their proceeds may be used, are:

(a) To make betterments or improvements of or upon any property which at the time of issuing the bonds reserved under this section 3 shall be subject to the lien of this indenture, and to construct or acquire additional mines, collieries, coal lands, or coal leases, and additional lines of railway, extensions, branches, bridges, shops, depots, terminal properties, power houses, electrical plant, rolling stock, or other additional property connected with, or for use in connection with, any of the mines or collieries or lines of railway, extensions, branches, shops, depots, terminal properties, power houses, electrical plant, rolling stock, bridges, or other properties which at the time of such construction or acquisition either shall be subject to the lien of this indenture, or shall belong to any company of whose capital stock at least ninety per cent shall be held by the trustee under this indenture; and to provide the railroad company with funds for expenditures by it made or incurred for any of the foregoing purposes;
185 (b) To furnish moneys, or to reimburse the railroad company for moneys furnished, to any other such company or companies of whose capital stock not less than ninety per cent in amount shall then be held hereunder by the trustee, to an amount not exceeding expenditures by such company or companies made or incurred for the construction or acquisition of betterments or improvements of, or additional, mines, collieries, coal lands, or coal leases, or additional lines of railway, extensions, branches, bridges, shops, depots, terminal properties, power houses, electrical plant, rolling stock, or other additional property connected with, or for

use in connection with mines, collieries, coal lands, or coal leases, or any of the lines of railway, extensions, branches, shops, depots, terminal properties, power houses, electrical plant, rolling stock, bridges, or other properties which at the time of such construction or acquisition shall belong to such other company or companies; provided, that in every such case the railroad company shall *f*require such other company or companies to issue, and shall pledge or shall cause to be pledged with the trustee hereunder, bonds or certificates of indebtedness or paid-up shares of the capital stock of such other company or companies of a par amount at least equal to the amount of the moneys so furnished; and,

(c) To acquire, or to reimburse the railroad company for the acquisition of, the shares of the capital stock, bonds, and indebtedness of any company which at the time of such acquisition shall own any mine or colliery, coal lands, or coal leases, or any line of railway, extension, branch, bridge, terminal property, power house, electrical plant, connected with, or available for use in connection with, any mine or colliery, coal lands or coal leaseholds, or any line of railway, owned by any company of whose capital stock the greater part shall then be held by the trustee hereunder; provided, that thereby not less than ninety per cent of all the shares of the capital stock of
186 such company shall be obtained, or previously shall have been obtained and pledged hereunder; and provided further, that no shares or bonds or indebtedness issued or created by any such company after a majority in amount of the outstanding shares of the capital stock of such company shall have been pledged hereunder shall be acquired under this clause (c), but the same may be acquired under clause (b) of this section.

II. The restrictions subject to which such $4,000,000 of reserved bonds from time to time shall be certified and delivered are as follows:

(1) Before certifying and delivering bonds under this section, there shall be delivered to the trustee a copy of a resolution of the board of directors of the railroad company certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and directing the officers of the railroad company to set aside such bonds and their proceeds separate and apart from any other assets and funds of the railroad company, and to use the same only as authorized by this section;

(2) From time to time when and as requested by the president of the railroad company, upon the presentation to the trustee of the copy of any such resolution as above provided, there shall be so certified and delivered such amount of the bonds reserved under this section, not in any one delivery exceeding, in the aggregate, $1,000,000 par value, as from time to time shall be called for in such resolutions. But, in every instance before certifying and delivering any of the bonds reserved under this section (except the $1,000,000 thereof first deliverable hereunder), the trustee shall require the railroad company to furnish, in addition to such resolution of its board of directors, the

certificate or certificates of some one or more officers of the railroad company, stating:

187 (a) That all bonds theretofore certified and delivered under this section in respect of which no such certificate previously shall have been furnished, and the proceeds of all such bonds have been actually used for the said purposes, or for some one or more of them, or to reimburse the railroad company as aforesaid, indicating the particular mines, collieries, coal lands and coal leaseholds, and the lines of railway, extensions, branches, bridges, shops, depots, terminal properties, rolling stock or other additional property, and the kind or class of betterments or improvements constructed, acquired, or made, and the stocks, bonds, or indebtedness acquired, and the sums furnished to any such other company or companies, and the amount and description of the shares of capital stock, bonds or certificates of indebtedness of such other company or companies received by the railroad company on account thereof;

(b) That the price paid for such construction or for such acquisition, betterments, or improvements was not in excess of the fair value of the property acquired or work done, and that the bonds included in such certificate were sold, disposed of, or otherwise accounted for at not less than their fair value at the time of such sale, disposition, or accounting.

(c) That no part of such expenditures so certified was included in any previous certificate furnished hereunder, or was made or reimbursed out of any bonds or moneys received by the railroad company under any other provision of this indenture;

(d) That no part of the expenditures in such certificate so certified was included in the operating or maintenance expenses reported in any annual report theretofore issued by the railroad company;

(e) In case such certificate shall show the acquisition of new

188 property, then such certificate also shall state whether such new property is known or is believed to be subject to any lien or charge prior to this indenture, except undetermined liens or charges incidental to construction; and such certificate shall specify the amount of any such prior lien nor charge (other than as aforesaid) known or believed to exist. In case the certificate shall show the acquisition of any shares of the capital stock, bonds, or other indebtedness of any other company, such certificate shall state whether the property of such other company is known or is believed to be subject to any lien or charge, and whether such company is known or is believed to have any indebtedness except ordinary operating accounts and undetermined claims, liens, and charges incidental to construction, and except also indebtedness to the railroad company and liens, charges, and indebtedness transferred to the trustee or in respect of which bonds shall have been set apart under the following clause (3), and such certificate in each case shall specify the amount of any such lien, charge, or indebtedness known or believed to exist;

(f) Any such certificate under this section may state any other facts pertaining to the right to certify and deliver bonds hereunder,

The same officer or officers of the railroad company need not certify to all the facts required to be certified under the provisions of this section, but different officers may certify to different facts respectively.

(3) After delivery of the $1,000,000 of bonds first deliverable hereunder, no bonds shall be certified and delivered under this section, for or in respect of the construction or acquisition of property subject to any such certified lien or charge, or for or in respect of the acquisition of shares of capital stock, bonds, or indebtedness of a
189 company subject to indebtedness so certified, or whose property is subject to a lien or charge so certified, unless or until the railroad company shall have deposited with the trustees an amount of the bonds hereby secured of a par amount equal to the aggregate amount of such certified indebtedness, liens, and charges. Whenever thereafter any of such certified indebtedness, liens, and charges, shall be paid or satisfied, or shall be acquired and be subjected to the lien hereof, then an equal amount at par of the bonds hereby secured so deposited with the trustee under this clause shall be redelivered by the trustee to the railroad company or upon its order, so that the amount of such bonds held by the trustee under this clause at all times shall be equal to the amount of such indebtedness, liens, and charges remaining unsatisfied or not subjected to the lien hereof.

(4) The railroad company covenants that whenever all the bonds reserved under this section shall have been certified and delivered to, and used by, the railroad company, it will execute and deliver to the trustee a similar certificate indicating the particular application of all bonds, or proceeds of bonds, in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

(5) Every such certificate furnished under this section, unless signed, first, by the president or a vice-president or the general manager or the chief engineer, and, secondly, by the comptroller or auditor or treasurer of the railroad company, shall have endorsed thereon, or shall be accompanied by, a written statement of one of the officers first above designated and one of the officers secondly above designated, that they believe that such certificate is true, and that such bonds have been used, and the expenditures certified have been made only for purposes authorized by this section. A certificate signed by
190 one of the officers first above designated and one of the officers secondly above designated or having endorsed thereon, or being accompanied by a written statement of said officers as above provided, may be received by the trustee as conclusive evidence of any facts pertaining to the right to certify and deliver bonds pursuant to this section.

Together with such statements and certificates there shall be delivered to the trustee any such bonds so acquired, and the certificates endorsed for transfer in blank for any such shares of stock so acquired, and any conveyances or instruments of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture any new property so acquired by the

railroad company, and, so far as may be, any indebtedness, liens, or charges so taken up or acquired by use of said bonds, and, also, the written opinion of counsel for the railroad company, to the effect that such conveyances or other instruments are sufficient for that purpose, or that no conveyance or instrument of further assurance is necessary for the purpose aforesaid. Such resolutions, statements, certificates, and opinion shall be deemed, and shall be taken to be, full authority and protection to the trustee for its certification of such bonds under the foregoing provisions of this section.

The railroad company covenants that when all the bonds reserved under this section 3 shall have been certified and delivered to and used by the railroad company it will execute and deliver to the trustee a similar certificate indicating the purposes for which the railroad company shall have used all bonds or the proceeds of all the bonds in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

SEC. 4. Whenever under section 3 of this article the railroad company shall be entitled to bonds hereby secured or their proceeds, the railroad company may take and accept such bonds at a price not less than their average market price during the previous calendar
191 month. Any bonds so taken and accepted by the railroad company in reimbursement for expenses theretofore actually made by the railroad company shall be held and may be used by the railroad company for its general corporate purposes, freed and discharged from all restrictions and provisions of said section 3 as though such bonds had been sold at such price, and the proceeds paid over to the railroad company.

SEC. 5. Whenever any coupon bond or bonds, issued under and secured by this indenture, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds without coupons, the railroad company shall execute, and the trustee shall certify, and in exchange for such coupon bond or bonds shall deliver registered bonds, or one registered bond, without coupons, for the like aggregate principal sum. Such registered bonds shall bear interest at the same rate as the surrendered coupon bonds, and from the date of the last-matured coupon thereof. In every case of such exchange the trustee forthwith shall cancel the surrendered bond or bonds and coupons, and shall deliver the same to the railroad company.

Whenever any registered bond without coupons shall be surrendered, transferred, and cancelled, the railroad company shall issue, and the trustee shall certify and deliver, to the transferee, registered bonds, or one registered bond, without coupons, for a like aggregate principal sum;

Whenever any registered bond without coupons shall be surrendered for exchange for a coupon bond or bonds, then upon cancellation of such surrendered bond and payment of the charges therefor, the railroad company shall issue, and the trustee shall certify and deliver,

in exchange therefor, coupon bonds for the like aggregate principal sum, having attached thereto the coupons maturing on and after the date when the next semi-annual instalment of interest would have matured on such surrendered registered bond without coupons.

192 For any exchange of coupon bonds for registered bonds, and (2) for any transfer of registered bonds without coupons, and (3) for any exchange of registered bonds without coupons for coupon bonds, the railroad company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge required to be paid, and also of the further sum of one dollar for each new coupon bond or registered bond without coupons issued upon any such exchange or transfer.

SEC. 6. In case any coupon bond issued hereunder with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated, or be destroyed, the railroad company, in its discretion, may execute, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond) bearing the same serial number, in exchange and substitution for and upon cancellation of, the mutilated coupon bond and its coupons, or the mutilated registered bond, or in lieu of, and substitution for, the coupon bond and its coupons, or the registered bond so destroyed, upon receipt of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond, and upon receipt also of satisfactory indemnity.

SEC. 7. Nothing in this article, or in any other article of this indenture, or in the bonds issued hereunder, expressed or implied, is intended, or shall be construed, to give to any person or corporation, other than the parties hereto and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or under any covenant, condition, or provision herein contained; all its covenants, conditions, and provisions being intended to be, and being, for the sole and exclusive benefit of the parties hereto and of the holders of the bonds hereby secured.

193 ARTICLE TWO.

The railroad company covenants as follows:

SECTION 1. Duly and punctually it will pay the principal and interest of every bond issued and secured hereunder at the dates and the place and in the manner mentioned in such bonds, or in the coupons thereto belonging, without deduction from either principal or interest, for any taxes imposed by the United States or any State or county or municipality thereof, which the railroad company may be required to pay or to retain therefrom under or by reason of any present or future law. The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and when paid such coupons shall

forthwith be canceled. The principal of each coupon bond shall be payable only upon presentation and surrender of the bond. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof. The principal of each registered bond without coupons shall be payable to the person registered as holder of such bond at the time of payment, but only upon presentation and surrender of such bond.

At all times until the payment of the principal of the bonds secured by this indenture, the railroad company will keep an office or agency in the city of New York where bonds and coupons may be presented for payment and where notices or demands in respect of said bonds and coupons may be served, and from time to time the railroad company will give written notice to the trustee of the place of such office or agency. In case the railroad company shall fail to do so, presentation and demand may be made and notices served at the office of the trustee in the city of New York.

194 SEC. 2. Whenever demanded by the trustee, the railroad company will do, execute, acknowledge, and deliver, or will cause to be done, executed, acknowledged, and delivered, all such further acts, deeds, transfers, and assurances for the better assuring, conveying, and confirming unto the trustee all and singular the premises and property hereby assigned, pledged, or mortgaged, or intended so to be, or which the railroad company herein has covenanted and agreed hereafter to assign, pledge, or mortgage, as the trustee shall reasonably require for better accomplishing the provisions and purposes of this indenture and for securing the payment of the principal and interest of the bonds intended to be secured hereby.

SEC. 3. The railroad company, at an office or agency to be maintained by it in the city of New York, will keep a register or registers for the registration and transfer of bonds issued hereunder, in which it will register, subject to such reasonable regulations as it may prescribe, bonds without coupons, and upon presentation thereof for such purpose any coupon bonds issued hereunder. Such register, at all reasonable times, shall be open to the inspection of the trustee.

Upon presentation to the railroad company, at the place where such register shall be kept, of any such registered coupon bond, accompanied by delivery of a written instrument of transfer in a form approved by the railroad company, executed by the registered holder, such bond shall be transferred upon such register, and such transfer shall be noted by the railroad company upon such bond. The registered holder of any such registered coupon bond also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond, when due, shall be payable to the per-

195 son presenting the bond; but any such coupon bond registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from

time to time as desired, and each registration of a coupon bond shall be noted by the railroad company on the bond.

Registration of any coupon bond, however, shall not restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely, and shall remain payable to bearer.

Any registered bond without coupons may be transferred at said office or agency by surrender of such bond to the railway company for cancellation, accompanied by the delivery of a written instrument of transfer in a form approved by the railroad company, duly executed by the registered holder for the time being, and by payment of any charge imposed under section 5 of article one hereof; and thereupon a new registered bond, or new registered bonds, for an equivalent aggregate principal sum, shall be issued to the transferee or transferees, as provided in said section 4 of article one.

SEC. 4. The railroad company will not voluntarily create, or suffer to be created, any debt, lien, or charge which would be prior to the lien of these presents upon any property which shall have become subject to this indenture, or any part thereof, or upon the income thereof; and, within three months after the same shall accrue, it will pay, or will cause to be discharged, or will make adequate provision to satisfy and discharge, all lawful claims and demands of mechanics, laborers, or others which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon such property
196 or any part thereof, or the income thereof; and if any company (other than the New York, Susquehanna and Western Railroad Company), of whose capital stock the greater part shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder, shall voluntarily create, or shall suffer to be created (except as in this indenture expressly permitted), any new lien or charge upon its property or income, or shall create, or shall suffer to be created, any new indebtedness other than indebtedness to the railroad company, or indebtedness for the current expenses of such company during a period not exceeding three months, then it (the railroad company) will acquire such lien, charge, or indebtedness and cause the same to be vested in the trustee, or will cause the same to be paid or discharged, or will make adequate provision for the satisfaction or discharge thereof; provided that nothing in this section contained shall require the railroad company to acquire, or cause to be paid or discharged or make provision for, any such debt, lien, or charge so long as the validity thereof in good faith shall be contested.

SEC. 5. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges (the lien of which would be prior to the lien hereof) lawfully imposed upon the stocks, bonds, and other property pledged or mortgaged hereunder, or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments, and governmental charges lawfully imposed upon the lien or interest under this indenture of the trustee or

of the holders of the bonds hereby secured in respect of such stocks, bonds, and other property, so that the lien and priority of this indenture shall be fully preserved at the cost of the railroad company without expense to the trustee or the bondholders; and if any company of whose capital stock the greater part shall have been acquired and pledged hereunder, at any time while a greater part of the capital stock of such company shall be pledged hereunder, shall fail
197 to pay all taxes, assessments, and charges lawfully imposed upon he property of such company, or upon the income and profits thereof, then it, the railroad company, either will pay the same, or will acquire and will transfer to the trustee the claim therefor, or will make adequate provision for the satisfaction or discharge thereof; provided, however, that nothing in this section contained shall require the railroad company to pay, acquire, or make provision for any such tax, assessment, or charge so long as in good faith the railroad company shall contest the validity thereof.

SEC. 6. Except as in this indenture expressly authorized, the railroad company will not, by affirmative vote or consent, or by abstaining from voting, sanction or permit any increase of the capital stock of any company of whose capital stock the greater part shall be subject to this indenture, or the issue or the guaranty of any new bonds by any such company, or the creation of any new indebtedness of any such company (except current operating accounts for a period not at any date exceeding six months prior thereto), or the creation of any new mortgage or other lien upon the railroad or property of any such company, unless simultaneously there shall be effective provision that such new indebtedness, and the evidences thereof and such new bonds issued or guaranteed, and such new mortgage or other lien, and all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously pledged hereunder) forthwith, upon the issue or creation thereof, shall be transferred to or pledged with the trustee, by it to be held subject to all the trusts of this indenture; and all such additional stock shall be fully paid and non-assessable.

198 Except as in this indenture expressly authorized, the railroad company will not, by affirmative vote or consent, or by abstaining from voting sanction or permit any company, of whose capital stock the greater part shall be subject to this indenture, to sell or otherwise to dispose of, any mine, colliery, railroad, or bridge belonging to such company, unless the operation thereof be abandoned, or any property required for such operation, or to lease the same (unless such lease be upon the express condition that it shall terminate at the election of the trustee in case any default shall be made and shall continue as provided in section 2 of article four hereof), except to the railroad company or to some other company of whose capital stock not less than ninety per cent shall then be held by the railroad company and be pledged with the trustee hereunder.

SEC. 7. Any and all claims or indebtedness, which the railroad company hereafter may acquire against any other company, of whose

capital stock the greater part shall have been pledged or assigned to the trustee hereunder, shall (subject to the provisions in respect thereof in this indenture contained) be and become subject to the lien of this indenture, and, if and when requested in writing by the trustee, the railroad company will execute to the trustee appropriate assignments thereof.

SEC. 8. The railroad company will not issue, negotiate, sell, or dispose of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained; and in issuing, selling, negotiating, or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, only to and for the purposes herein prescribed, and to and for no other or different purpose.

199 SEC. 9. In each and every year after the year 1901 during the month of May the railroad company will deliver to the trustee, and also to the copartnership firm of J. P. Morgan & Co., bankers in the city of New York, as sinking fund trustees hereunder, a statement in writing, under its corporate seal, showing the total amount of coal sold and delivered during the preceding calendar year from the mines of the Pennsylvania Coal Company; and simultaneously it will pay to the said copartnership firm of J. P. Morgan & Co. as sinking fund trustees hereunder, a sum equal to ten cents for every ton of coal so sold and delivered. The moneys so received, together with all accumulations of interest thereon, as hereinafter provided, shall be appropriated to, and shall constitute, a sinking fund, as additional security for the retirement of every bond of this issue at or before the stated maturity thereof.

The moneys paid or coming into the sinking fund shall by the said firm of J. P. Morgan & Co., sinking fund trustees, be held as bankers; and from time to time the said sinking fund, together with any accumulations of interest thereon, shall by them be invested in bonds hereby secured, by the purchase thereof in such manner as to them shall seem best, and at such prices as they shall deem best, not exceeding par and accrued interest, with five per cent premium added to the principal.

To the extent that, in the opinion of the sinking fund trustees, bonds hereby secured cannot be purchased on said terms, the sinking fund trustees may and shall proceed to draw and to designate by lot, bonds hereby secured to an aggregate amount sufficient at the valuations above prescribed to exhaust the net moneys paid by the railroad company under the provisions of this section, and all accumulations of interest thereon and then in possession of the sinking fund trustees and available for the redemption of the bonds so designated.

200 The numbers of all bonds so designated and drawn shall be published as directed by the sinking fund trustees, twice in each week for three successive weeks in the month of January or the month of July, in two or more newspapers published in the city of

New York, with a notice that upon presentation thereof to the sinking fund trustees, every such bond will be paid at par, together with a premium of five per cent thereof and all interest accrued thereon upon the first day of the following month of February or of August, as the case may be; and after such day so designated no interest shall thereafter accrue or be payable upon, or in respect of, any bond so designated and notified, nor shall any coupon representing any such subsequently accruing interest be of any force or effect. But, to the extent of any moneys at any time thereafter in their possession, upon receipt of any such bond so designated and notified, and not presented before the day so designated, together with all coupons (if any) belonging thereto for interest accruing after such designated day, the sinking fund trustees may receive the same, and may pay therefor a sum equal to par together with a premium of five per cent thereof and all interest accrued thereon up to the date so designated.

All of the bonds hereby secured, which shall be called or purchased, as aforesaid, shall, as soon as received by the sinking fund trustees, be conspicuously and indelibly stamped on the face thereof, as "Received for the sinking fund, and no longer negotiable or transferable," and the date of the receipt thereof by the sinking fund trustees shall also be plainly noted thereon; and the coupons thereto belonging shall be defaced or canceled by perforations or punctures through the name of the treasurer; or the sinking fund trustees may exchange any coupon bond for a registered bond or bonds without coupons, for the like aggregate principal sum, as permitted by section 5 of article one of this indenture; and, in case of such exchange, every such registered bond so received shall be stamped "Received for the sinking fund and no longer transferable."

201 All coupon bonds or registered bonds so received by the sinking fund trustees shall be held by them for the sinking fund. All of the bonds hereby secured, which shall come into or be received for the sinking fund, shall remain in force as valid obligations, as an investment of and for the sinking fund, but for no other purpose; and the semi-annual interest thereon, as the same shall mature, shall be payable, and shall continue to be paid by the railroad company to the sinking fund trustees, in the same manner and at the same times as such payments of interest would be made if the said bonds were held and owned by any other corporation or person, and the amount of such interest shall be added to and deposited and shall be applied as a part of the sinking fund, in the manner, and with the limitations hereinbefore provided in respect of the deposit and investment of other moneys paid or coming into the sinking fund and the accumulations thereof.

When all of the bonds secured by this indenture shall have been paid, or shall have been called or designated for acquisition for the sinking fund, as hereinbefore provided, all of the said bonds that shall have been acquired or held for the sinking fund shall by the sinking fund trustees be canceled and delivered to the railroad company, to-

gether with all coupons (if any) thereto belonging; and the sinking fund trustees shall also pay over and deliver to the railroad company all moneys and securities for money then in or belonging to the sinking fund; but not without making ample provision, or taking adequate security, for the payment of the principal at or before the maturity of any of the said bonds that shall have been called for the sinking fund, as hereinbefore provided, and shall not have been presented and delivered in pursuance of such call.

No registered bond without coupons shall be drawn so long as any coupon bond is outstanding and unpaid.

As sinking fund trustees, J. P. Morgan & Co. shall act as a
202 copartnership. Notwithstanding any change in said firm, J. P. Morgan & Co., as from time to time constituted, shall continue to be sinking fund trustees, with all the powers, right, and title vested hereunder in the sinking fund trustees. But in case of any change in said firm, the railroad company and the trustee, by an instrument in writing under the corporate seals of the trustee and of the railroad company, may appoint to be sinking fund trustee in place and in lieu of J. P. Morgan & Co. some trust company in good standing, doing business in the city of New York and having a capital and surplus aggregating at least $1,000,000. Thereupon the firm of J. P. Morgan & Co., as then constituted, shall execute and deliver an instrument transferring to such sinking fund trustee all of the estates, properties, rights, powers, and duties of the said J. P. Morgan & Co. as sinking fund trustees, and shall duly transfer and deliver to the new sinking fund trustee so appointed in their place all bonds and other property and moneys held by them as such sinking fund trustees after deducting therefrom their reasonable costs and charges then remaining unpaid. Without any further act, deed, or conveyance, such new sinking fund trustee forthwith shall become and be vested with all the properties, rights, powers, trusts, duties, and obligations of J. P. Morgan & Co., as sinking fund trustees hereunder, with like effect as if originally named herein as sinking fund trustee.

Neither J. P. Morgan & Co., nor any successor, as sinking fund trustees, shall be answerable for the default or misconduct of any agent or attorney appointed by them in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, or for anything whatever in connection with such sinking fund except wilfull misconduct and gross negligence. The sinking fund trustees shall be entitled to a reasonable compensation payable primarily by the railroad company and secondarily out of the sinking fund.

203 ARTICLE THREE.

SECTION 1. The trustee shall be authorized to cause to be registered in its name as trustee hereunder any and all coupon bonds pledged with it hereunder, or which at any time hereafter may be pledged with it under any of the provisions of this indenture, or it may cause the same to be exchanged for registered bonds without coupons of

any denomination, or it may cause any such bonds to be stamped "Nonnegotiable. Held in trust under the collateral trust indenture bearing date February 1, 1901, executed by Erie Railroad Company to the Mercantile Trust Company, as trustee."

The trustee shall cause to be transferred into its name, as trustee hereunder, all registered bonds which shall have been delivered and assigned to it as security hereunder. The trustee at any time may transfer into its name, as trustee hereunder, all or any shares of stock, the certificates for which shall have been pledged with it hereunder.

The trustee may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any company the greater part of whose shares shall have been pledged hereunder, and for such purposes, from time to time, it may sell, assign, transfer, and deliver so many shares of the stock of the several companies as may be necessary to qualify persons to act as directors of or in any other official relation to said companies; provided, however, that under this provision no transfer shall be made which shall so reduce the amount of stock in any company held by the trustee as to render it less than a controlling interest in such stock; and in every case the trustee may make such arrangements as it shall deem necessary for the protection of the trust hereunder.

SEC. 2. Unless and until there shall be some continuing default (1) in the payment of any interest on any bond or bonds secured by
204 this indenture and such default shall have continued for a period of ninety days, or (2) in the payment of the principal of any bond hereby secured when the same shall have become payable, or (3) in the due observance or performance of any other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for a period of six months after written notice thereof shall have been given by the trustee to the railroad company, (a) the trustee (except upon the request or with the assent of the railroad company) shall not enforce the payment of or collect the principal or interest of any bonds or of any other claims or indebtedness now or hereafter subject to this indenture, whether at or before or after the maturity of such bonds or contract obligations or other claims or indebtedness, and shall not enforce any provision of the mortgages, trust deeds, or other instruments under which such bonds or other obligations were issued or by which the same are secured, and (b) the railroad company shall be entitled to receive all interest paid in respect of any such bonds or obligations, and the dividends on all shares of stock which shall be subject to this indenture, although the same shall have been transferred to the trustee; (c) from time to time (subject to the covenants in respect thereof in this section contained), upon the request of the Railroad Company on a date not more than sixty days prior to the maturity of any coupons held by the trustee for such interest, the trustee shall deliver such coupons to the Railroad Company in order that the railroad company may receive payment thereof for its own use, or may cause the same to be canceled, and upon request of the Railroad Company on a date not more than sixty days prior to the maturity of any interest or dividends, the trustee shall deliver to the railroad company suitable orders in favor of the railroad company, or its nominee, for the payment of such in-

terest and dividends upon any bonds or shares held by the trustee, and the railroad company may collect such coupons, interest
205 and dividends, but not by any proceeding which the trustee shall deem to be prejudicial to the trusts hereunder, and the trustee at once shall pay over to the railroad company any such interest and dividends which may be collected or be received by it, and (d) the railroad company, for its own use, shall be entitled to demand, collect, and receive and may release and discharge the principal and interest of any claims and indebtedness subjected to the lien of this indenture under section 7 of article two hereof, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose.

Provided, however, and hereby it is declared and agreed that, except as in this indenture otherwise expressly provided, (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to the railroad company, any principal of any bond pledged or assigned to the trustee hereunder; (2) the railroad company shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond, or any principal or interest of any such other obligation, claim or indebtedness, which shall have been collected or paid out of the proceeds of any sale of the property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, obligations, claims or indebtedness in case of a dissolution or liquidation of such company, it being the intention that the railroad company shall be entitled to receive payments made only out of the rents, revenues, income or proceeds of operation of such properties; (3) the railroad company shall not sell, assign or transfer any such coupon, or right to interest or dividends, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or interest, or any such other claims or indebtedness, by legal proceeding or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee
206 shall deem prejudicial to the trust hereunder; and, (5) until actually paid, released or discharged every such coupon, or right to interest or dividends, and such other claims and indebtedness, shall remain subject to the lien of this indenture.

If any such coupon, claim or indebtedness shall not be paid or satisfied within sixty days after delivery thereof to the railroad company hereunder, the railroad company shall return the same to the trustee; and in case of the payment or satisfaction of any such coupon, claim or indebtedness delivered by the trustee to the railroad company hereunder, the railroad company, upon demand of the trustee, shall furnish satisfactory evidence of such payment or satisfaction.

SEC. 3. In case any sum shall be paid on account of the principal of any bonds or of any obligations held by the trustee hereunder, or

in case any sum shall be paid on account of the interest on any such bonds or obligations out of the proceeds of a sale of the property covered by a mortgage or trust deed securing such bonds or obligations, or in case, upon the dissolution or liquidation of any company, any sum shall be paid upon any shares of stock of such company pledged hereunder or upon any such claims against or indebtedness of any such company held by the trustee, then, in any such case any such sum, unless applied on account of the purchase price of property purchased pursuant to section 5 of this article, shall be received by the trustee and shall be paid over by the trustee to the railroad company to reimburse it for expenditures by it made for any one or more of the purposes for which bonds reserved under section 4 of article one hereof or their proceeds may be used, upon certificates of such expenditures, signed by the president or a vice-president, and by the comptroller, or auditor, or treasurer, of the railroad company.

SEC. 4. Unless and until there shall be some continuing default (1) in the payment of any interest on any bond or bonds secured by this indenture and such default shall have continued
207 for a period of ninety days; or (2) in the payment of the principal of any bond hereby secured when the same shall have become payable, or (3) in the due observance or performance of any other covenant or condition in this indenture, required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for a period of six months after written notice thereof shall have been given by the trustee to the railroad company, the railroad company shall have the right to vote upon all shares of stock subject to this indenture for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such shares were not subject hereto; and from time to time, upon demand of the president of the railroad company, the trustee, forthwith, shall execute and deliver to the railroad company, or to its nominees, suitable powers of attorney or proxies to vote upon any shares of stock which shall have been transferred to the name of the trustee.

SEC. 5. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations which shall have been delivered to and held by the trustee hereunder, then in any such case, if the trustee shall hold more than ninety per cent in amount of the entire issue of such bonds or obligations in default, upon the written request of the railroad company, it shall, and in other cases, upon such written request, it may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose or enforce the mortgage, or trust, or charge, by which such bonds or obligations in default are secured. In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default in the payment of interest shall have continued for a period of ninety

days, then the trustee, in its discretion, may institute such proceedings without such written request.

208 In case, at any time, any company of whose capital stock the greater part shall be held by the trustee hereunder shall be dissolved or liquidated; or in case all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale; or in case any property covered by a mortgage securing any bonds, or subject to any charge or trust for the payment of any other obligations held by the trustee hereunder, shall be sold upon foreclosure of such mortgage, or by enforcement of such charge of trust; then and in every such case (if the property of such company, or the property sold, can be acquired by crediting on the bonds, obligations, claims, indebtedness, or shares of stock of such company, held by the trustee hereunder, any sum accruing or to be received thereon out of the proceeds of such property, and paying not more than ten per cent of the price of such property in cash) the trustee, in its discretion, may, but, if by the railroad company requested in writing and provided with the amount of cash necessary therefor (whether such amount be more or be less than ten per cent of the price of such property), the trustee shall purchase, or shall cause to be purchased, or shall permit the railroad company to purchase such property, either in the name or on behalf of the trustee or of the railroad company, or by purchasing trustees, and shall use, or shall permit the railroad company to use such bonds, obligations, claims, indebtedness, and stock, so far as may be, to make payment for such property. In case of such purchase the trustee shall take such steps as it may deem proper to cause such property to be vested either in the railroad company, subject to the lien of this indenture, or in some other corporation organized or to be organized, with power to acquire and manage such property, provided that all the outstanding bonds and shares of capital stock of such other corporation (excepting the number of shares required to qualify directors) shall by the trustee be acquired on behalf of the railroad company and be held under this indenture.

209 With the consent of the railroad company at any time, the trustee may take such proceedings as in its discretion it shall deem desirable to protect its interests hereunder in respect of any bonds, obligations, or stock subject to the lien hereof, and for that purpose it may join in any plan of reorganization in respect of any such bonds, obligations, or stocks, and may accept new securities issued in exchange therefore under such plan. In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default shall have continued for the period of ninety days, the trustee shall be entitled to take such proceedings without the consent of the railroad company.

The railroad company covenants that, forthwith, on demand of the trustee, it, the railroad company, will pay or will make satisfactory provision for all expenditures to be incurred by the trustee under any of the provisions of this section, including all expenditures nec-

essary to obtain and to perfect the ownership and title to any property which, pursuant to the provisions of this section, the trustees shall purchase or shall cause to be purchased; and in case the railroad company shall fail so to do, then, without impairment of or prejudice to any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien prior to that under this indenture upon the bonds, obligations, claims, indebtedness, or stock in respect of which such advances shall have been made, and upon the proceeds thereof and upon any property acquired by means of such bonds, obligations, claims, indebtedness, or stock.

In case the trustee shall not purchase or cause to be purchased
210 the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds, obligations, or stock, then the trustee shall receive any portion of the proceeds of the sale accruing on the bonds, obligations, and stock by it held hereunder, and from time to time such proceeds shall be paid over to the railroad company to reimburse it for expenditures which shall have been made by it for any purpose for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures signed by the president or a vice-president and by the comptroller or auditor or treasurer of the railroad company.

SEC. 6. Anything in this indenture to the contrary notwithstanding, any company of whose shares of capital stock the larger part shall be held by the trustee hereunder may be merged or consolidated with, or all or any part of the property of any such company may be sold to, the railroad company, or with or to any other company of whose capital stock at least ninety per cent in amount shall then be held by the trustee hereunder;

Provided, however, (1) that in case of a merger or consolidation with or sale or conveyance to the railroad company the property of such company, or the property sold or conveyed, shall become and be subject to the lien of this indenture, free from any prior charge except to secure bonds then held by the trustees or by the trust company hereunder, and shall be vested in the trustees; and (2) that in case of a merger or consolidation with or sale or conveyance to any company other than the railroad company, all the shares of capital stock (except the number of shares required to qualify directors), and all the bonded indebtedness and other obligations of such consolidated company or company into which such other company shall have been merged (except current operating liabilities), shall continue to be held by the trustee, notwithstanding such merger, consolida-
211 tion, sale, or conveyance. The trustee may make any exchange, substitution, cancellation, or surrender of securities required for the purposes or in accomplishment of any such merger or consolidation; and the trustee may receive the opinion of any counsel

approved by it as to the legal effect of any such merger or consolidation, and as to the steps necessary to be taken to consummate the same, and as to any other matter under this section; and such opinion shall be full protection to the trustee for any action by it taken pursuant thereto.

SEC. 7. At any time in its discretion the trustee may, and, if requested in writing by the railroad company, the trustee shall, consent to the extension or renewal of any bonds or obligations now held or which hereafter shall be held by the trustee hereunder; provided that the mortgage and lien securing such bonds or obligations shall continue unimpaired notwit'standing such extension. The trustee may receive the opinion of any counsel approved by it as conclusive evidence that any such extension is in compliance with the provisions of this section.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond which in any way, at or after maturity, shall have been transferred or pledged separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of
212 any interest on any bond or bonds secured by this indenture, and any such default shall continue for a period of ninety days, or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured, or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of six months after written notice thereof shall be given to the railroad company by the trustee or by the holders of five per cent in amount of the bonds hereby secured, then and in every such case the trustee, by any officer, attorney, or agent appointed by it therefor shall be entitled to vote on all shares of stock then held by the trustee hereunder, and shall be entitled to receive and collect all dividends and all interest moneys maturing or payable upon any and all stocks and bonds then held by the trustee hereunder, and the trustee shall be entitled, by its attorneys or agents, to enter into and upon all or any property and premises, rights and interests conveyed or mortgaged to the trustee hereunder, and may exclude the railroad company, its agents and servants, wholly therefrom, and, having and holding the same, may use, operate, manage, and control the same and conduct the business thereof by its superintendents, managers, receivers, agents, and servants to the best advantage of the holders of the bonds hereby secured; and, at the expense of the trust estate, the trustee may administer and manage the same as it may deem to the

best advantage of the holders of said bonds. After deducting all expenses incurred under this section and any other expenses of the trust hereunder, the trustee shall apply all moneys collected or received by it hereunder as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, with interest
213 thereon at the rate of four per cent per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference; and

In case the principal of the bonds hereby secured shall have become due, by declaration or otherwise, first to the payment of the accrued interest (with interest on the overdue installments thereof at the rate of four per cent per annum) in the order of the maturity of the installments, and next to the payment of the principal of all bonds hereby secured; in every instance such payments to be made ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify the provisions of section 1 of this article four, but are subject thereto.

SEC. 3. In case default shall be made in the payment of any interest on any bond or bonds hereby secured, and any such default shall continue for a period of six months, then and in every case of such continuing default, the holders of a majority in amount of the bonds hereby secured then outstanding, by notice in writing delivered to the railroad company and to the trustee, may declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon all such bonds, with interest at the rate of four per cent per annum on overdue installments of interest, shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby secured then out-
214 standing, by written notice to the railroad company and to the trustee, may rescind and annul such declaration and its consequences; but no such rescission and annulment shall extend to, or shall effect any subsequent default, or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the trustee, then and in every such case the railroad company and the trustee shall be restored respectively to their several

positions and rights hereunder in respect of the mortgaged premises, and the shares of stock and the bonds and other property herein pledged or agreed to be pledged; and all rights, remedies, and powers of the trustee shall continue as though no such proceedings had been taken.

SEC. 4. In case (1) default shall be made in the payment of any interest on any bond at any time issued under and secured by this indenture, and any such default shall continue for a period of ninety days; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of six months after written notice thereof from the trustee; then, and in each and every such case of default, with or without entry, personally or by attorney, in its discretion, (a) the trustee may sell to the highest and best bidder all and singular the stocks, bonds, and other property which then shall be held by the trustee, or in any manner shall be subject to this indenture, including any real and personal property, franchises, and rights of
215 any kind, and all right, title and interest, claim and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of section 6 of this article four, in which case such sale may be made in parcels as in said section provided, which sale or sales shall be made at public auction at such place in the city of New York, in the State of New York, or at such other place or places, and at such time or times, and upon such terms, as the trustee may fix and briefly specify in the notice or notices of sale to be given, as herein provided; or, (b) the trustee may proceed to protect and enforce its rights and rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder.

SEC. 5. Upon the written request of the holders of twent'-five per cent in amount of the bonds hereby secured, in case of any such continuing default, it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit, or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured; but anything in this indenture to the contrary notwithstanding, the holders of seventy-

five per cent in amount of the bonds hereby secured and then outstanding, from time to time shall have the right to direct and
216 control the method and place of conducting any proceedings for any sale of the premises subject to the lien of this indenture or for the foreclosure hereof, or for a receiver or any other proceedings hereunder.

SEC. 6. In the event of any sale hereunder, whether under the powers of sale or by virtue of judicial proceedings or of some judgment or decree of foreclosure and sale, the whole of the property held by the trustee, or in any manner subject to this indenture, shall be sold in one parcel and as an entirety, unless the holders of a majority in amount of the bonds hereby secured then outstanding shall in writing request the trustee to cause said premises to be sold in parcels, in which case the sale or sales shall be made in such parcels and at such times and places as may be specified in such request, or unless such sale as an entirety shall be impracticable by reason of some statute or other cause. This provision shall bind the parties hereto and the holders of the bonds and the coupons hereby secured.

SEC. 7. Notice of any sale pursuant to any provision of this indenture shall state the time and place or the times and places when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be given sufficiently if published once in each week for four successive weeks prior to such sale in a newspaper published in New York, N. Y.

217 SEC. 8. From time to time the trustee may adjourn any sale by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales, and in such event, without further notice or publication, the trustee may make such sale at the time and place to which the same shall be so adjourned.

SEC. 9. Upon the completion of any sale or sales under this indenture the trustee shall execute and deliver to the accepted purchaser or purchasers good and sufficient assignments, transfers, and conveyances of the stocks, bonds, and other property sold, and shall deliver to such purchaser or purchasers all bonds and obligations and the certificates for all shares of stock by it held hereunder which shall have been sold to such purchaser or purchasers. The trustee and its successors hereby are appointed the true and lawful attorney or attorneys irrevocable of the railroad company, in its name and stead to make all necessary assignments, transfers, and conveyances of shares of stock or bonds or other property thus sold; and for that purpose it and they may execute all necessary acts of assignment and transfer and may substitute one or more persons with like power, the railroad company hereby ratifying and confirming all that its said attorney or attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred or under and by virtue of judicial proceedings, shall operate to divest all

right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company of, in, and to the property sold, and shall be a perpetual bar, both at law and in equity, against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises sold, or any part thereof, from, through, or under the railroad company, its successors or assigns.

218 SEC. 10. The receipt of the trustee shall be a sufficient discharge to any purchaser of the property or any part thereof sold as aforesaid for the purchase money, and no such purchaser or his representatives, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or shall in any manner whatsoever be answerable for any loss, misapplication, or non-application of any such purchase money, or any part thereof, or shall be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sales.

SEC. 11. In case of such sale, whether made under the power of sale hereby granted or pursuant to judicial proceedings, the whole of the principal sums of the bonds hereby secured, if not previously due, shall at once become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 12. The purchase money, proceeds, or avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, together with any other sums which then may be held by the trustee under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances made or incurred by the trustee under this indenture and to the payment of all taxes, assessments, or liens prior to the lien of these presents, except any taxes, assessments, or other superior liens to which such sales shall have been made subject;

219 Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of four per cent per annum on the overdue installments of interest, and, in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, ratably, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, subject, however, to the provisions of section 1 of this article four; and

Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 13. Upon any such sale by the trustee or pursuant to judicial proceedings, any purchaser, in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any bonds, and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons in order that there may be credited thereon the sums applicable to the payment thereof under section 12 of this article; and such purchaser thereupon shall be credited, on account of such purchase price payable by him, with the sums so applicable to the payment of, and credited on, the bonds and coupons so presented; and, at any such sale, any bondholders may bid for and purchase such property, and may make payment therefor as aforesaid, and, in compliance with the terms of sale, may hold, retain and dispose of such property without further accountability.

220 SEC. 14. The railroad company covenants that (1) in case default shall be made in the payment of any interest on any bonds at any time outstanding and secured by this indenture, and such default shall continue for a period of six months, or (2) in case default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds, or by declaration as authorized by this indenture, or upon a sale of the mortgaged premises as hereinbefore provided, then, upon demand of the trustee, the railroad company will pay to the trustee, for the benefit of the holders of the bonds and coupons hereby secured, then outstanding, the whole amount which then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest at the rate of four per cent per annum upon the overdue principal and installments of interest; and in case the railroad company shall fail to pay the same forthwith upon such demand, the trustee in its own name, and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The trustee shall be entitled to recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture upon the mortgaged and pledged premises, and the right of the trustee to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises, and of the application of the proceeds of sale to the payment of the mortgage debt, the trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued

221 hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgage debt remaining unpaid, with interest. No recovery of any such judgment by the trustee, no levy of any execution upon any such judgment upon property subject to the lien of this

indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the mortgaged premises or any part thereof, or any rights, powers, or remedies of the trustee hereunder, or any lien, rights, powers or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies of the trustee and of the bondholders shall continue unimpaired as before.

Any moneys thus collected by the trustee under this section shall be applied by the trustee towards payment of such amounts then due and payable upon such bonds and coupons and in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind, upon presentation of the respective bonds and coupons and stamping such payments thereon, if partly paid, or upon cancellation thereof, if paid in full.

SEC. 15. The railroad company will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law, now or at any time hereafter in force in any locality where the mortgaged premises or pledged property, or any part of either, may or shall be situate, nor will it claim, take, or insist on, any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the mortgaged premises or pledged property, or any part thereof, prior to any sale, or sales, thereof to be made pursuant to any provision herein contained, or to the decree of any court of competent jurisdiction, nor after any such sale or sales will it claim or exercise any right,

conferred by any statute enacted by any State, or otherwise, to
222 redeem the property so sold or any part thereof, and it hereby
expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

SEC. 16. Upon filing a bill in equity, or upon beginning any other judicial proceedings, to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein conferred, and provided to be exercised by the trustee upon the occurrence and continuance of default, as hereinbefore provided; and, as matter of right, the trustee shall be entitled to the appointment of a receiver of the premises subject to the lien of this indenture, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but, notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledgee, to continue to retain possession and control of the stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 17. At any time hereafter before full payment of the bonds secured hereby and whenever it shall deem expedient for the better protection or security of such bonds (although then there shall be no

default entitling the trustee to exercise the rights and powers conferred by section 2 of this article four of this indenture) the railroad company, with the consent of the trustee, may authorize the trustee for any period, fixed or indefinite, to vote upon all the shares of stock then held by the trustee hereunder, and to collect the dividends thereon and the interest upon any bonds or other obligations then
223 held by the trustee hereunder, and to enter into full possession of the whole or any part of the property and premises hereby mortgaged or conveyed or intended so to be. In such event the trustee shall have, and may exercise, the same rights and powers, and shall apply the moneys by it collected or received, in the manner provided in said section 2 of this article four in case of exercise by the trustee of the rights and powers thereby conferred upon a default continuing as therein set forth; but no action under this section shall prejudice or impair the right of the trustee at any time subsequently to exercise, or continue to exercise, the rights and powers conferred by said section 2 of this article four, or by any other provision of this indenture, when entitled thereto.

SEC. 18. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the trustee written notice of such default and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured, then outstanding, shall have made written request upon the trustee, and shall have afforded to it a reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name; nor unless, also, they shall have offered to the trustee adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts of this indenture, and to any action or cause of action for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds
224 and coupons shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided, and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 19. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative,

and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 20. No delay or omission of the trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default, continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default or an acquiescence therein; and every power and remedy given by this article to the trustee or to the bondholders may be exercised from time to time and as often as may be deemed expedient by the trustee or by the bondholders.

ARTICLE FIVE.

No recourse under or upon any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly
225 or through the railroad company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly understood that this mortgage and the obligations hereby secured are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, stockholders, officers, or directors of the railroad company, or of any successor corporation, or any of them, because of the creation of the indebtedness hereby authorized, or under or by reason of the obligations, covenants, or agreements contained in this indenture, or in any of the bonds or coupons hereby secured or implied therefrom; and that any and all personal liability of every name and nature, either in common law or in equity, or by statute, of, and any all rights and claims against every such stockholder, officer, or director, are hereby expressly waived as a condition of and as a consideration for the execution of this indenture and the issue of such bonds and coupons.

ARTICLE SIX.

SECTION 1. Any request or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent instruments of similar tenor and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee with regard to due action taken by it under such request or other instrument, if made in the following manner:

The fact and date of the execution by any person of any such
226 request or other instrument or writing may be proved by the

certificate of any notary public or other officer authorized to take acknowledgements of deeds to be recorded in New York, that the person whose name was subscribed to such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The amount of coupon bonds transferable by delivery held by any person executing any such request or other instrument as a bondholder and the amounts and issue numbers of the bonds held by such persons and the date of his holding the same may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), if such certificate shall be deemed by the trustee to be satisfactory, showing therein that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

SEC. 2. The railroad company and the trustee may deem and treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond and coupon, as the case may be, for the purpose of receiving payment thereof and for all other purposes; and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

The railroad company and the trustee may deem and treat the person in whose name any registered bond without coupons issued hereunder shall be registered upon the books of the railroad company, as hereinbefore provided, as the absolute owner of such bond for the purpose of receiving payment of, or on account of, the principal and interest of such bond, and for all other purposes, and may
227 deem and treat the person in whose name any coupon bond shall be so registered as the absolute owner thereof for the purpose of receiving payment of, or on account of, the principal thereof, and for all other purposes except to receive payment of interest represented by outstanding coupons; and all such payments so made to any such registered holder for the time being, or upon his order, shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

ARTICLE SEVEN.

In case any real property, rolling stock, machinery, or other tangible property (but not shares of stock or certificates therefor, bonds, certificates of indebtedness, or other securities) shall be conveyed or mortgaged to the trustee hereunder, then from time to time, upon the written request of the railroad company approved by resolution of its board of directors or executive committee, the trustee shall release from the lien and operation of this indenture any of such real property, rolling stock, machinery, or other tangible property described in

such written request; provided, that there shall be delivered to the trustee together with such written request a certified copy of the resolution approving thereof, and a certificate signed by the president or a vice-president of the railroad company, stating (a) that the railroad company has sold or exchanged or has agreed to sell or exchange, such property, and the price or consideration to be received therefor by the railroad company, in cash or other property, and that such price or consideration in his opinion is equal to the full value of such property; and (b) that it is no longer necessary or expedient to retain the property described in such request for use in carrying on the business of the railroad company or in connection with the maintenance or operation of any mine, colliery, railway, or property belonging to any
228 of the companies of whose capital stock the greater part shall then be held by the trustee hereunder.

The railroad company covenants and agrees that it will set aside, separate, and apart from all other property and funds of the railroad company, the price or consideration by it received for any property which may be released under the provisions of this article, and that the same shall be applied, but only with the approval of the trustee, for some one or more of the purposes for which bonds or their proceeds reserved under section 3 of article one of this indenture may be applied.

It is expressly understood and declared that nothing in this article contained shall authorize or permit the release by the trustee of any shares of stock or the certificates therefor, or any bonds or other evidences of indebtedness or securities which shall be held by the trustee hereunder, but that the provisions of this article shall apply only to real property, rolling stock, machinery, or other tangible property which, pursuant to any provision of this indenture, shall have been conveyed or assigned to the trustee by way of mortgage.

Article eight.

Section 1. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; or for anything whatever in connection with this trust, except willful misconduct or gross negligence. The trustee shall not be personally liable for any debts contracted by it, or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts during any period wherein the trustee shall manage the trust property or premises. The trustee shall not be under any
229 obligation to take any action towards the execution or enforcement of the trusts hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at

least five per cent in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent in amount of the bonds hereby secured, then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but the foregoing provisions of this section are intended only for the protection of the trustee, and shall not be construed to limit or affect any discretion or power by any provision of this indenture given to the trustee to determine whether or not it shall take action in respect of any default, or any power or discretion of the trustee to take action in respect of any default without such notice or request from bondholders. The trustee shall not be responsible for the recording of this indenture and shall not be required to file the same as a chattel mortgage.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the railroad company agrees to pay such compensation as well as all expenses necessarily incurred or disbursed by the trustee hereunder.

SEC. 2. The trustee, or any trustees hereafter appointed, may resign, and may be discharged of the trusts created by this denture by giving notice thereof to the railroad company and to the bondholders, by publication, at least twice a week, for four successive weeks, in one newspaper at that time published in New York, N. Y.

230 The trustee may be removed at any time by an instrument in writing under the hands of the holders of not less than two-thirds in amount of the bonds hereby secured and then outstanding.

SEC. 3. In case at any time said trustee, The Mercantile Trust Company, or any trustee hereafter appointed, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared that, in case at any time there shall be a vacancy in the office of trustee hereunder, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. Thereupon the railroad company shall publish notice of such appointment once a week for six successive weeks in a newspaper published in New York, N. Y., but any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured prior to the expiration of one year after such publication of notice. Every such trustee appointed in place of The Mercantile Trust Company, or its successor in the

trust, shall always be a trust company in good standing, doing business in the city of New York, and having a capital and surplus aggregating at least $1,000,000, if there be such a trust company willing and able to accept the trust upon reasonable or customary terms.

Any such new trustee appointed hereunder shall execute, acknowledge and deliver to the trustee last in office, and also to the
231 railroad company, an instrument accepting such appointment hereunder, and thereupon such new trustee, without any further act, deed, or conveyance, shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in the trust hereunder with like effect as if originally named as trustee herein; but nevertheless, on the written request of the new trustee, the trustee ceasing to act shall execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the trustee so resigning or removed, and shall duly assign, transfer, and deliver all stocks, bonds, or other property and moneys held by such trustee to the new trustee so appointed in its place; and, upon request of any such new trustee, the railroad company shall make, execute, acknowledge, and deliver any and all assignments, deeds, conveyances, or instruments in writing for more fully and certainly vesting in and confirming to such new trustee all such estates, properties, rights, powers, and duties.

ARTICLE NINE.

SECTION 1. Until some default shall have been made in the due and punctual payment of the interest, or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and, until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall waive any such period of grace (such waiver by the railroad company being hereby expressly permitted), the railroad company, its successors and assigns, shall be suffered and permitted to retain actual possession of any property, other than certificates for shares of stock, bonds, certificates of in-
232 debtedness or other securities, cash or other property pledged or to be pledged hereunder with the trustee, which, hereafter, may be mortgaged to the trustee pursuant to any provision of this indenture, and to manage, operate and use such property, with the rights and franchises appertaining thereto, and to collect, receive, take, use and enjoy the earnings, income, rents, issues and profits thereof, but not to sell or dispose of the property itself except as expressly in this indenture authorized; and to vote upon or to cause to be voted upon all the shares of stock subject to this indenture except as hereinbefore otherwise expressly provided.

SEC. 2. If, when all the bonds hereby secured shall have become due and payable, the railroad company well and truly shall pay, or shall cause to be paid, the whole amount of the principal moneys and interest due upon all of such bonds and coupons for interest thereon then due and unpaid, or shall provide for such payment by depositing with the trustee hereunder, for the payment of such bonds and coupons, the entire amount then due thereon for principal and interest, and also shall pay, or shall cause to be paid, all other sums payable hereunder by the railroad company (including any costs and charges of the trustee or of the sinking fund trustee then remaining unpaid), and well and truly shall keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then, and in that case, all property, rights and interests hereby conveyed or pledged shall revert to the railroad company and the estate, rights, title and interest of the trustee shall thereupon cease, determine and become void, and in such case the trustee, on demand of the railroad company, and at its cost and expense, shall execute proper instruments acknowledging satisfaction of and discharging this indenture; otherwise the same shall be, continue and remain in full force and virtue.

233 ARTICLE TEN.

SECTION 1. All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the railroad company, shall bind its successors and assigns, whether or not so expressed.

SEC. 2. Nothing contained in this indenture or in any bond hereby secured shall prevent any consolidation or merger of the railroad company with any other corporation or any conveyance and transfer subject to the continuing lien of this indenture and to all the provisions thereof of all the mortgaged and pledged premises as an entirety to any other corporation; provided, however, that such consolidation, merger, or sale shall not impair the lien and security of this indenture or any of the rights or powers of the trustee or of the bondholders hereunder, and that all stock, and the certificates thereof, and all bonds, certificates of indebtedness and other obligations then held by the trustee shall continue to be held by the trustee as though such consolidation, merger, or sale had not taken place; and provided further, that upon such consolidation, merger, or sale the due and punctual payment of the principal and interest of all of the said bonds, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case, pursuant to section 2 of this article, the railroad company shall be consolidated or merged with any other corporation, or shall sell, convey, and transfer, subject to this indenture, all the

mortgaged and pledged premises as an entirety, as aforesaid, the successor corporation formed by such consolidation, or into which the railroad company shall have been merged, or which shall have
234 purchased and received a conveyance and transfer as aforesaid—upon executing, acknowledging and delivering to the trustee an indenture satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions of this indenture—shall succeed to and shall be substituted for the railroad company, party of the first part hereto, with the same effect as though it had been named herein as such party of the first part; and thereupon such successor corporation may cause to be signed and may issue, either in its own name or in name of the railroad company, any or all of such bonds which theretofore shall not have been signed by the railroad company and delivered to the trustee; and upon the order of said successor corporation, in lieu of the railroad company and subject to all the terms, conditions, and restrictions herein prescribed, the trustee shall certify and shall deliver any of such bonds which previously shall have been signed and delivered by the officers of the railroad company to the trustee for certification and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall in all respects have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this Indenture as though all of said bonds had been issued at the date of the execution thereof.

SEC. 4. For every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the words "railroad company" include and mean not only the party of the first part hereto, but also any such successor corporation. Every such successor corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the railroad company in its name or otherwise.

235 SEC. 5. Any act or proceeding, by any provision of this indenture required to be done or performed by any board or officer of the railroad company, shall and may be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be such lawful sole successor of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the railroad company, by instrument in writing executed by authority of two-thirds of its board of directors and delivered to the trustee, may surrender any of the powers reserved to the railroad company or to such successor corporation under this article; and thereupon such power so surrendered shall terminate.

The Mercantile Trust Company, trustee, party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

Except when otherwise indicated, the words "the trustee," or "said trustee," or any other equivalent term, as used in this indenture shall be held and construed to mean the trustee or trustees for the time being, whether original or successor, and the words "trustee," "bond," "bondholders," "coupon," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," whether or not so expressed.

The internal-revenue stamps required by law are to be affixed to this indenture from time to time when and as the bonds thereby secured shall be issued.

In witness whereof Erie Railroad Company, the party hereto of the first part, has caused this indenture to be signed by its
235 president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary, and the due execution of these presents to be proved, and The Mercantile Trust Company, the party hereto of the second part, has caused its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary, and the due execution of these presents to be proved, and these presents to be signed by its vice-president.

ERIE RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Signed, sealed, and delivered in the presence of—
WM. H. BRUDER.

Attest:
[SEAL.] J. A. MIDDLETON, *Secretary.*

THE MERCANTILE TRUST COMPANY,
By H. C. DEMING, *Vice-President.*

Signed, sealed, and delivered in the presence of—
WM. H. BRUDER.

Attest:
[SEAL.] E. R. ADEE, *Secretary.*

On page 35, line 13, the words "president of the" interlined before execution.—WM. H. BRUDER.

237 STATE OF NEW YORK,
County of New York, ss:

On the 14th day of March, in the year one thousand nine hundred and one, before me personally came Eben B. Thomas, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the president of Erie Railroad Company, the corporation described in and which executed the above instrument as party of the first part therein; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board

of directors of said corporation; and that he signed his name thereto by like order.

WM. H. BRUDER, [SEAL.]
Notary Public, New York Co.

STATE OF NEW YORK,
County of New York, ss:

On the 14th day of March, in the year one thousand nine hundred and one, before me personally came Henry C. Deming, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of The Mercantile Trust Company, the corporation described in and which executed the above instrument as party of the second part therein; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

I. MICHAELS, [SEAL.]
Notary Public, New York County, N. Y., No. 65.

241 *General mortgage securing four per cent convertible fifty-year gold bonds. Interest payable April 1 and October 1.*

Erie Railroad Company to The Standard Trust Company of New York, trustee. Dated April 1, 1903. Stetson, Jennings & Russell, general counsel, 15 Broad street, New York.

243 TABLE OF CONTENTS.

	Page.
Recitals:	
Directors' resolutions	1
Stockholders' consent	3
Form of coupon bond	5
Form of registered bond	7
Form of coupon	9
Form of trustee's certificate	10
Granting clauses	11–22
ARTICLE ONE.	
Issue of bonds:	
Sec. 1. Total authorized issue, $50,000,000	22
Certification by trustee	22
Sec. 2. $10,000,000 issuable immediately	24
Sec. 3. $40,000,000 issuable from time to time after 1903	24
Sec. 4. Company may take bonds at market price	31
Sec. 5. Exchanges of bonds	31
Sec. 6. Replacement of mutilated or destroyed bonds	32
Sec. 7. Temporary bonds	33
Sec. 8. Rights limited to parties and bondholders	33
ARTICLE TWO.	
Covenants of railway company:	
Sec. 1. To pay interest and principal of bonds	34
Sec. 2. To execute further assurances	34
Sec. 3. To provide for registration	35
Sec. 4. To preserve leaseholds	37
To create no prior liens on mortgaged premises	37
Sec. 5. To pay taxes and assessments	38
Sec. 6. As to companies whose stocks are pledged	39
Sec. 7. To assign claims	40
Sec. 8. To issue and use bonds only as authorized	40
Sec. 9. Conversion of bonds into stock, etc	41

244

ARTICLE THREE.

Concerning pledged securities: Page.
Sec. 1. Lien of prior indentures 42
Powers and duties of trustee 43
Sec. 2. Collection of dividends and interest 45
Sec. 3. Application of payments 48
Sec. 4. Voting of stocks until default 48
Sec. 5. Foreclosure of mortgages 49
Reorganizations 51
Sec. 6. Mergers 52
Sec. 7. Extensions or renewals 54

ARTICLE FOUR.

Remedies of trustees and bondholders:
Sec. 1. Detached coupons—liens subordinated 55
Sec. 2. Entry after default 55
Sec. 3. Voting and dividend collections after default 58
Sec. 4. Principal of bonds may be declared payable 59
Sec. 5. Power of sale 60
Power to foreclose 61
Sec. 6. Bondholders may direct trustee 61
Sec. 7. Property to be sold as entirety 62
Sec. 8. Notice of sale 62
Sec. 9. Adjournments of sale 63
Sec. 10. Conveyance to purchaser 63
Sec. 11. Receipt to purchaser a discharge 64
Sec. 12. Maturity of principal in case of sale 64
Sec. 13. Distribution of proceeds of sale 64
Sec. 14. Purchaser may pay in bonds 65
Sec. 15. Trustee may recover judgment 66
Sec. 16. Waiver of redemption, etc 68
Sec. 17. Trustee entitled to appointment of receiver 68
Sec. 18. Railroad company may surrender possession 69
Sec. 19. Modification of indenture 70
Sec. 20. Bondholders not entitled to sue 71
Sec. 21. Remedies cumulative 72
Sec. 22. Trustee's delay or omission on waiver 72

ARTICLE FIVE.

Immunity of officers, directors, and stockholders 73

ARTICLE SIX.

Sec. 1. Authentication of bondholders' instruments 73
Sec. 2. Apparent title to bonds 74

245

ARTICLE SEVEN.

Releases of mortgaged property:
Sec. 1. Railroad property 75
Sec. 2. Leasehold interests 77
Sec. 3. Receiver may grant releases 77
Sec. 4. Alteration of structural contracts 77
Sec. 5. Evidence of facts 78

ARTICLE EIGHT.

Concerning the trustee:
Sec. 1. Immunities and compensation 78
Sec. 2. Resignation or removal 80
Sec. 3. Appointment of successor trustee 80
Appointment of additional trustee 82

ARTICLE NINE.

Sec. 1. Possession until default 82
Sec. 2. Defeasance 83

ARTICLE TEN.

	Page.
Sundry provisions:	
Sec. 1. Covenants to bind successors and assigns	83
Sec. 2. Railroad company may consolidate	83
Sec. 3. Successor may issue bonds	84
Sec. 4. Rights and powers of successor	85
Sec. 5. Authority of officers of successor	85
Sec. 6. Railroad company may surrender powers	85
Trustees' acceptance of trust	86
Acknowledgments	87–92
Certificate of record	93–111

247 This indenture, made this first day of April, in the year one thousand nine hundred and three, between

Erie Railroad Company, a corporation created by and existing under the laws of the State of New York, hereinafter called the "railroad company," party of the first part, and

The Standard Trust Company of New York, a corporation created by and existing under the laws of the State of New York, hereinafter called the "trustee," party of the second part.

Whereas at the 43rd meeting of the board of directors of the railroad company, duly held, pursuant to due notice, at the office of the company, in the city of New York, on the 11th day of February, 1903, a quorum being present, resolutions were duly adopted, including the following—that is to say:

Whereas upon the report of the president this day made the board of directors of the Erie Railroad Company has determined that it is desirable now to make comprehensive provision for the progressive improvement of the line and terminals of its railroad, during a series of years, to an extent involving the probable expenditure of $50,000,000 for such purpose and for the acquisition of equipment and the funding or consolidating of existing obligations, which sum can best be provided through an issue of four per cent convertible fifty year bonds, such bonds to be dated April 1, 1903, and to be convertible into the common stock of the company (stock trust certificates), at a price not less than the market value thereof at the date when the stockholders of the company shall have given their consent to such bonds; such bonds to be issued either in a single series or in successive series, and such price of conversion to be fixed from time to time by the board of directors when authorizing the issue of the several series and to be specified in every bond of the several series when and as issued;

Now, therefore, be it

Resolved, that for the purpose of completing and finishing or operating and improving its railroad, or for any other of its lawful purposes, including the acquisition of equipment or the funding or consolidation of existing obligations, the Erie Railroad Company

248 do borrow the sum of $50,000,000, and do issue and dispose of its bonds for such amount so borrowed, and do mortgage its property and franchises to secure the payment of the said bonds; and, accordingly, that the president or any vice-president and the

secretary or any assistant secretary of the Erie Railroad Company be, and hereby they are, authorized to execute and to issue and deliver bonds of the Erie Railroad Company for the aggregate principal sum of $50,000,000, dated April 1, 1903, and payable April 1, 1953, with interest thereon at the rate of four per cent per annum, payable semiannually on the first day of April and the first day of October in each and every year until the principal shall be fully paid; both the principal and the interest to be payable in gold coin of the United States of the present standard of weight and fineness, at the office or agency of the Erie Railroad Company in the city of New York, without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under or by reason of any present or future law of the United States or of any State, county, or municipality therein, such bonds to be coupon bonds, each for the principal sum of $1,000, giving to the holder the right to register the principal thereof and the right to convert the same into registered bonds without coupons; and also registered bonds without coupons, each for the principal sum of $500, of $1,000, or of such multiples of $1,000 as from time to time may be prescribed by the railroad company by resolution of its board of directors, the bonds to be substantially in the form now submitted to this meeting, of which copies are annexed to the minutes thereof, interim or temporary bonds to be issued and to be exchangeable for permanent bonds pursuant to like resolution.

Resolved, that at any time after April 1, 1905, and before April 1, 1915, the holder of any such bonds shall have the right to convert the principal thereof at par into common stock (stock trust certificates) of the Erie Railroad Company at a price not less than the market value thereof at the date when the stockholders of this company shall have given their consent to such bonds, such bonds to be issued either in a single series or in successive series, and such prices of conversion to be fixed from time to time by the board of directors when authorinzing the issue of the several series and to be specified in every bond of the several series when and as issued.

Resolved, that the president or any vice-president and the secretary or any assistant secretary of the Erie Railroad Company be, and hereby they are, authorized, in the name and behalf of the Erie Railroad Company and under its corporate seal, to execute and acknowledge and to deliver to the Standard Trust Company of New York, a corporation of the State of New York, as trustee, a mortgage
249 or deed of trust to be dated April 1, 1903, mortgaging and pledging any and all of the railroads, franchises, income, and property now owned or hereafter acquired by the Erie Railroad Company as security for the said issue of bonds for the aggregate principal sum not exceeding $50,000,000 authorized by the foregoing resolutions, such mortgage or deed of trust to be in form generally similar to the first consolidated mortgage or deed of trust of the Erie Railroad Company dated December 10, 1895, and to be prepared and approved by the general counsel of this company.

Resolved, that the coupons attached to the said coupon bonds to be issued under these resolutions, may be authenticated by the engraved facsimile signature of the present treasurer, or of any future treasurer of the Erie Railroad Company, it being hereby intended that the railroad company may adopt, and may use for that purpose, the engraved signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer, at the time when such bonds shall actually be certified and delivered.

Resolved, that the first $10,000,000 bonds of such $50,000,000 bonds shall be convertible at par into common stock at $50 per share, and from time to time, when and as it shall become necessary for the conversion of any of said $50,000,000 bonds, the common stock be increased to the required amount, and that whenever so requested by the voting trustees such increased stock be issued to them in exchange for such bonds, that they may issue their common stock trust certificates in respect thereof.

Resolved, that the president or any vice-president and the secretary or any assistant secretary be, and hereby they are, authorized, in behalf of the Erie Railroad Company, to take all such action as from time to time may become necessary or proper to carry these resolutions into effect.

Resolved, that the execution and delivery of the bonds hereby authorized, and of the mortgage or deed of trust securing the same, shall take place when and not before consent thereto shall have been given by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent shall be given and certified, and shall be filed and recorded in the office of the clerk or register of the county of New York, as provided in section 2 of the stock corporation law, and consent to such mortgage shall have been given also by the board of railroad commissioners.

And whereas prior to the execution and delivery of the bonds and of the mortgage or deed of trust securing the same, as authorized by the said resolutions, consent in due form to the execution and issue of such convertible bonds conferring upon the holder thereof the right to convert the principal thereof into common stock (stock trust certificates) of the Erie Railroad Company as therein provided, was duly given upon February 11, 1903, by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent, prior to the execution and delivery of this indenture and of the bonds therein mentioned, as thus duly given and certified, was duly filed and recorded in the office of the clerk or register of the county of New York as provided in section 2 of the stock corporation law, and consent to the execution of such mortgage has been duly given or authorized by stockholders, and has been duly given also by the board of railroad commissioners of the State of New York; and

Whereas at the 44th meeting of the board of directors of the Erie Railroad Company held upon the 21st day of April, 1903, the draft of a mortgage or deed of trust of the form and tenor and date of this

indenture was submitted and read, and resolutions authorizing the execution and delivery thereof were duly and unanimously adopted by said board; and

Whereas the bonds to be secured by this indenture may be issued in series, and are to be coupon bonds of the denomination of $1,000, numbered consecutively from 1 upwards, giving to the holder the right to register the principal thereof and the right to convert the same into registered bonds without coupons; and also registered bonds without coupons, each for the principal sum of $500, or of $1,000, or of such multiples of $1,000 as from time to time may be prescribed by the railroad company by resolution of its board of directors; every series of such bonds to have a distinctive serial letter and every such bond to bear a distinctive number or designation; and all such bonds from time to time, as directed by the board of directors of the railroad company, to be executed in the name and behalf of the corporation and under its corporate seal, by the presi-
251 dent or any vice-president, and by the secretary or any assistant secretary, of the railroad company, and to be substantially of the following tenor—the letter of the series, the number of the bond, the rate at which shares of common stock will be issued in conversion of the bond, and the principal sum of each registered bond without coupons, and the date from which interest thereon is to accrue, having been inserted in the respective blanks therefor:

(Form of coupon four per cent gold bond.)

No. Series $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company 4% convertible 50-year coupon gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder of this bond, one thousand dollars in gold coin of the United States of America, on the first day of April, 1953, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon at the rate of four per cent per annum from April 1, 1903, payable semi-annually at the said office or agency, in like gold coin, on the first day of April and the first day of October in each and every year until the payment of said principal sum, but only upon presentation and surrender, as severally they shall mature, of the coupons therefor annexed hereto; such United States gold coin in every case to be of the standard of weight and fineness as it existed April 1, 1903.

Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any

present or future law of the United States, or of any state or county or municipality therein.

This bond is one of a series of four per cent convertible 50-year gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding fifty million dollars at any one time outstanding, under and in pursuance of, and all equally secured by, a mortgage or deed of trust
252 dated April 1, 1903, duly executed by the railroad company to the Standard Trust Company of New York, as trustee, of the property and franchises mentioned in said mortgage or deed of trust, to which reference hereby is made for a description of the property and franchises mortgaged and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

This bond shall pass by delivery, unless registered in the owner's name on the books of the railroad company, at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the railroad company. After such registration, no transfer shall be valid unless made on the railroad company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored, but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons, which shall continue to be transferable by delivery merely.

The holder also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon, in exchange for a registered bond without coupons, as provided in said indenture.

As duly authorized by the consent of stockholders, the board of directors has conferred upon the holder of this bond the right to convert the principal thereof at par at any time after April 1, 1905, and before April 1, 1915, into the fully paid common stock of the Erie Railroad Company of the par value of $100, at the price of $ for each and every share; and if such common stock shall not be sufficient to meet the conversion when made, the board of directors will authorize an increase sufficient for that purpose. Accordingly this bond is convertible, at the option of the holder hereof, at any time after April 1, 1905, and prior to April 1, 1915, as provided in said mortgage or deed of trust, into shares of the common capital stock of the railroad company as such stock shall be constituted at the time of such conversion, with an adjustment of current or accrued interest and dividends as between this bond and the stock into which the same may be converted, with the right on the part of the railroad company during the continuance of the voting trust agreement of

January 1, 1896, in said indenture described, to deliver in lieu of certificates of common stock, voting trust certificates therefor.

253 This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, and coupons for such interest, with the engraved fac-simile signature of its treasurer, to be attached hereto, this first day of April, 1903.

[L. S.] ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

(Form of registered four per cent gold bond.)

No. Series $

UNITED STATES OF AMERICA.

Erie Railroad Company 4% convertible 50-year registered gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to or assigns, dollars, in the gold coin of the United States of America, on the first day of April, 1953, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon from the first day of , 19 , at the rate of four per cent per annum, payable semiannually at said office or agency, in like gold coin, on the first day of April and the first day of October in each and every year until the payment of said principal sum; such United States gold coin in every case to be of the standard of weight and fineness as it existed April 1, 1903.

Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

254 This bond is one of a series of four per cent convertible 50-year gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding fifty million dollars at any one time outstanding, under and in pursuance of, and all equally secured by, a mortgage or deed of trust dated April 1, 1903, duly executed by the railroad company to the Standard Trust Company of New York, as trustee, of the property and franchises mentioned in said mortgage or deed of trust, to which reference hereby is made for a description of the property

and franchises mortgaged and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company, at its office or agency in the city of New York, upon surrender and cancellation of the bond; and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said indenture, and on payment, if the railroad company shall so require, of the charge therein provided for. This bond, also, in the manner prescribed in said indenture, and upon payment of the charge therein provided for, is exchangeable for coupon bonds for the same aggregate principal sum.

As duly authorized by the consent of stockholders, the board of directors has conferred, upon the holder of this bond, the right to convert the principal thereof at par at any time after April 1, 1905, and before April 1, 1915, into the fully paid common stock of the Erie Railroad Company of the par value of $100, at the price of $ for each and every share; and if such common stock shall not be sufficient to meet the conversion when made, the board of directors will authorize an increase sufficient for that purpose. Accordingly this bond is convertible, at the option of the holder hereof, at any time after April 1, 1905, and prior to April 1, 1915, as provided in said mortgage or deed of trust, into shares of the common capital stock of the railroad company as such stock shall be constituted at the time of such conversion, with an adjustment of current or accrued interest and dividends as between this bond and the stock into which the same may be converted, with the right on the part of the railroad company, during the continuance of the voting trust agreement of January 1, 1896, in said indenture described, to deliver in lieu of certificates of common stock, voting trust certificates therefor.

This bond shall not become obligatory for any purpose
255 until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, this first day of April, 1903.

[L. S.] ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

And whereas, there are to be attached to the said coupon bonds, at the time of the issue thereof, coupons representing the semiannual

installments of interest which are to become due thereon, each of which coupons is to be substantially of the following tenor, to wit:

(Form of interest coupon, of which the first is to be payable October 1, 1903.)

No. $20.00

On the first day of Erie Railroad Company will pay to bearer, at its office or agency in the city of New York, N. Y., twenty dollars, United States gold coin of the standard existing April 1, 1903, without deduction for taxes, being six months' interest then due on its four per cent convertible 50-year gold bond, series , No. , subject to the terms and conditions stated in said bond and in the indenture dated April 1, 1903, therein mentioned.

, *Treasurer.*

And whereas, on each of said coupon bonds and on each of said registered bonds without coupons there is to be indorsed a cer-
256 tificate of the trustee, or its successor appointed hereunder, that it is one of a series of bonds described in this indenture, and no bond shall be secured by this indenture or shall be obligatory for any purpose unless such certificate shall have been executed by the said trustee or its successor appointed hereunder; said certificate to be substantially of the following tenor, to wit:

(Form of trustee's certificate.)

This bond is one of a series of bonds described in the within mentioned indenture.

THE STANDARD TRUST COMPANY OF NEW YORK,
Trustee.

By

And whereas, each of the coupons to be attached to said coupon bonds is to be authenticated by the engraved fac-simile signature of the present treasurer or of any future treasurer of the railroad company, and the railroad company may adopt and may use for that purpose the engraved fac-simile signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer at the time when any such coupon bond shall be actually certified and delivered, and such coupons shall be attached to the bond; and

Whereas, this indenture is of the tenor of the draft thereof submitted to and duly approved by the railroad company; and

Whereas, all acts and things prescribed by law and by the by-laws of the railroad company have been duly complied with, and the railroad company has executed this indenture and proposes to issue the bonds hereby secured, in the exercise of each and every legal right and power in it vested:

257 Now, therefore, this indenture witnesseth, that in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly

paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which such bonds shall be issued and received:

The railroad company, party of the first part hereto, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over unto

The trustee, party of the second part, its successors and assigns forever:

All the estate, right, title, interest, and property now belonging to the railroad company, or that hereafter may be acquired by the railroad company, of, in and to

All and singular the railway of the railroad company, from and including Piermont, on the Hudson River, in the State of New York, to and including the terminus of the said railway on Lake Erie at or near Dunkirk, in said State, and the railway known as the Newburgh Branch, from Newburgh to the main line, and also all that part of the railway designated as the Buffalo Branch of the Erie Railway extending from Hornellsville to Attica, in the State of New York, also that part of the railway known as the Newburgh and New York Railroad, extending from Turners on the main line to
258 Vail's Gate on the Newburgh branch; also the railway formerly belonging to the Lockport and Buffalo Railroad Company and extending from Lockport to North Tonawanda (subject to the lease thereof to the International Railway Company), both in the State of New York; also the railway formerly belonging to the Erie International Railway Company, and extending from a point of connection with the road formerly known as the Suspension Bridge and Erie Junction Railroad in Erie County to International Bridge in Erie County, both in the State of New York; also the railway formerly known as the Suspension Bridge and Erie Junction Railroad, extending from East Buffalo in Erie County to Suspension Bridge in Niagara County, with the passenger branch extending from the main line near Eleventh street in the city of Niagara Falls, Niagara County, to the passenger station at the corner of Fourth and Niagara streets in said city, all in the State of New York; also the railway formerly known as the Buffalo, New York and Erie Railroad, extending from Painted Post, Steuben County, to the city of Buffalo, Erie County, both in the State of New York; also all the railroad formerly of the Buffalo and Southwestern Railroad Company, extending from Jamestown in Chatauqua County to Buffalo in Erie County, both in the State of New York; and also all other railways now belonging to the Railroad Company in the States of New York, Pennsylvania, and New Jersey, or any of them:

Also all the estate, right, title, and interest, terms and remainder of terms, franchises, privileges, and rights of action of whatsoever name or nature in law or in equity, conveyed or assigned to the New York and Erie Railroad Company, or to the Erie Railway Company, or to the New York, Lake Erie and Western Railroad Company, or to the Erie Railroad Company, by the Union Railroad Company, a corporation existing under the laws of the State of New York; by the Bergen County Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Buffalo, Bradford and
259 Pittsburg Railroad Company, a corporation existing under the laws of the States of New York and Pennsylvania; by the Rochester and Genesee Valley Railroad Company, a corporation existing under the laws of the State of New York; by the Long Dock Company, a corporation existing under the laws of the State of New Jersey; by the Goshen and Deckertown Railroad Company, a corporation existing under the laws of the State of New York; by the Hoboken Land and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the New York and Fort Lee Railroad Company, a corporation existing under the laws of the State of New Jersey, and the New Jersey Junction Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Jefferson Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Montgomery and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Docks and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the Middletown and Crawford Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Coal and Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Northern Railroad Company of New Jersey, a corporation existing under the laws of the State of New Jersey; by the New York and Greenwood Lake Railway Company, a corporation existing under the laws of the State of New Jersey; by the Avon, Geneseo and Mount Morris Railroad Company, a corporation existing under the laws of the State of New York; by the Tioga Railroad Company, a corporation existing under the laws of the State of Pennsylvania; or by the Newark and Hudson Railroad Company, a corporation existing under the laws of the State of New Jersey.

And also all the estate, right, title, and interest of the railroad
260 company in and to certain real estate situate in Hudson County, in the State of New Jersey, known as the Penhorn property; and also in and to a certain parcel of land lying west of the Bergen Tunnel, in Hudson County, State of New Jersey, known as the Laundry property; and also in and to all other real estate of the railroad company, situate in the State of New Jersey, of every kind and description, and wherever in the said State the same may be situate.

And also all the estate, right, title, and interest of the railroad company of, in, and to certain piers, bulkheads, and water fronts in

the said city of New York—that is to say: Piers 20 and 21, North River, with slips and appurtenances; also 560 feet of bulkhead extending northerly from the northerly line of Pier 19, with certain wharf surface, together with ferry near foot of Chambers street, and rights and franchises appurtenant thereto; also bulkhead, slip, and ferry at the foot of West Twenty-third street, and that portion of the bulkhead between Twenty-second and Twenty-third streets abutting on the ferry; together with ferry rights and franchises appurtenant thereto; also pier at foot of West Forty-ninth street, and slips in connection therewith, together with certain water front south of the pier, and also Pier 7, East River, and slips connected therewith and appurtenant thereto.

And also all tracts of land or interest therein of the railroad company lying and being in the following States and counties, namely: Counties of Rockland, Orange, Sullivan, Delaware, Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Genesee, Erie, Niagara, Cattaraugus, Chautauqua, and Monroe, in the State of New York; counties of Hudson, Essex, Bergen, and Passaic, in the State of New Jersey; counties of Susquehanna, Jefferson, Elk, Pike, McKean, Wayne, and Lackawanna, in the State of Pennsylvania.

Also all and singular the railroad, property, and franchises of the Nypano Railroad Company demised and leased to the Erie
261 Railroad Company by the indenture made the 17th day of March, 1896, by and between said the Nypano Railroad Company, a corporation of the States of Ohio and Pennsylvania, as party of the first part thereto, and the Erie Railroad Company, as party of the second part thereto, and all rights of the Erie Railroad Company of every name and nature in and to such railroad, property, and franchises leased as aforesaid; subject, however, to the conditions, reservations, and provisos set forth in a certain indenture of pledge, dated July 6, 1896, by the Erie Railroad Company to the Farmers' Loan and Trust Company, as trustee, wherein the said leasehold estate and interest was assigned to the said trustee as security under the first consolidated mortgage deed, dated December 10, 1895, made by the Erie Railroad Company to said the Farmers' Loan and Trust Company; and also any and all other right, title, and interest of every name and nature now possessed or hereafter acquired by the railroad company in or to the property, railroad, and franchises of said the Nypano Railroad Company, or of any branch, extension, or leased or operated line thereof, or in or to any stocks, bonds, or other obligations of said the Nypano Railroad Company, or of any successor company or companies, subject to the terms upon which any such acquisition may have been made.

Also all the right, title, estate, interest, and property of the railroad company of, in, and to any and all other lines of railway, extensions, and branches now owned, leased, or held by the railroad company, or in which it has any interest whatsoever (excepting its leasehold interest in the Buffalo Creek Railroad, and excepting also all shares of

capital stock not herein expressly described and made subject hereto), wherever located, including the franchises appurtenant thereto, notwithstanding the same may not be particularly set forth or described in this indenture.

Also all the estate, right, title, interest, and property of the railroad company of, in, and to any and all lines of railway, extensions and branches, including the franchises appurtenant thereto, and
262 any and all ferry houses, ferryboats, shops, depots, terminal properties, rolling stock and other equipment, and other acquisitions, additions, improvements, and betterments, and any and all bonds, stocks, and other property of every kind or description (notwithstanding that the same are not now particularly set forth in this indenture), which, from time to time, in the manner hereinafter provided, shall be purchased, acquired, or constructed by the use of any of the bonds secured by this indenture.

Including in the railroads, franchises, and properties subject to this indenture any and all roadbed, superstructure, rights of way, rails, tracks, side tracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections, and fixtures, and all other things of whatever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to this indenture, or to any branch thereof, or provided for use thereon, or in connection therewith; and any and all lands designed for depots, warehouses, or other structures at any terminus, or on or along such lines of railway, or upon or along any such branch; and any and all locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels now or hereafter acquired or provided for use upon such lines of railway or branches, or upon any other line or branch; and any and all property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, such lines of railway or any such branch; and any and all corporate rights, privileges, and franchises which the railroad company now has or hereafter can or shall acquire, possess, or exercise in, to, upon, or in any respect of such lines of railway or branches or any part thereof, necessary for or appertaining to the construction, maintenance, or operation
263 of such lines of railway or any such branch, or any part thereof; and any and all the rents, issues, profits, tolls, and other income of such lines of railway, and of any and all branches; and also any and all the rights, privileges, franchises, properties, real or personal, rights, and things which the railroad company may or shall hereafter possess or become entitled to possess for the purposes of or in connection with such lines of railway or any such branch.

Together with all and singular the franchises, rights, and privileges now or hereafter appurtenant to or used in connection with the lines of railway above mentioned, or any branch thereof.

Also all the right, title, and interest of the railroad company in and to the following shares of stock heretofore transferred to and now held by the Farmers' Loan and Trust Company, as trustee under the said first consolidated mortgage deed, dated December 10, 1895:

264 Name of company.	Par value per share.	Number of shares.
Buffalo, New York and Erie Railroad Company	$100	8,938
Jefferson Railroad Company	50	41,909
Buffalo, Bradford and Pittsburgh Railroad Company	100	22,049
Bergen County Railroad Company	100	2,000
Middletown and Crawford Railroad Company	50	2,413
Newark and Hudson Railroad Company	100	2,500
Paterson, Newark and New York Railroad Company	50	5,000
Bergen and Dundee Railroad Company	100	400
Long Dock Company	100	8,000
New York, Lake Erie and Western Docks and Improvement Company	100	6,040
Suspension Bridge and Erie Junction Railroad Company	100	5,000
Buffalo Creek Railroad Company	100	1,250
Chicago and Erie Railroad Company	100	1,000
Pavonia Ferry Company	100	1,000
Hillside Coal and Iron Company	100	10,000
Northwestern Mining and Exchange Company	100	5,000
Blossburg Coal Company	100	10,000
Tioga Railroad Company, preferred stock	50	3,794
Tioga Railroad Company, common stock	50	7,818
Elmira State Line Railroad Company	100	692
Arnot and Pine Creek Railroad Company	100	2,550
Union Steamboat Company	100	10,000
Union Dry Dock Company	500	300
Conesus Lake Railroad Company	50	375
The Nypano Railroad Company	100	199,991

Also all the right, title, and interest of the railroad company in and to the following bonds, heretofore delivered to and now held by the said trustee under the said first consolidated mortgage deed, dated December 10, 1895:

$580,000 bonds of the Buffalo, Bradford and Pittsburgh Railroad Company, secured by its mortgage dated January 1st, 1865, to Dorman B. Eaton, as trustee.

265 $57,200 bonds of the Middletown and Crawford Railroad Company, secured by its mortgage dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford as trustees.

$250,000 bonds of the Newark and Hudson Railroad Company, secured by its mortgage dated September 20th, 1871, to H. N. Otis as trustee.

$499,000 bonds of the Paterson, Newark and New York Railroad Company, secured by its mortgage dated January 1st, 1868, to W. C. Rushmore and C. Walsh as trustees.

$604,000 bonds of the New York, Lake Erie and Western Docks and Improvement Company, secured by its mortgage dated June 1st, 1883, to the Farmers' Loan and Trust Company as trustee, as modified by the supplemental contract dated February 8, 1890.

$1,900,000 bonds of the New York, Lake Erie and Western Coal and Railroad Company, secured by its mortgage dated May 15th, 1882, to the Metropolitan Trust Company, of the city of New York, and J. Lowber Welsh, of the city of Philadelphia, as trustees.

$1,000,000 bonds of the Suspension Bridge and Erie Junction Railroad Company, secured by its mortgage dated June 1st, 1870, to Horatio N. Otis as trustee.

$9,899,000 income bonds of the Chicago and Erie Railroad Company, secured by its mortgage dated August 21st, 1890, to New York Security and Trust Company and John B. Elam as trustees.

$125,000 bonds of the Tioga Railroad Company, secured by its mortgage dated November 1, 1876, to Myron P. Bush as trustee.

$140,000 bonds of the Lockport and Buffalo Railroad Company, secured by its mortgage dated October 1, 1877, to Mathias H. Arnot as trustee.

$20,000,000 bond of the Nypano Railroad Company, secured by its mortgage dated March 17, 1896, to the Farmers' Loan and Trust Company as trustee.

Also all the right, title, and interest of the railroad company in and to shares of stock of the following corporations, for which the certificates have been delivered to and are now held by the Mercantile Trust Company as trustee, under the Pennsylvania collateral indenture of the railroad company dated February 1, 1901, viz:

The Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company, the Delaware Valley and Kingston Rail-
266 road Company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company.

Also all the right, title, and interest of the railroad company in and to sixty shares, of the aggregate par value of $6,000, of the capital stock of the Penhorn Creek Railroad Company, being all the outstanding capital stock of said corporation.

But nothing in this indenture is intended or shall be construed to prevent or limit the powers in respect of any bonds and stocks subject to this indenture conferred upon the trustee under said first consolidated mortgage deed dated December 10, 1895, or upon the trustee under the said indenture dated February 1, 1901.

Also all property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof pledged, assigned, or transferred by the railroad company or any one in its behalf, to the trustee, which hereby is authorized to receive any property at any and all times as and for additional security, and also, when and as hereafter provided, as substituted security for the payment of the bonds issued or to be issued hereunder, and to hold and apply any and all of such property according to the terms hereof.

It being intended to include within the grant of this indenture all the right, title, and interest of the railroad company of, in, and to all lines of railway, extensions, branches, real estate, and railroad property, and all stocks and bonds and other securities now or hereafter described or embraced in the two several indentures heretofore executed and delivered by the railroad company, viz: (1) The first

consolidated mortgage deed to the Farmers' Loan and Trust Company as trustee, dated December 10, 1895, and (2) the Pennsylvania collateral indenture to the Mercantile Trust Company as trustee, dated February 1, 1901; and of, in, and to the properties severally and respectively mentioned in and subject to the lien of
267 said several indentures; and also all the right, title, and interest of the railroad company of, in, and to any and all other property herein conveyed, or agreed to be conveyed, to the trustee hereunder.

To have and to hold, the premises, railroads, properties, real or personal, rights, franchises, estates, appurtenances, stocks and bonds hereby conveyed and assigned, or intended to be conveyed or assigned, unto the trustee, its successor or successors and assigns, forever:

Subject, however, to the two indentures last above mentioned, and to the existing liens of the several mortgages or charges underlying either of the said indentures, and to all other existing liens and charges, upon and against the railroads, properties, and franchises, and stocks, bonds, and other obligations, hereby or in and by said indentures, mortgages, or charges, severally and respectively, conveyed, assigned, mortgaged, or pledged, or so intended to be:

But in trust, nevertheless, for the equal, proper, and proportionate benefit and security, severally and respectively, of all and every the present and future holders of any and every bond and interest obligation issued under and secured by this indenture, as well all those now issued as all hereafter issued in addition thereto or by way of substitution or exchange in accordance with the terms of this indenture, and for enforcing the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture and of the said bonds and interest obligations respectively, without preference, priority, or distinction, as to lien or otherwise, of any one bond over any other bond, by reason of priority in the execution, delivery, or negotiation thereof, and so that each and every bond, issued and to be issued as aforesaid, shall have, un-
268 der and by this indenture, the same right, lien, and privilege as every other bond of the issue; and so that the principal and interest of every such bond shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond, as though all had been made, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture, without regard to the date of actual issue, sale, or disposition thereof; and so that the lien and security of this indenture, and of all bonds issued hereunder, shall take effect from the day of the date hereof, as though upon such day all such bonds shall have been actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

And it is hereby expressly covenanted that all such bonds, and the coupons for interest thereon, are to be issued, certified, delivered, received, and negotiated, and that the mortgaged and pledged properties

and franchises are to be held by the trustee, subject to the following further covenant, conditions, and provisions, viz:

ARTICLE ONE.

SECTION 1. From time to time the bonds to be secured hereby shall be executed by the railroad company and by it shall be delivered for certification to the trustee; and thereupon as provided in this article, and not otherwise, the trustee shall certify and shall deliver the same. At the option of the railroad company, from time to time, any of such bonds may be executed, certified, and delivered originally either as coupon bonds or as registered bonds.

The amount of bonds hereby secured which may be executed
269 by the railroad company, and which may be certified by the trustee, is limited so that never at any time shall there be outstanding bonds hereby secured for an aggregate principal sum exceeding $50,000,000. All of such bonds shall be dated April 1, 1903; but in no instance shall the interest upon any such bond begin to accrue from a date earlier than the first day of April or the first day of October, as the case may be, next preceding the day of the certification thereof. The trustee shall not certify or deliver any coupon bond hereby secured, until all coupons thereof then matured shall have been detached and shall have been canceled. The trustee shall not certify or deliver any registered bond without coupons until there shall have been inserted therein the date from which interest is to accrue, which date shall be the first day of April or the first day of October, as the case may be, next preceding the day of the certification thereof, except as provided in section 6 of this article one.

Only such of said bonds as shall bear thereon a certificate substantially in the form hereinbefore recited, duly executed by the trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. No such bond nor any coupon thereunto attached shall be valid for any purpose until such certificate shall have been duly endorsed on such bond. Every such certificate of the trustee upon any bond executed by the railroad company shall be the conclusive and the only evidence that the bond so certified was duly issued hereunder, and is entitled to the benefit of the trust hereby created.

On request of the railroad company, but within the limitations hereinafter prescribed, bonds shall be certified and be delivered hereunder in advance of registration or recording of this indenture; but the railroad company with all convenient speed shall cause this indenture to be recorded as a mortgage upon railways.

Whenever, from time to time, any bonds certified by the trustee, shall be delivered by it according to the terms of this indenture (excepting the $10,000,000 bonds for the immediate delivery
270 whereof provision is hereinafter made in section 2 of this article), such bonds shall be delivered by the trustee as may be directed by resolution of the board of directors of the railroad com-

pany or of the executive committee thereof. A copy of any such resolution, certified by the secretary under the corporate seal, shall be full authority to the trustee for the certification and delivery of such bonds.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture, bonds for the aggregate principal sum of ten million dollars ($10,000,000), convertible at par into common stock of the railroad company at fifty per cent of the par value of such stock, shall be executed by the railroad company and be delivered to the trustee for certification, and as soon as may be after the execution of this indenture, and without any further action on the part of the railroad company, shall by the trustee be certified and be delivered to the railroad company from time to time upon the written order of the railroad company signed by its president and its treasurer under the corporate seal.

SEC. 3. The remaining forty million dollars ($40,000,000), par value, of the bonds authorized to be issued under and secured by this indenture, shall be reserved to be executed by the railroad company and to be certified and delivered by the trustee from time to time after December 31, 1903, for some one or more of the purposes specified in this section, but only as herein provided, and subject to the restrictions herein stated.

Such reserved bonds may be issued in one or more series. The board of directors of the railroad company from time to time shall determine the amount of bonds to be issued in any series, and shall fix the price or rate at which shares of the common stock of the railroad company will be issued in and upon conversion of the bonds of such series, when the right to demand such conversion shall be exercised by the holder of any such bond; but in no instance shall
271 such price or rate be less than the market price of such shares on February 11, 1903. The price or rate of conversion, as so fixed by the board of directors, shall be stated in every bond issued hereunder, and shall be alike in every bond of the same series.

A. The purposes for which such $40,000,000 of reserved bonds from time to time shall be executed, certified, and delivered, and for which such bonds or their proceeds may be used, are:

(*a*) The construction or acquisition after December 31, 1903, of branch or connecting lines of railroad and extensions; and of ferry houses, ferry boats, shops, depots, terminal properties, rolling stock and other equipment, and other acquisitions, additions, improvements, and betterments, upon, along, or appertaining to, or for use in connection with, any lines of railway, branches, or terminal properties, which, at the time of such construction or acquisition, shall belong to the railroad company and be subject to the lien of this indenture, or shall belong to any other company of whose capital stock at least ninety per cent in amount shall then be subject to this indenture (whether or not subject to the prior lien of the said first consolidated mortgage deed dated December 14, 1895, or of the said indenture dated February 1, 1901), or upon, along, or appertaining to, or for

the use in connection with, the lines of railway of the Paterson and Hudson River Railroad Company, the Paterson and Ramapo Railroad Company, the Union Railroad Company, the New York and Greenwood Lake Railway Company, the Northern Railroad Company of New Jersey, the Cleveland and Mahoning Valley Railroad Company, the Sharon Railway, the Westerman Railroad, or the Elmira State Line Railroad Company; and to reimburse the railroad company for sums expended by it, or by any such other company, after December 31, 1903, for any of the foregoing purposes.

(b) The acquisition after December 31, 1903, of shares of the
272 capital stock, bonds, or other indebtedness of any company owning any branch or connecting lines of railroad or extensions; or any ferry houses, ferry boats, shops, depots, or terminal properties such as are specified in the foregoing clause (a), provided that no bonds or their proceeds shall be used for the acquisition of any shares of the capital stock, bonds, or other indebtedness, for the purchase and acquisition of which any bonds have been reserved under the provisions of said first consolidated mortgage deed of December 10, 1895; and provided, further, that no bonds shall be used for the purchase of shares of the capital stock, bonds, or other indebtedness of any company unless or until the greater part of the entire capital stock of such company shall be acquired or shall have been acquired, and that all the shares, bonds, and other indebtedness so acquired shall become and shall be subject to the lien of this indenture, whether or not also subject to the prior lien of said first consolidated mortgage deed dated December 10, 1895, or of said indenture of February 1, 1901; and provided, further, that no shares, bonds, or other indebtedness issued or created by any such company after such ninety per cent of the capital stock thereof shall have become subject to this indenture, shall be acquired under this clause (b); but bonds may be certified and delivered under the foregoing clause (a) in respect of any construction or acquisition such as is specified in said clause, by any such company, and to reimburse the railroad company for sums expended by it after December 31, 1903, for any such acquisition.

B. The restrictions subject to which such $40,000,000 of reserved bonds from time to time shall be certified and delivered, are as follows, viz:

(1) Before certifying and delivering bonds under this section, there shall be delivered to the trustee a copy of a resolution of the board of directors of the railroad company, certified by its secretary
or an assistant secretary, calling for the certification and de-
273 livery of a specified amount of such bonds, and directing the officers of the railroad company to set aside such amount of bonds or their proceeds separate and apart from any other assets and funds of the railroad company, and to use the same only for purposes authorized by this section.

(2) In each calendar year after December 31, 1903, there shall be so certified and delivered out of such $40,000,000 of bonds, such

amount not in the aggregate exceeding ten million dollars ($10,000,000) par value in any calendar year, as from time to time shall be called for in such resolutions; but in every instance except the first, before certifying or delivering any of the bonds reserved under this section, the trustee shall require the railroad company to furnish, in addition to such resolution of its board of directors, the certificate or certificates of some officer or officers of the railroad company, stating:

(a) That all bonds certified and delivered under this section in respect of which no such certificate previously shall have been furnished, and the proceeds of all such bonds, have been actually used, or actually appropriated and set aside for liabilities actually incurred, for said purposes or for some one or more of them, or to reimburse the railroad company as aforesaid—indicating the particular branches, extensions, terminal properties, rolling stock, or other property, acquired or constructed or contracted for, or the stock, bonds, or other indebtedness of any other company acquired, and the kind or class of betterments or improvements made or contracted for, and the amount of bonds or proceeds of bonds or other cash, used or applied or actually appropriated and set aside for each such purpose;

(b) That the price paid or liability incurred for such construction, or for such acquisition, betterments, or improvements, was not in excess of the fair value of such property or of such work, and
274 that the bonds included in such certificate were sold, disposed of, or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting;

(c) That no part of such certified expenditures or liabilities was included in any previous certificate furnished hereunder, or was made or reimbursed or provided for out of any bonds or moneys received by the railroad company under any other provision of this indenture, or under any provision of the first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901;

(d) That no part of the expenditures certified in such certificate was included in the operating or maintenance expenses reported in any annual report theretofore issued by the railroad company;

(e) In case such certificate shall show the acquisition of, or any contract for, new property, then such certificate also shall state whether such new property is known or believed to be, or that when acquired such new property will be, subject to any lien or charge prior to this indenture, except prior liens and charges to which the grant of this indenture is made subject, and undetermined liens or ordinary operating accounts or charges incidental to construction, and such certificate shall specify the amount of any such prior lien or charge (other than as aforesaid) known or believed to exist or intended or expected to be created;

(f) Any such certificate under this section may state any other facts pertaining to the right to certify and deliver bonds hereunder. The same officer or officers of the railroad company need not certify to all

the facts required to be certified under the provisions of this section, but different officers may certify to different facts respectively.

275 (3) None of the $40,000,000 of reserved bonds deliverable after December 31, 1903, pursuant to this section 3, shall be certified and delivered for or in respect of the construction or acquisition of property subject to any lien or charge so certified, unless or until the railroad company shall have deposited with the trustee an amount of bonds hereby secured equal at par to the aggregate amount of such certified indebtedness, liens, and charges. Whenever thereafter any of such certified indebtedness, liens, and charges shall be paid or be satisfied, or shall be acquired and be subjected to the lien hereof, then an equal amount at par of the bonds hereby secured so deposited with the trustee under this clause shall be redelivered by the trustee to the railroad company or upon its order, so that the amount of such bonds held by the trustee under this clause at all times shall be equal to the amount of such indebtedness, liens, and charges remaining unsatisfied or not subjected to the lien thereof.

(4) The railroad company covenants that whenever all the bonds reserved under this section shall have been certified and delivered to, and used by, the railroad company, it will execute and deliver to the trustee a similar certificate indicating the particular application of all such bonds, or proceeds of such bonds, in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

(5) Every such certificate furnished under this section, unless signed, first, by the president or a vice-president or the general manager or the chief engineer, and, secondly, by the comptroller or auditor or treasurer of the railroad company, shall have endorsed thereon, or shall be accompanied by, a written statement of one of the officers first above designated, and one of the officers secondly above designated, that they believe that such certificate is true, and that such bonds or their proceeds have been used, and the expenditures certified have been made, only for purposes authorized

276 by this section. A certificate signed by one of the officers first above designated and one of the officers secondly above designated, or a certificate having endorsed thereon or annexed thereto a written statement of such officers in the form in this paragraph specified, shall be received by the trustee as conclusive evidence of any facts pertaining to the right to certify and deliver bonds pursuant to this section.

Unless the bonds or the certificates for shares of stock or the other indebtedness acquired under the provisions of this section, shall be deliverable and shall have been delivered to the trustee under the said first consolidated mortgage deed dated December 10, 1895, or to the trustee under the said indenture dated February 1, 1901, such bonds and such certificates of stock, endorsed for transfer in blank, and the assignments of such other indebtedness, shall be delivered to the trustee hereunder, together with the said statements and certificates, and the railroad company shall execute or shall cause to be executed any

conveyances or instruments of further assurance that may be necessary for the purpose of subjecting to the lien and operation of this indenture any new property so acquired by the railroad company, and, so far as may be, any indebtedness, liens, or charges so taken up or acquired by use of said bonds, and also, in the case of any construction upon or acquisition for any of the railroads specifically referred to in part A of this section 3, the railroad company shall execute or cause to be executed such instruments as may be necessary to subject the same to the leases, if any, under which such railroads are held; and also, shall furnish the written opinion of counsel for the railroad company to the effect that such conveyances or other instruments are sufficient for that purpose or that no conveyance or instrument of further assurance is necessary for the purpose aforesaid. Such resolutions, statements, certificates and opinion shall be deemed,
277 and shall be taken to be, full authority and protection to the trustee for its certification of such bonds under the foregoing provisions of this section.

SEC. 4. Whenever, under section 3 of this article, the railroad company shall be entitled to reimbursement out of bonds of any series hereby secured or their proceeds, the railroad company may take and accept such bonds at prices to be fixed by the resolution of the board of directors, but not in any case less than the average market prices for bonds of the same series at the New York Stock Exchange during the previous calendar month (if there be any such market price for such bonds) in settlement and discharge of its claim to be reimbursed; and the bonds so taken and accepted by the railroad company shall be held and may be used by it for its general corporate purposes, freed and discharged from all restrictions and provisions of said section 3 as though such bonds had been sold at such price and the proceeds paid over to the railroad company.

SEC. 5. Whenever any coupon bond or bonds, issued under and secured by this indenture, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for a registered bond or registered bonds without coupons, the railroad company shall execute, and the trustee shall certify, and in exchange for such coupon bond or bonds shall deliver, registered bonds, or one registered bond, without coupons, for the like aggregate principal sum. The registered bond or bonds without coupons so delivered in exchange shall be of the same series as the surrendered coupon bond or bonds, and shall bear interest from the date of the last-matured coupon thereof.

Whenever any registered bond without coupons shall be surrendered, transferred, and canceled, as provided in section 3 of article two hereof, the railroad company, upon request therefor,
278 shall issue to the transferee, and the trustee shall certify and shall deliver registered bonds, or one registered bond without coupons, of the same series, for the like aggregate principal sum.

Whenever any registered bond or bonds without coupons, for the principal sum of one thousand dollars or some even multiple of one thousand dollars, shall be surrendered for exchange for a coupon

bond or bonds, the railroad company shall issue, and the trustee shall certify, and, in exchange for such registered bond or bonds without coupons, shall deliver, a coupon bond or coupon bonds, of the same series, for the like aggregate principal sum, with the coupons maturing on and after the date when the next semi-annual installment of interest would have been payable on such surrendered bond or bonds.

In every case of any such exchange, the trustee forthwith shall cancel the surrendered bond or bonds and coupons and shall deliver the same to the railroad company.

For (1) any exchange of coupon bonds for registered bonds, and for (2) any transfer of registered bonds without coupons, and for (3) any exchange of registered bonds without coupons for coupon bonds, the railroad company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge, and in addition thereto, such further sum as may be necessary to meet other expense connected therewith; such further sum, however, not to exceed one dollar for each new coupon bond or registered bond without coupons issued upon such exchange or transfer.

SEC. 6. In case any coupon bond issued hereunder with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may execute, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond) bearing the same serial number, in exchange
279 and substitution for, and upon cancellation of, the mutilated coupon bond and its coupons, or the mutilated registered bond without coupons, or in lieu of and substitution for the coupon bond and its coupons or the registered bond without coupons so destroyed, upon receipt of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond without coupons, and upon receipt also of satisfactory indemnity.

SEC. 7. Until the bonds to be issued under and secured by this indenture can be engraved and printed the railroad company may execute and, upon its request, the trustee shall certify and deliver, in lieu of such engraved bonds, and subject to the same provisions, limitations, and conditions, temporary bonds of any denomination, substantially of the tenor of the bonds to be issued as hereinbefore provided. Upon surrender of such temporary bonds for exchange the railroad company, at its own expense, shall issue, and upon cancellation of such surrendered bonds the trustee shall certify and deliver, in exchange therefor, engraved coupon bonds or registered bonds without coupons of the denominations hereinbefore provided, for the same aggregate principal sum as the temporary bonds surrendered; and until so exchanged the temporary bonds shall be entitled to the same security as the engraved bonds issued hereunder.

SEC. 8. Nothing in this indenture or in the bonds issued hereunder, expressed or implied, is intended or shall be construed to give to any person or corporation other than the parties hereto and the holders of

bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or under any covenant, condition, or provision herein contained, all its covenants, conditions, and provisions being intended to be, and being, for the sole and exclusive benefit of the parties hereto and of the holders of the bonds hereby secured.

280 ARTICLE TWO.

The railroad company covenants as follows:

SECTION 1. Duly and punctually it will pay the principal and the interest of every bond issued under this indenture, at the dates and the place and in the manner mentioned in such bonds or in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under or by reason of any present or future law of the United States or of any State or county or municipality therein. The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and when paid such coupons shall forthwith be canceled. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof.

Duly and punctually the railroad company will also pay the principal and the interest of every bond issued under the said first consolidated mortgage deed dated December 10, 1895, and of every bond issued under the said indenture dated February 1, 1901, according to the terms of said bonds and coupons and of said indentures securing the same, severally and respectively.

SEC. 2. All railways, franchises, and other property of every kind, in respect of the acquisition or construction whereof bonds under this indenture hereafter shall be certified and be issued as hereinbefore provided, and all franchises and other property of every kind as described and to the extent provided in the granting clauses of this indenture, which hereafter may be acquired by the railroad
281 company, immediately upon the acquisition thereof by the railroad company and without any further conveyance or assignment, shall become and shall be subject to the lien of this indenture as fully and completely as though now owned by the railroad company and specifically described in the granting clauses hereof; but at any and all times the railroad company will execute and deliver any and all such further assurances or conveyances or assignments thereof as the trustee may reasonably direct or require for the purpose of expressly and specifically subjecting the same to the lien of this indenture; and also it will do, execute, acknowledge, and deliver, or cause to be done, executed, acknowledged, and delivered all and every such further acts, deeds, conveyances, and transfers and assurances in the law for the better assuring, conveying, assigning, and

confirming unto the trustee all and singular the hereditaments and premises, estates and property, hereby conveyed or assigned, or intended so to be, or which the railroad company may hereafter become bound to convey or assign to the trustee, as the trustee shall reasonably require.

But nothing expressed or implied in this indenture is intended or shall be construed to limit the right or power of the railroad company, hereby distinctly reserved, by the use of its credit or in any manner other than by the use of the bonds hereby secured, or their proceeds, to construct or acquire other lines of railway, branches, or extensions, or interests therein, or other property, free from the lien hereof.

SEC. 3. The railroad company, at an office or agency to be maintained by it in the city of New York, will keep a register or registers for the registration and transfer of bonds issued hereunder, in which it will register, subject to such reasonable regulations as it may prescribe, all such bonds without coupons, and, upon presentation thereof for such purpose, any such coupon bonds; and such register or registers at all reasonable times shall be open to the inspection of the trustee.

282 Upon presentation to the bond registrar of the railroad company, at the place where such register shall be kept of any such registered coupon bond, accompanied by delivery of a written instrument of transfer in a form approved by the railroad company, executed by the registered holder, such bond shall be transferred upon such register by the registered holder in person or by attorney, and such transfer shall be noted by such bond registrar upon the bond. The registered holder of any such registered coupon bond also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person presenting the bond; but any such coupon bonds registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired, and each registration of a coupon bond shall be noted by the bond registrar on the bond.

Registration of any coupon bond, however, shall not affect the transferability of any coupon thereto belonging, by delivery merely, and payment to the bearer of any such coupon shall discharge the railroad company in respect of the interest therein mentioned, whether or not the bond shall have been registered.

Any registered bond without coupons may be transferred upon such register at such office or agency by the registered holder, in person or by attorney, upon surrender of such bond to such bond registrar for cancellation, accompanied by delivery of a written instrument of transfer in a form approved of by the railroad company, duly executed by the registered holder of the bond; and thereupon a new registered bond, or new registered bonds, for an equivalent principal sum

shall be issued to the transferee or transferees as provided in section 5 of article one hereof.

283 SEC. 4. The railroad company shall not and will not suffer or permit any default wherefor any of the several lessors may terminate any of the existing leases of the Cleveland and Mahoning Valley Railroad, the Sharon Railroad, or the Westerman Railroad, or any lease hereafter made to it, or for its benefit, of any franchises or property now or hereafter belonging to any of the said railroad companies. In case and whenever it shall make default in paying any sum stipulated to be paid in any such present or future lease of any of the said railroads, the trustee, without affecting any of its rights hereunder, from time to time, in its discretion, may itself pay any sum so in default, and thereupon shall have and forthwith may assert a lien for such advances upon the premises hereby mortgaged, and the proceeds thereof, which lien shall be entitled to priority in rank and payment from the income and profits of the mortgaged premises over any bonds hereby secured.

The railroad company will not voluntarily create, or suffer to be created, any debt, lien, or charge (except as permitted or required under the said first consolidated mortgage deed dated December 10, 1895, or under the said indenture dated February 1, 1901, severally and respectively) which would be prior to the lien of these presents upon the mortgaged or pledged premises and property or any part thereof, or upon the income thereof; and within three months after the same shall accrue, it will pay, or will cause to be discharged, or will make adequate provision to satisfy and discharge, all lawful claims and demands of mechanics, laborers, and others, which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon the mortgaged premises or any part thereof, or the income thereof; and if any company, of whose capital stock the greater part, pursuant to the provisions of article one or to the provisions of sections 5 and 6 of article three of this indenture, shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder (excepting the

284 New York, Susquehanna and Western Railroad Company, or the Buffalo Creek Railroad Company, or the Blossburg Coal Company, or the Conesus Lake Railroad Company), shall create or shall suffer to be created (except as permitted or required under the two indentures above mentioned, or under this indenture, or as required by any existing obligation) any lien or charge upon its property or income, or any indebtedness other than indebtedness to the railroad company, or for the current operating expenses of such company during a period not exceeding three months, then it (the railroad company) will cause the same to be paid or discharged, or will make adequate provision for the satisfaction or discharge thereof; provided, however, that the railroad company shall have the right to contest by legal proceeding any such debt, lien, or charge, and pending such contest may delay or defer the payment or discharge thereof.

SEC. 5. The Railroad Company from time to time will pay and discharge all taxes, assessments, and governmental charges (the lien whereof would be prior to the lien hereof) lawfully imposed upon the premises or property subject to this indenture, or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments, and governmental charges lawfully imposed upon the lien or interest of the Trustee in respect of such premises or property, so that the lien and priority of this indenture shall be fully preserved at the cost of the Railroad Company without expense to the Trustee or the bondholders; and if any company of whose capital stock the greater part pursuant to article one or article three of this indenture shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder (except the Buffalo Creek Railroad Company, or any coal company, in respect of lands upon which mining shall have been abandoned), shall fail to pay all such taxes, assessments, and
285 charges lawfully imposed upon the property of such company or upon the income and profits thereof, then the Railroad Company itself will pay the same or make adequate provision for the satisfaction or discharge thereof; provided, however, that the Railroad Company shall have the right to contest by legal proceeding any such tax, assessment, or charge, and pending such contest may delay or defer the payment thereof.

SEC. 6. Except in the cases in this indenture expressly authorized the railroad company will not, by affirmative vote or by abstaining from voting, sanction or permit any increase of the capital stock of any company of whose capital stock the greater part shall be subject to this indenture, or the issue or guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company, unless simultaneously there shall be made effective provision that such indebtedness and the evidences thereof, and such bonds issued or guaranteed, and such mortgage or other lien, and all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously subject to this indenture), forthwith, upon the issue or creation thereof, shall be delivered to and be pledged with the trustee under the said first consolidated mortgage deed dated December 10, 1895, or with the trustee under the said indenture dated February 1, 1901, if required by said instruments, severally and respectively, or with the trustee hereunder, and shall be subject to all the trusts of this indenture; and all such additional stock shall be fully paid and nonassessable. Nothing herein, however, shall be construed to prohibit any increase of stock of or the creation of mortgages or other liens by the Buffalo Creek Railroad Company or the New York, Susquehanna and Western Railroad Company.

Except as herein otherwise expressly provided the railroad
286 company will not, by affirmative vote or by abstaining from voting, sanction or permit any railroad or ferry or terminal company, of whose capital stock the greater part shall be owned by the

railroad company and be subject to this indenture, to sell or otherwise to dispose of its railroad or any part thereof, or any ferry or terminal, or to lease the same (unless such lease be upon the condition that it shall terminate, at the election of the trustee, by entry or otherwise, in case default shall be made and shall continue as provided in section 2 of article four hereof, or at the election of the purchaser in case of a sale of the property subject to this indenture, under this indenture or under either of said two former indentures, dated respectively December 10, 1895, and February 1, 1901), except to the railroad company, or to some other company of whose capital stock not less than ninety per cent shall then be held by the railroad company and be subject to this indenture.

SEC. 7. Any and all claims and indebtedness which the railroad company now has or hereafter may acquire against any other company, of whose capital stock the greater part shall have become subject to this indenture, shall (subject to the provisions in respect thereof in this indenture contained) be and become subject to this indenture, and if, and when requested in writing by the trustee, the railroad company will execute to the trustee appropriate assignments thereof: subject, however, to any prior rights of the trustee under the said first consolidated mortgage deed dated December 10, 1895, or of the trustee under the said indenture dated February 1, 1901.

SEC. 8. The railroad company will not issue, negotiate, sell, or dispose of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained; and in issuing, selling, negotiating, or otherwise disposing of such bonds from time to time it will
287 well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for the purposes herein prescribed, and to or for no other or different purpose.

SEC. 9. Prior to the first day of April, 1905, the railroad company will authorize the increase of its common capital stock to such amount as may be necessary to provide for the conversion thereinto of all of the bonds issued hereunder in accordance with the terms thereof; and, when and as demand therefor after April 1, 1905, and before April 1, 1915, shall be made by the holder of any such bond, it will as soon as practicable issue certificates for such shares of common stock as the same shall then be constituted, in exchange for, and in conversion of, such bond at the rate stipulated therein, but never at a rate less than the market price of such common stock on February 11, 1903; provided, however, that in case the voting trust of the stock of the railroad company under a certain agreement dated January 1, 1896, between Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, of the one part, and J. Pierpont Morgan, Louis Fitzgerald, and Sir Charles Tennant, Bart., voting trustees, of the other part, or any extension or renewal of said agreement, shall exist at the time of any such conversion, common stock voting trust certificates shall be deliverable in lieu of common stock certificates; and provided fur-

ther, that scrip may be delivered for any fraction of a share of common stock, which scrip shall be exchangeable for common stock certificates, or common stock voting trust certificates, as the case may be, when presented in amounts aggregating $100 or some even multiple thereof, but which, until so exchanged, shall not confer on the holder the right to receive any dividends declared on such common stock, or any right whatever other than such right of exchange.

288 Demand by the holders of bonds for the conversion thereof into common stock shall be made by writings addressed to the railroad company, which shall be delivered, together with the bonds to be converted, to the bond registrar of the railroad company. If the bond so surrendered be a registered bond without coupons, all rights to interest subsequently payable shall cease and determine. If the bond so surrendered be a coupon bond, the holder shall also surrender all unmatured coupons thereof. All registered bonds (with or without coupons) shall bear a written assignment in blank in a form satisfactory to the railroad company.

Upon the conversion and exchange of any such surrendered bond as above provided, the railroad company forthwith will cancel such surrendered bond (and also all unmatured coupons thereof if it be a coupon bond), and will exhibit the same to the trustee; and thereupon the said bond shall be deemed to be and shall be satisfied and discharged, and no bond in place thereof shall be issued by the railroad company or be certified or be delivered by the trustee.

ARTICLE THREE.

SECTION 1. It is hereby declared and covenanted that until the final satisfaction or release of the said first consolidated mortgage deed dated December 10, 1895, and of the said indenture dated February 1, 1901, all the bonds, stocks, and other property covered by said indentures, severally and respectively, shall be and shall remain subject to the prior and superior lien thereof, and shall be held as provided in said indentures severally and respectively, with all the powers, rights, and discretions, and subject to all the provisions set forth in said indentures severally and respectively; and neither the execution of this indenture, nor any action hereunder, shall in any manner affect said indentures or either of them, or any rights of the holders of the bonds thereby secured, or any rights or duties of the trustee under either of said indentures.

289 Whenever said indenture dated February 1, 1901, shall have been satisfied or released, the trustee hereunder shall be entitled to receive, to take possession of, and to hold, as trustee under this indenture, all the bonds, shares of stock, and other property (including cash), then held by the trustee under said indenture dated February 1, 1901; and the railroad company covenants that it will execute and will deliver to the trustee hereunder, such assignments, transfers, powers of attorney, and other instruments, as the trustee may reasonably require in order to vest in the trustee hereunder, or

in order to enable the trustee hereunder to acquire, the title and possession of all such bonds, shares of stock, and other property; and the trustee thereupon shall hold under this indenture all such bonds, shares of stock, and other property, including cash.

The railroad company covenants that forthwith upon the execution hereof, it will cause due notice of the execution of this indenture to be given to each corporation or association which issued any of the shares of stock or any of the bonds now held by the trustee under either of said two former indentures; and from time to time, upon the delivery to the trustee under either of said indentures, of stocks, bonds, or other obligations of any other corporation or association, it will give similar notice to such other corporation.

The trustee shall be authorized (1) to cause to be registered in its name as trustee, any and all coupon bonds pledged with and delivered to it hereunder, or which at any time hereafter may be received by it under any of the provisions of this indenture, or (2) to cause the same to be exchanged for registered bonds without coupons of any denomination, or (3) to cause any such bonds to be stamped "Not negotiable. Held by The Standard Trust Company of New York, as trustee under the general mortgage of Erie Railroad Company, dated April 1, 1903."

The trustee shall cause to be transferred into its name, as
290 trustee hereunder, all registered bonds which shall have been delivered and assigned to it hereunder. The trustee at any time may transfer into its name, as trustee hereunder, all or any shares of stock, the certificates for which shall have been pledged with and delivered to it hereunder, or in its discretion it may hold such certificates in the name of the registered holder thereof at the time of such pledge, provided that the same be endorsed in blank for transfer.

The trustee may do whatever may be necessary for the purpose of maintaining, preserving, renewing or extending the corporate existence of any company the greater part of whose shares shall then be held by the trustee hereunder, and for such purposes, from time to time, it may sell, assign, transfer, and deliver so many shares of the stock of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies. Whenever requested in writing by the Railroad Company, the Trustee shall assign and transfer to persons designated by the Railroad Company a sufficient number of any shares that then shall be held by the Trustee hereunder, to qualify such persons to act as directors of, or in any official relation to, the several companies which issued such shares; provided, however, that under this provision no transfer shall be made which shall reduce the amount of stock in any company held by the Trustee so as to render it less than a controlling interest in such stock; and in every case the Trustee may make such arrangements as it shall deem necessary for the protection of the trust hereunder.

Until the final satisfaction or release of said indentures dated December 10, 1895, and February 1, 1901, severally and respectively, unless the Railroad Company either (1) shall be in default in the payment of any interest upon any bond or bonds hereby secured and then outstanding, and such default shall have continued for
291 the period of six months, or (2) shall be in default in the payment of the principal of any bond hereby secured; or (3) shall be in default in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901; or (4) shall be in default in the due observance or performance of some other covenant or condition in this indenture required to be kept or performed by the Railroad Company, and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the Trustee to the Railroad Company, all stocks, bonds, coupons, claims, and other property that shall be subject to either of said indentures, dated December 10, 1895, and February 1, 1901, severally and respectively, except as herein expressly otherwise provided, may be used, held, dealt with, and disposed of under and in accordance with the provisions of article four of said indenture dated December 10, 1895, and of article three of said indenture dated February 1, 1901, severally and respectively, as well by the Railroad Company as by the several trustees under said indentures, respectively, as though this indenture had not been made. None of the particular provisions hereinafter contained shall be construed as limiting the general provision contained in this section.

SEC. 2. Unless and until a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed; or unless the trustee shall have entered into possession of the mortgaged premises or part thereof under the power herein granted; or unless and until there shall be a default (1) in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture and such default shall have continued for the period of six months; or (2) in the payment of the principal of any bond hereby secured; or (3) in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901; or (4) in the due
292 observance or performance of any other covenant or condition in this indenture required to be kept or performed by the railroad company and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, (a) the trustee shall not (except with the assent of the railroad company) collect, or be entitled to collect, the principal or interest of any bonds or of any other claims or indebtedness now or hereafter subject to this indenture, whether at, or before, or after, the maturity of such bonds or contract obligations or other claims or indebtedness, and shall not enforce any provisions of the mortgages, trust deeds, or other instruments under which such bonds or other obligations were issued, or by which the same are secured; (b) the railroad company shall be entitled to receive all interest paid in respect of any such bonds or

obligations, and the dividends on all shares of stock, which shall be subject to this indenture although the same may have been transferred to the trustee; (c) from time to time (subject to the covenants in respect thereof in this section contained), upon the request of the railroad company, the trustee shall deliver to it any coupons for such interest then in the possession of the trustee, in order that the railroad company may receive payment thereof for its own use or may cause the same to be canceled, and the trustee shall deliver to the railroad company suitable orders in favor of the railroad company, or its nominee, for the payment of such interest and dividends, and the railroad company may collect such coupons, interest, and dividends (but not by any proceeding which the trustee shall deem to be prejudicial to the trusts hereunder), and the trustee at once shall pay over to the railroad company any such interest and dividends which may be collected or be received by it; and (d) the railroad company, for its own use,

293 shall be entitled to demand, receive, and collect, and may release and discharge, the principal and interest of any such claims and indebtedness subjected to the lien of this indenture under section 7 of article two hereof, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose:

Provided, however, and hereby it is declared and agreed that, except as in this indenture otherwise expressly provided, (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to the railroad company, the principal of any bond subject to this indenture; (2) the railroad company shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond, or the principal of or any interest on any such other obligations, claims, or indebtedness, which shall have been collected or paid out of the proceeds of any sale or condemnation of the property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, obligations, claims, or indebtedness, in case of a dissolution or liquidation of such company, it being the intention that the railroad company shall be entitled to receive only payments made out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon, or right to interest or dividends, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or interest, or any such other claims or indebtedness, by legal proceedings or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee shall deem prejudicial to the trustee hereunder; and (5) until actually paid, released, or discharged every such coupon, or right to interest or dividends, and all such other claims and indebtedness shall remain subject to this indenture.

294 If any such coupons, or if any evidence of any such claim or indebtedness, delivered to the railroad company hereunder,

shall not, as aforesaid, forthwith be paid or canceled, the railroad company shall return the same to the trustee, and in case of the payment of any such coupon, claim, or indebtedness, shall, upon the demand of the trustee, furnish satisfactory evidence of the cancellation and extinguishment thereof.

SEC. 3. In case any sum shall be paid on account of the principal of any bonds or of any obligations subject to this indenture, or in case any sum shall be paid on account of the interest on any such bonds or obligations, out of the proceeds of property covered by a mortgage or trust deed securing such bonds or obligations, or in case, upon the dissolution or liquidation of any company, any sum shall be paid upon any bonds or any shares of stock or any claims against or indebtedness of such company, subject to this indenture, then, in any such case, any such sum, unless received by the trustee under the said first consolidated mortgage deed dated December 10, 1895, or by the trustee under the said indenture dated February 1, 1901, upon the trusts thereof, severally and respectively, or unless applied on account of the purchase price of property purchased pursuant to section 5 of this article, shall be received by the trustee and shall be paid over by the trustee to the railroad company to reimburse it for expenditures by it made for any of the purposes for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures, signed by the president, or a vice-president, or the general manager, or chief engineer, and by the comptroller, or auditor, or treasurer of the railroad company.

SEC. 4. Unless and until a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed; or unless the trustee shall have entered into possession of the mortgaged
295 premises, or part thereof, under the power herein granted; or unless and until there shall be a default (1) in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and such default shall have continued for the period of six months; or (2) in the payment of the principal of any bond hereby secured; or (3) in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901; or (4) in the due observance or performance of some other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, the railroad company shall have the right to vote upon all shares of stock subject to this indenture, for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such shares were not subject to this indenture; and from time to time, upon demand of the railroad company, the trustee forthwith shall execute and deliver, or shall cause to be executed and delivered, to the railroad company, or to its nominees, suitable powers of attorney or proxies to vote upon any shares of stock which shall have been transferred to the trustee.

SEC. 5. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations which shall have been delivered to, and shall be held by the trustee hereunder, or of any other bonds then secured by the same mortgage or deed of trust as such bonds held by the trustee, then in any such case, if the trustee shall hold more than ninety per cent in amount of the entire issue of such bonds or obligations in default, it shall, upon the written request of the railroad company, and in other cases, upon such written request, it may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction
296 to foreclose or enforce the mortgage, or trust, or charge, by which such bonds or obligations in default are secured. In case the railroad company shall be in default in the payment of the principal of any of the bonds hereby secured, or in case the railroad company shall be in default in the payment of the interest on any of such bonds, and such default in the payment of interest shall have continued for the period of six months, or in case a receiver of the mortgaged premises shall have been appointed, or in case the trustee shall have entered or shall have elected to enter into possession of the mortgaged premises, either under the power herein conferred or by the voluntary action of the railroad company, then and in any such case the trustee, in its discretion, may institute such proceedings without such written request.

In case (1) any company of whose capital stock the greater part shall be held by the trustee subject to this indenture as a first lien thereon, shall be dissolved or liquidated, or in case (2) all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale, or in case (3) any property, covered by a mortgage securing any bonds, or subject to any charge or trust for the payment of any other obligations, held by the trustee subject to this indenture as a first lien thereon, shall be sold upon foreclosure of such mortgage, or by enforcement of such charge or trust, then in any such event, if the property of such dissolved or liquidated company, or the property sold, can be acquired by crediting on the bonds, obligations, claims, indebtedness, or stock, held by the trustee hereunder, any sum accruing or to be received thereon out of the proceeds of such property, and by paying not more than ten per cent of the price of such property in cash (or more than ten per cent, if the holders of a majority in amount of the bonds hereby secured shall so request), the trustee in its discretion may, but, if requested in writing by the railroad company or by the holders
297 of a majority in amount of the bonds hereby secured, and provided with the amount of cash necessary therefor (whether such amount be more or less than ten per cent of the price of such property), the trustee in every case shall purchase or cause to be purchased, or permit the railroad company to purchase, such property, either in the name or on behalf of the trustee or of the railroad company, or by purchasing trustees, and shall use, or permit the railroad company to use, such bonds, obligations, claims, indebted-

ness, and stock, so far as may be, to make payment for such property; and in case of any such purchase the trustee shall take such steps as it may deem proper to cause such property to be vested either in the railroad company, subject to this indenture, or in some other corporation organized or to be organized, with power to acquire and manage such property, provided that all the bonds and other indebtedness and capital stock thereof (excepting the number of shares required to qualify directors), shall be received by the trustee and shall be held for the benefit of the railroad company, or its assigns, subject to this indenture.

With the written consent of the railroad company the trustee at any time may vote upon any shares of stock that shall be held by it hereunder, and may take such other action as in its discretion it shall deem advisable to protect its interests and the interests of the bondholders hereunder, in respect of any bonds, obligations, or stocks subject to the lien hereof, and with such consent of the railroad company the trustee may join in any plan of reorganization in respect of any such bonds or stocks and may accept new securities issued in exchange therefor under such plan. In case the railroad company shall be in default in the payment of any interest or the principal of any of the bonds hereby secured and such default shall have continued for the period of six months, the trustee shall be entitled to take such steps without the consent of the railroad company.

The railroad company covenants that, on demand of the
298 trustee, it, the railroad company, forthwith will pay, or will satisfactorily provide for, all expenditures incurred by the trustee under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any property which the trustee shall purchase or shall cause to be purchased pursuant to the provisions of this section; and in case the railroad company shall fail so to do, then, without impairment of, or prejudice to, any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien prior to these presents upon all the stocks, bonds, claims and indebtedness in respect of which such advances shall have been made, and the proceeds thereof and any property acquired by means thereof.

In case the trustee shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stocks, then the trustee shall receive any portion of the proceeds of the sale accruing on the securities by it held hereunder, and such proceeds, from time to time, shall be paid over to the railroad company to reimburse it for expenditures by it made for any of the purposes for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures signed by the president or a vice-

president or the general manager or chief engineer, and by the comptroller or auditor or treasurer, of the railroad company.

SEC. 6. Anything in this indenture to the contrary notwithstanding, any company all or part of whose capital stock shall be subject to this indenture, may be merged or consolidated with, or all or any
299 part of its property may be sold or conveyed to, the railroad company. In the event of such consolidation or merger or sale, this indenture shall become and be a lien upon the property of the company so consolidated or merged with, or the property so sold or conveyed to, the Railroad Company, with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured shall always have as full and complete a lien upon such property as that herein created by the pledge of the stock and bonds of such constituent companies or of such selling company, to the Trustee hereunder.

Anything in this indenture to the contrary, notwithstanding, any company, all or part of whose capital stock shall be subject to this indenture, may be merged or be consolidated with, or all of its property may be sold or conveyed to, any other company, all or part of whose capital stock shall be subject to this indenture; provided, however, that the portion of the capital stock of any such consolidated or merging company (but never less than a majority thereof) issued for and in lieu of any stock previously pledged hereunder, shall always bear to the total capital stock a proportionate relation at least as high as that borne by such previously pledged stock to the total capital stock of such constituent companies; and provided further that in the case of any such sale by any such company of all its property, the portion of the capital stock of the purchasing company (but never less than a majority thereof) subject to this indenture, shall always bear to the total capital stock of such purchasing company a proportionate relation at least as high as that borne by the previously pledged stock of the selling company to the total capital stock of such selling company. Such portion of such stock of such consolidated or merging company shall then become and be subject to this indenture, and shall be held by the Trustee hereunder pursuant to the provisions hereof, or by the Trustee under the first consolidated mortgage deed,
300 dated December 10, 1895, or by the Trustee under the indenture dated February 1, 1901, pursuant to the provisions thereof, severally and respectively, and the holders of the bonds hereby secured shall always, subject to the lien of said two former indentures last above mentioned, have a lien upon such portion of such stock of such consolidated or merging company as full and complete as upon the stock of such constituent companies, by reason of the pledge hereunder.

The trustee holding the same may make any exchange, substitution, cancellation or surrender of securities required for the purposes or in accomplishment of any such merger or consolidation; and the Trustee hereunder may receive the opinion of any counsel approved by it as to the legal effect of any such merger or consolidation, and as to the

steps necessary to be taken to consummate the same, and as to any other matter under this section; and such opinion shall be full protection to the Trustee for any action by it taken pursuant thereto.

SEC. 7. Nothing in this indenture contained shall prevent (1) the renewal or extension, if without impairment of lien or security, at the same or a lower rate of interest, (a) by the Railroad Company of any bond or obligation secured by a mortgage or charge underlying the lien of the said first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901, or secured by a mortgage or lien permitted to be created under the provisions of either of said indentures or of this indenture; or (b) by any company any of the shares of whose capital stock shall be subject to this indenture, of any bond or obligation secured by mortgage upon its property; or (c) by any company of any of its bonds or obligations which shall be subject to this indenture; or (2) the issue in place of and in substitution for any such bonds or obligations of the Railroad Company or of any such other company, of other bonds or obligations for
301 equivalent amounts, bearing the same or a lower rate of interest, adequately secured by a similar mortgage or lien upon the same property; provided, however, that in case any bonds or obligations subject to this indenture shall be so renewed or extended, such bonds or obligations as so renewed or extended shall continue subject to this indenture to the same extent, and shall be lodged and held in the same manner as theretofore; and that in case any bonds or obligations subject to this indenture shall be exchanged for bonds or obligations substituted as aforesaid, the substituted bonds or obligations shall ipso facto forthwith become subject to this indenture to the same extent, and shall be lodged and held in the same manner as those for which they are substituted.

At any time, in its discretion, the trustee may, and, if requested in writing by the railroad company, it shall, consent to any such renewal, extension, or subdivision. The trustee may receive the opinion of any counsel approved by it as conclusive evidence that any such renewal, extension, or substitution is in compliance with the provisions of this section.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond, which in any way at or after maturity shall have been transferred or pledged separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured

by this indenture, and any such default shall have continued for the period of six months, or in case (2) default shall be made in
302 the payment of the principal of any bond hereby secured, or in case (3) default shall be made in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901; or (4) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given to the railroad company by the trustee or by the holders of five per cent in amount of the bonds hereby secured, then and in each and every such case the trustee personally, or by its agents or attorneys, may enter into and upon all or any part of the railways, rolling stock, property, and premises, lands, rights, interests, and franchises, hereby conveyed or intended so to be, and each and every part thereof, and may exclude the railroad company, its agents and servants, wholly therefrom; and having and holding the same, may use, operate, manage, and control said railways and other premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents, and servants or attorneys, to the best advantage of the holders of the bonds hereby secured; and upon every such entry, the trustee, at the expense of the trust estate, from time to time, either by purchase, repairs, or construction, may maintain and restore, and may insure or keep insured, the rolling stock, tools, and machinery, and other property, buildings, bridges, and structures, erected or provided for use in connection with said railways and other premises whereof it shall have become possessed as aforesaid, in the same manner and to the same extent as is usual with railway companies; and likewise, from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals, and replacements, and useful alterations, additions, betterments, and im-
303 provements thereto and thereon, as to it may seem judicious; and in such case the trustee shall have the right to manage the mortgaged premises and to carry on the business and exercise all rights and powers of the railroad company, either in the name of the railroad company or otherwise, as the trustee shall deem best; and it shall be entitled to collect and receive all tolls, earnings, income, rents, issues, and profits of the same and every part thereof, and also the income from stocks and bonds subject to this indenture; and after deducting the expenses of operating said railways and other premises, and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, with interest on the overdue installments at the rate of four per cent per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference.

In case the principal of the bonds hereby secured shall have become due, by declaration or otherwise, first to the payment of the accrued interest (with interest on the overdue installments thereof at the rate of four per cent per annum) in the order of the maturity of the installments, and next to the payment of the principal of all bonds hereby secured; in every instance such payments to be
304 made ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify the provisions of section 1 of this article four, but are subject thereto.

SEC. 3. In case the Trustee shall have entered, or shall have elected to enter, as aforesaid, or in case a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed, or in case default shall be made and shall continue as specified in the preceding section 2 of this article, the Trustee shall be entitled (subject to any prior rights of the Trustee under the said first consolidated mortgage deed dated December 10, 1895, or of the Trustee under the said indenture dated February 1, 1901, severally and respectively, in respect of the stocks and bonds pledged thereunder) to vote on all shares of stock then subject to this indenture, and, for the benefit of the holders of the bonds hereby secured, shall be entitled to collect and receive all dividends on the shares of stock that shall then be subject to this indenture, and all sums payable for principal, interest, or otherwise upon any bonds or obligations that shall then be subject to this indenture, and to apply as hereinbefore provided the net moneys received; and, as holder of any such shares of stock and of any such bonds, to perform any and all acts, or to make or execute any and all transfers, requests, requisitions, or other instruments, for the purpose of carrying out the provisions of this section; but in the event that a receiver of any railway upon which this indenture is a first lien shall have been appointed and shall be in possession thereof, the Trustee from time to time, in its discretion, may, and if requested by the holders of a majority in amount of the bonds hereby secured it shall, turn over any part or all of the interest moneys and dividends so collected by it to such receiver, and may cooperate with such receiver in managing and operating the entire system of the
305 Railroad Company in such manner as the Trustee shall deem for the best interests of the holders of the bonds hereby secured.

In aid of the powers in this section to it granted, the trustee hereunder in case of and during any entry or receivership or default as herein contemplated, shall possess and may exercise, to the exclusion of the railroad company, any and all of the rights reserved to the

railroad company under the said first consolidated mortgage deed of December 10, 1895, and the indenture of February 1, 1901, in respect of the stocks, bonds, or other obligations held by the trustee of either of said indentures, respectively, and subject to this indenture, including the right to demand and to receive from either of said trustees, suitable proxies, orders or other instruments to enable it or its nominee to vote and to collect dividends and interest upon any of such stocks, bonds or other obligations.

SEC. 4. In case a default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months, then and in every case of such continuing default, upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared due and payable, and before any sale of the mortgaged premises shall have been made, all arrears of interest upon all the bonds secured hereby, with interest at the rate of four per cent per annum on overdue installments of interest, shall either be paid by the railroad company or be collected out of the mortgaged
306 premises, and all defaults as aforesaid shall have been made good, then and in such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the railroad company and to the trustee may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon. In case the trustee shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the Trustee, then and in every such case, the Railroad Company and the Trustee shall be restored to their former position and rights hereunder in respect of the mortgaged premises, and the shares of stock and the bonds and other property subject or to be subject to this indenture, and all rights, remedies, and powers of the Trustee shall continue as though no such proceeding had been taken.

SEC. 5. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be

kept or performed by the railroad company, and any such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given to the railroad Company by the Trustee, or by the holders of five per cent in amount of the bonds hereby secured, then, and in each and every such case of default, the Trustee, with or without entry, personally or by attorney, in its discretion either (a) may sell, subject to the liens thereon which then shall be prior and superior to the lien of this in-
307 denture, to the highest and best bidder, all and singular the property and premises covered by this inenture, including bonds and stocks, rights, franchises, and interests, and appurtenances, and other real and personal property of every kind, and all right, title, and interest, claim and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of section 7 of this article four, in which case such sale shall be made in parcels, as in said section provided; which sale or sales shall be made at public auction at such place in the city of Elmira, in the State of New York, or at such other place, and at such time and upon such terms as the Trustee may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law; or (b) may proceed to protect and to enforce its rights and the rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the Trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder.

SEC. 6. Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured, in case of any continuing default as specified in section 5 of this article four, it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders
308 of the bonds hereby secured; but anything in this indenture to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct and to control the action of the trustee, and the method and the place of conducting any and all proceedings for any sale of the premises and property subject to this indenture, or for the foreclosure of this indenture or for the appointment of a receiver, or any other proceedings hereunder.

SEC. 7. In the event of any sale, whether made under the power of sale herein granted or conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property subject to this indenture shall be sold in one parcel and as an entirety, including all the rights, title, estates, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature, unless such sale as an entirety is impracticable by reason of some statute or other cause, or unless the holders of a majority in amount of the bonds hereby secured then outstanding shall in writing request the trustee to cause said premises to be sold in parcels, in which case the sale shall be made in such parcels as may be specified in such request; and this provision shall bind the parties hereto, and each and every of the holders of the bonds and coupons hereby secured, or intended so to be.

SEC. 8. Notice of any such sale pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in New York, N. Y., and in a newspaper published in Chicago, Illinois.

309 SEC. 9. The trustee may adjourn from time to time any sale by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication it may make such sale at the time and place to which the same shall be so adjourned.

SEC. 10. Upon the completion of any sale or sales under this indenture, the trustee shall execute and deliver to the accepted purchaser or purchasers a good and sufficient deed, or good and sufficient deeds, and other instruments, conveying, assigning, and transferring the properties and franchises sold, subject severally and respectively to the liens thereon which then shall be prior and superior to the lien of this indenture. The trustee and its successors hereby are appointed the true and lawful attorneys irrevocable of the Railroad Company, in its name and stead to make all necessary conveyances and assignments of property and all necessary transfers of shares of stock or bonds or other obligations thus sold; and for that purpose it and they may execute all necessary deeds and instruments of assignment and transfer, and may substitute one or more persons with like power; the railroad company hereby ratifying and confirming all that its said attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale herein granted and conferred, or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the Railroad Company, of, in, and to the prem-

ises and property so sold, and shall be a perpetual bar both at law and in equity against the Railroad Company, its successors and assigns, and against any and all persons claiming or to claim the premises or property sold, or any part thereof, from, through, or under the Railroad Company, its successors or assigns.

The personal property and chattels conveyed or intended
310 to be conveyed by or pursuant to this indenture, other than stocks, bonds, and other securities and claims, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the said railroads and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

SEC. 11. The receipt of the Trustee for the purchase money paid at any such sale shall be a sufficient discharge therefor to any purchaser of the property or any part thereof, sold as aforesaid; and no such purchaser or his representatives, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 12. In case of such sale under the foregoing provisions of this article, whether made under the power of sale herein granted or pursuant to judicial proceedings, or in case of a sale upon foreclosure of the said first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901, by reason of a default of the Railroad Company thereunder, the principal sums of the bonds hereby secured, if not previously due, shall immediately thereupon become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 13. The purchase money, proceeds, or avails of any such sale, whether under the power of sale herein granted or pursuant to judicial proceedings, together with any other sums which then may
311 be held by the Trustee under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys and counsel, and of all expenses, liabilities, and advances made or incurred by the trustee, and to the payment of all taxes, assessments, or liens prior to the lien of these presents, except the superior liens and any taxes, assessments, or other charges subject to which the property shall have been sold.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of four per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full

the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of section 1 of this article four.

Third. To the payment of the surplus, if any, to the Railroad Company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 14. Upon any such sale by the Trustee or pursuant to judicial proceedings, any purchaser, for or in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any bonds, and any matured and unpaid coupons hereby secured by presenting such bonds and coupons in order that there may
312 be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons, as his ratable share of such net proceeds, after the deduction of costs, expenses, compensations, and other charges; and thereupon such purchaser shall be credited, on account of such purchase price payable by him, with the portion of such net proceeds that shall be applicable to the payment of, and that shall have been credited upon, the bonds and coupons so presented; and, at any such sale, any bondholders may bid for and purchase such property and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability.

SEC. 15. The Railroad Company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and such default shall have continued for the period of six months, or (2) in case default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether upon the maturity of said bonds, or upon declaration as authorized by this indenture, or upon a sale as set forth in section 12 of this article four, then, upon demand of the Trustee, the Railroad Company will pay to the Trustee, for the benefit of the holders of the bonds and coupons hereby secured, then outstanding, the whole amount that then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest at the rate of four per cent per annum upon the overdue principal and installments of interest; and in case the Railroad Company shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

313 The Trustee shall be entitled to recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture, and the right of the Trustee to recover such judgment shall not be affected

by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the property subject to this indenture, and of the application of the proceeds of sale to the payment of the debt hereby secured, the Trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid with interest. No recovery of any such judgment by the Trustee and no levy of any execution upon any such judgment upon property subject to this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the property or any part of the property subject to this indenture, or any rights, powers, or remedies of the Trustee hereunder, or any lien, rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies of the Trustee and of the bondholders shall continue unimpaired as before.

Any moneys thus collected by the Trustee under this section shall be applied by the Trustee towards payment of the amounts then due and unpaid upon such bonds and coupons in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind (except as provided in section 1 of this article four), according to the amounts due and payable upon such bonds and coupons, respectively, at the date fixed by the Trustee for the distribution of such moneys upon presentation of the several
314 bonds and coupons and stamping such payment thereon, if partly paid, and upon surrender thereof, if fully paid.

SEC. 16. The Railroad Company will not at any time insist upon or plead, or in any manner whatever claim or take the benefit or advantage of, any stay or extension law, now or at any time hereafter in force, nor will it claim, take, or insist upon any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the property or any part of the property subject to this indenture, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree, judgment, or order of any court of competent jurisdiction, nor after any such sale or sales will it claim or exercise any right under any statute enacted by any State, or otherwise, to redeem the property so sold, or any part thereof, and it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the Trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

SEC. 17. Upon filing a bill in equity, or upon commencement of any other judicial proceedings, to enforce any right of the Trustee or of the bondholders under this indenture, the Trustee shall be entitled

to exercise the right of entry, and also any and all other rights and powers herein conferred and provided to be exercised by the Trustee upon the occurrence and continuance of default, as hereinbefore provided; and, as matter of right, the Trustee shall be entitled to the appointment of a receiver of the premises and property subject to this indenture, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the Trustee shall be entitled, as pledgee, to continue to
315 retain possession and control of any stocks, bonds, cash, and other property pledged or to be pledged with the Trustee hereunder.

SEC. 18. At any time hereafter before full payment of the bonds secured hereby, and whenever it shall deem expedient for the better protection or security of such bonds (although then there shall be no default entitling the Trustee to exercise the rights and powers conferred by sections 2 and 3 of this article four), the Railroad Company, with the consent of the Trustee, may surrender and may deliver to the Trustee full possession of the whole or of any part of the property, premises, and interests hereby conveyed or assigned, or intended so to be, and may authorize the Trustee to collect the dividends and interest on all shares of stock, bonds, and other obligations subject to this indenture, and to vote upon all such shares of stock, for any period fixed or indefinite. In such event the Trustee shall enter into and upon the premises and property so surrendered and delivered, and shall take and receive possession thereof, for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon maintaining and to maintain such possession though beyond the expiration of any such prescribed period, and the Trustee, from the time of its entry upon such premises and property, shall work, maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenues thereof as provided in section 2 of this article four. Upon application of the Trustee, and with the consent of the Railroad Company, if then there be no subsisting default such as is specified in said section 2 of this article four, and without such consent if then there shall be such a subsisting default, a receiver may be appointed to take possession of, and to operate, maintain, and manage the whole or any part of the property subject to this
316 indenture, and the Railroad Company shall transfer and deliver to such receiver all such property, wheresoever the same may be situated; and in every case, when a receiver of the whole or of any part of said property shall be appointed under this section, or otherwise, the net income and profits of such property shall be paid over to, and shall be received by, the Trustee, for the benefit of the holders of the bonds hereby secured; provided, however, that notwithstanding the appointment of any such receiver, the Trustee, as pledgee, shall

be entitled to retain possession and control of any stocks, bonds, cash, and other property pledged or to be pledged with the Trustee hereunder.

SEC. 19. In case of any default hereunder, if, in order to preserve the franchises of the Railroad Company and to avoid foreclosure and sale involving the organization of a successor company, any plan of reorganization shall be proposed with provisions for the modification of this indenture, so far as to authorize and require the creation of new liens upon the property subject to this indenture, prior and superior to the lien hereof, then, and in every such case, registered holders of four-fifths in amount of all of the bonds hereby secured then outstanding, by writing, may direct the Trustee, in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan, which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the Railroad Company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to the amount of principal or the date of payment thereof, or as to the rate or dates of payment of interest, or as to the price or rate at which shares of common stock will be issued in conversion of any such bond according to the terms thereof, as herein contemplated. Thereupon, but not otherwise, the Trustee shall, by writing, acquiesce in such provisions of such plan,
317 and such acquiescence by the Trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured, shall be reduced to a written agreement between the Railroad Company and the Trustee, and such agreement shall be recorded in New York County, New York; Passaic County, New Jersey; Susquehanna County, Pennsylvania; Marion County, Ohio; Huntington County, Indiana; and Cook County, Illinois; and, thenceforth, shall be deemed to be part of this indenture, and thereafter the lien of this indenture, and of the bonds hereby secured, shall be deemed to be, and shall be, subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement.

Registration for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 3 of article two of this indenture.

SEC. 20. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereunder, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the Trustee written notice of such default, and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of

twenty-five per cent in amount of the bonds hereby secured, then outstanding, shall have made written request upon the Trustee, and shall have afforded to it a reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name; nor unless, also, they shall have offered to the Trustee adequate security and indemnity against
318 the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared, in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this indenture for the benefit of the bondholders, and to any action or cause of action for foreclosure or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb, or prejudice the lien of this indenture, or to enforce any right hereunder except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 21. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy or remedies, and each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 22. No delay or omission of the Trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein; and every power and remedy given by this article to the Trustee, or to the bondholders, may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the bondholders.

319 ARTICLE FIVE.

No recourse under or upon any obligation, covenant or agreement contained in this indenture, or in any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer or director of the railroad company or of any successor corporation, either directly or through the railroad company by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this indenture, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, stockholders, officers or directors of the railroad company or of any successor corporation,

or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all personal liability of every name and nature, and any and all rights and claims against every such stockholder, officer or director, whether arising at common law or in equity, or created by statute or constitution, are hereby expressly released and waived as a condition of, and as part of the consideration for, the execution of this indenture and the issue of the bonds and interest obligations secured hereby.

ARTICLE SIX.

SECTION 1. Any demand, request or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by agent
320 appointed in writing. Proof of the execution of any such demand, request or other instrument, or of the writing appointing any such agent, and of the ownership by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee or of the railroad company with regard to due action taken by it under such instrument, if such proof be made in the following manner:

The fact and date of the execution by any person of any such demand, request, or other instrument or writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The fact of the holding by any bondholder of coupon bonds transferable by delivery, and the amounts and issue numbers and serial letter of such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), if such certificate shall be deemed by the trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

SEC. 2. The railroad company and the trustee may deem and may treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond or coupon, as the case may be, for the purpose of converting the bond, or of receiving payment of any bond or coupon, and for all other purposes, and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

321 The Railroad Company and the Trustee may deem and treat the person in whose name any registered bond without coupons, issued hereunder, shall be registered upon the books of the Railroad Company as hereinbefore provided, as the absolute owner of such bond, for the purpose of converting the bond, or of receiving payment of, or on account of the principal and interest of such bond, and for all other purposes, and may deem and treat the person in whose name any coupon bond shall be so registered as the absolute owner thereof, for the purpose of converting the bond, or of receiving payment of, or on account of, the principal thereof, and for all other purposes, except to receive payment of interest represented by outstanding coupons; and all such conversions or payments so made to any such registered holder for the time being, or upon his order, shall be valid and effectual to satisfy and discharge the obligation to convert such bonds, and to the extent of the sum or sums so paid the liability for moneys payable upon any such bonds.

ARTICLE SEVEN.

SECTION 1. Upon the written request of the president or of a vice-president of the Railroad Company, approved of or authorized by resolution of its board of directors or executive committee, from time to time, while the Railroad Company is in possession of any of the property subject to this indenture, but subject to the conditions and limitations in this section prescribed, and not otherwise, the Trustee shall release from the lien and operation of this indenture any part of the railways, land, and other property then subject thereto, except stocks, bonds, and other securities; provided (1) that no part of the lines of track or of the rights of way shall be released unless the use thereof no longer shall be necessary or advantageous in the operation of any of the lines of railway subject to this indenture, and no part of such lines of track or rights of way shall so be released if
322 thereby the continuity of the lines of railway of the railroad company shall be broken; and (2) that no part of the railways or other property subject to this indenture shall be released hereunder unless at the time of such release it no longer shall be necessary or advantageous to retain the same for the operation, maintenance, or use of such lines of railway, or for use in the business of the railroad company, and no such release shall be made unless the railroad company shall have sold, or shall have contracted to exchange for other property or to sell, the property so to be released.

The proceeds of any and all such sales, and all moneys received as compensation for any property subject to this indenture, taken by exercise of the power of eminent domain (unless applied in accordance with the requirements of the said indentures dated December 10, 1895, and February 1, 1901, severally and respectively), shall be set apart and applied, with the approval of the trustee, to the purchase of other property, real and personal, or for betterments of or improvements upon any part of the mortgaged premises. Any new property

acquired by the railroad company to take the place of any property released hereunder, ipso facto, shall become and be subject to this indenture as fully as if specifically mortgaged or assigned hereby, but if requested by the trustee, the railroad company will convey and assign the same to the trustee by appropriate deeds or other instruments upon the trusts and for the purposes of this indenture.

The railroad company, from time to time, while in possession of any of the property subject to this indenture, also shall have full power, in its discretion, to dispose of any portion of the machinery, equipment, and implements, at any time, subject to the lien hereof, which may have become unfit for such use, replacing the same by new machinery, equipment, or implements, which shall become subject to this indenture.

323 In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article be required to see to the application of the purchase money.

SEC. 2. Upon the written request of the president or of a vice-president of the Railroad Company, authorized or approved by resolution of the board of directors or of the executive committee of the Railroad Company, the Trustee, from time to time, shall execute such releases or other instruments as may be required to release from the lien and operation of this indenture, the leasehold interest, or the term of the lessee or lessees and assigns, under any lease or sublease, which may be executed by the Railroad Company or by any lessor company of any land subject to this indenture or embraced in any lease pledged or assigned under this indenture, which is not embraced in the right of way of the mortgaged railroad or of any leased railroad and is not used for the purpose of stations, yards, round houses, freight houses, machine shops, docks, or gravel beds, or other purposes connected with the maintenance or operation of the railroad, and thereupon such leasehold interest or term shall be free from the lien and operation of this indenture. The reversion under any such lease shall be and shall remain subject to this indenture.

SEC. 3. In case any of the property subject to this indenture shall be in the possession of a receiver lawfully appointed, the powers in and by this article conferred upon the Railroad Company may be exercised by such receiver with the approval of the Trustee; and if the Trustee shall be in possession of any of such property under any provision of this indenture, then all the powers of this article conferred upon the Railroad Company may be exercised by the Trustee in its discretion.

SEC. 4. The Railroad Company from time to time may make changes or alterations in, or substitutions of, any leases, track-
324 age rights, or contracts that are subject to this indenture; provided that in case of any changes or alterations in, or any substitutions of, any leases, contracts, or trackage rights, by which the Railroad Company now secures access to any point or points, the written consent of the trustee under the said first consolidated mortgage deed, dated December 10, 1895, shall first be obtained so far as

concerns any such leases, contracts, or trackage rights subject to said indenture, and the written consent of the Trustee hereunder shall first be obtained so far as concerns any such leases, contracts, or trackage rights, subject to this indenture and not subject to said first consolidated mort 'age deed. In any such event, any modified, altered, or substituted eases, contracts, or trackage rights forthwith shall become bound by and be subject to the terms of this indenture, in the same manner as those previously existing.

SEC. 5. A certificate signed by the president or any vice-president, or the chief engineer of the railroad company, may be received by the trustee as conclusive evidence of any of the facts mentioned in this article, and shall be full warrant to the trustee for its action on the faith thereof.

ARTICLE EIGHT.

SECTION 1. The trustee shall not be answerable for the default or the misconduct of any agent or attorney appointed in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; nor shall any trustee be responsible for the acts or defaults of any other trustee or trustees, or for anything whatever in connection with this trust, except each for its or his willful misconduct or gross negligence. The trustee shall be protected in acting upon any notice, request, consent, certificate, bond, or other paper or document, believed by it to be genuine and to have been signed by the
325 proper party. The trustee shall not be personally liable for any debts duly contracted by it, or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. Neither shall the trustee be under any obligation to take any action towards the execution or enforcement of the trusts hereby created, which, in the opinion of the trustee, shall be likely to involve expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at least five per cent in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent in amount of the bonds hereby secured, then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but the foregoing provisions of this section are intended only for the protection of the trustee, and shall not be construed to affect any discretion or power by any provision of this indenture given to the trustee, to determine whether or not it shall take action in respect of any default without such notice or request from bondholders, or to affect any other decision or power given to the trustee. The trustee shall not be responsi-

ble for the recording of this indenture and shall not be required to file the same as a chattel mortgage.

The Trustee shall be reimbursed for, and be indemnified against, any liability or damages which may be sustained by it in the premises. The Trustee shall have, secured hereby upon the property covered by this indenture, a lien prior to that of any bond issued under
326 this indenture, for its compensation and expenses, and also for any liability or damage by it sustained in the premises.

The Trustee shall not be responsible in any manner whatsoever for the validity hereof, or for the amount or the extent of the security afforded by the property covered hereby, or for the recitals herein or in said bonds contained, all such recitals being and to be taken as the statements of the Railroad Company; nor shall it be accountable for the use of any bonds certified and delivered by the Trustee hereunder or for the application of the proceeds of such bonds.

The Trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the Railroad Company agrees to pay such compensation as well as all expenses necessarily incurred or disbursed by the Trustee hereunder.

SEC. 2. The Trustee, or any trustee or trustees hereafter appointed, may resign and be discharged from the trusts created by this indenture by giving to the Railroad Company and to the bondholders, notice by publication of such resignation, specifying a date when such resignation shall take effect, which notice shall be published at least once a day not less than thirty days nor more than sixty days prior to the date so specified, in a newspaper at that time published in New York, N. Y., and in a newspaper published in Chicago, Illinois. Such resignation shall take effect on the day specified in such notice, unless previously a successor trustee shall have been appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such successor trustee.

Any trustee or trustees hereunder may be removed at any time by an instrument in writing under the hands of the holders of one-half in amount of the bonds hereby secured and then outstanding.

SEC. 3. In case at any time the trustee, or any successor
327 trustee, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys-in-fact duly authorized; but until a new trustee shall be appointed by the bondholders as herein authorized, the Railroad Company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy; provided, however, that every such trustee shall be a trust company in the city of New York, having a capital and surplus aggregating at least $2,000,000, if there be such a trust company willing and able to accept the trust upon reasonable or customary terms. After any such appointment by the railroad company, it shall publish

notice of such appointment once in each of four successive weeks in a newspaper published in New York, N. Y., and a newspaper published in Chicago, Illinois; and any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a new trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured, if such appointment by such bondholders be made prior to the expiration of six months after such publication of notice.

Any successor trustee appointed hereunder shall execute, acknowledge, and deliver to the Railroad Company an instrument accepting such appointment hereunder, and thereupon such successor trustee, without any further act, deed, or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in the trust hereunder, with like effect as if originally named as trustee herein; but nevertheless, on the written request of the Railroad Company or of the successor trustee, the trustee ceasing to act shall execute and deliver an instrument transferring to such successor trustee, upon the trusts herein ex-
328 pressed, all the estates, properties, rights, powers, and trusts of the trustee so ceasing to act, and shall duly assign, transfer, and deliver its interest in any stocks, bonds, or other property and moneys subject to this indenture to the successor trustee so appointed in its place; and upon request of any such successor trustee the Railroad Company shall make, execute, acknowledge, and deliver any and all deeds, conveyances, or other instruments in writing for more fully and certainly vesting in and confirming to such successor trustee all such estates, properties, rights, powers, and duties.

If at any time or times, in order to conform to any law of any State in which the railroad company may hold property, the railroad company shall so request, the railroad company and the trustee shall unite in the execution, delivery, and performance of all instruments and agreements necessary or proper to appoint another trust company or one or more persons approved by the trustee, to act either as co-trustee or as co-trustees, for any purpose of this indenture, of all or any of the property subject to this indenture jointly with the trustee originally named herein or its successors, or to act as separate trustee or trustees of any of such property.

Article nine.

Section 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds at any time outstanding and hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and, until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall have surrendered possession to the trustee as herein permitted, the railroad company, its successors,

and assigns shall be suffered and permitted to retain actual possession of all the property subject to this indenture (other than bonds, certificates of stock, cash, and other property pledged or to be pledged hereunder with the trustee), and to manage, operate, and use the same and every part thereof, with the rights and franchises appertaining thereto, and to collect, receive, take, use, and enjoy the tolls, earnings, income, rents, issues and profits thereof.

SEC. 2. If, when the bonds hereby secured shall have become due and payable, the railroad company shall well and truly pay, or cause to be paid, the whole amount of the principal and interest due upon all of the bonds and coupons hereby secured, then outstanding, or shall provide for the payment of such bonds and coupons by depositing with the Trustee hereunder the entire amount due thereon for principal and interest, and also shall pay, or cause to be paid, all other sums payable hereunder by the railroad company, and shall well and truly keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights, and interests hereby conveyed or assigned or pledged shall revert to the railroad company, and the estate, rights, title, and interest of the trustee shall thereupon cease, determine, and become void; and the trustee in such case, on demand of the railroad company, and at its cost and expense, shall enter satisfaction of this indenture upon the record, otherwise the same shall be, continue, and remain in full force and virtue.

ARTICLE TEN.

SECTION 1. All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the railroad company, shall bind its successors and assigns whether so expressed or not.

SEC. 2. Nothing contained in this indenture or in any bond hereby secured shall prevent any consolidation or merger of the railroad company with any other corporation, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof) of all the property subject to this indenture as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and empowered to acquire the same; provided, however, that such consolidation, merger, or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee or of the bondholders hereunder, and that upon such consolidation, merger, or sale, the due and punctual payment of the principal and interest of all of the bonds hereby secured, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case, pursuant to section 2 of this article, the railroad company shall be consolidated or merged with any other corporation,

or shall sell, convey, and transfer (subject to this indenture) all the property covered by this indenture, as an entirety as aforesaid, the successor corporation formed by such consolidation, or into which the railroad company shall have been merged, or which shall have purchased and received a conveyance and transfer, as aforesaid—upon executing and causing to be recorded an instrument satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance of all the covenants and conditions of this indenture—shall succeed to and be substituted for the railroad company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part; and such successor corporation thereupon may cause to be signed, and may issue, either in its own name or in the name of the Erie Railroad Company, any or all of such bonds which theretofore shall not have been signed by the Erie Railroad Company and delivered to the
331 trustee; and, upon the order of said successor corporation, in lieu of the railroad company, and subject to all the terms, conditions, and restrictions herein prescribed, the trustee shall certify and shall deliver any of such bonds which previously shall have been signed and delivered by the officers of the railroad company to the trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, the terms "Railroad Company" and "Erie Railroad Company" include and mean not only the party of the first part hereto, but also any such successor corporation formed by consolidation or otherwise under the laws of New York or of any State or States. Every such successor or purchasing corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the Erie Railroad Company, in its name or otherwise.

SEC. 5. Any act or proceeding, by any provision of this indenture authorized or required to be done or performed by any board or officer of the Railroad Company, shall and may be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time be such lawful sole successor or purchaser of the Railroad Company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the Railroad Company, by instrument in writing executed by authority of two-thirds of its board of directors and delivered to the Trustee, may surrender any of the powers reserved
332 to the Railroad Company or to such successor corporation; and thereupon such power so surrendered shall terminate.

The Standard Trust Company of New York, trustee, the party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which when so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

The Erie Railroad Company hereby constitutes and appoints Frederick D. Underwood to be its attorney for it and in its name, and as and for its corporate act and deed, to acknowledge this mortgage deed before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

The Standard Trust Company of New York hereby constitutes and appoints William C. Lane to be its attorney for it and in its name, and as and for its corporate act and deed, to acknowledge this mortgage deed before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

In witness whereof, the Erie Railroad Company, the party hereto of the first part, has caused this indenture to be signed and acknowledged or proved by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Standard Trust Company of New York, the party of the second part, has caused its corporate seal to be hereunto affixed and to be attested by its secretary, and these presents to be signed
333 and acknowledged or proved by its president, the day and year first above written.

[L. S.] ERIE RAILROAD COMPANY,
By F. D. UNDERWOOD, *President.*

Attest:
G. A. RICHARDSON, *Secretary.*

[L. S.] THE STANDARD TRUST COMPANY OF NEW YORK,
By WM. C. LANE, *President.*

Attest:
WM. C. COX, *Secretary.*

Signed, sealed, and delivered in the presence of—
As to Erie Railroad Company.
GEO. H. COREY,
GEORGE H. GARDINER.

Signed, sealed, and delivered in the presence of—
As to The Standard Trust Company of New York,
GEO. H. COREY,
GEO. H. GARDINER.

STATE OF NEW YORK,
County of New York, city of New York, ss:

Be it remembered, and I do certify, that on this 28th day of
334 May, in the year one thousand nine hundred and three, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Frederick D. Underwood, the attorney named by the Erie Railroad Company in the foregoing mortgage deed, and Granville A. Richardson, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the 1st day of April, 1903, as president and secretary respectively of Erie Railroad Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and attorney and the secretary respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary respectively of Erie Railroad Company, the within-named grantor, and one of the corporations described in and which executed the said mortgage deed, in the said city and county of New York, for themselves and on behalf of said Erie Railroad Company, and being by me informed of the contents of said mortgage deed they, on this day, severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed individually and as such president and secretary respectively, and as the free and voluntary act and deed of the said Erie Railroad Company, for the uses and purposes therein contained and set forth, and the said Frederick D. Underwood, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the same to be the act of the said Erie Railroad Company; and the said Frederick D. Underwood and Granville A. Richardson, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Frederick D. Underwood in the city of New York, and the said Granville A. Richardson in the city of New York, both in the State of New York, that the said Frederick D. Underwood is the president and the said Granville A. Richardson is the secretary of the said Erie Railroad Company, one of the corporations described in and which executed the above instrument; that their names, respectively signed in attestation of the foregoing mortgage deed, are in the said deponents' own proper handwriting respectively; that they know the corporate seal of the said Erie
335 Railroad Company, the grantor in the foregoing mortgage

deed named; that the seal affixed to the foregoing instrument is the common or corporate seal of the said Erie Railroad Company, and was thereto affixed by authority of the board of directors, and by order of said Erie Railroad Company, as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, of said company; and the said Granville A. Richardson did further depose and say that he was personally present and saw said Frederick D. Underwood as such president sign the said mortgage deed and affix the common or corporate seal of the said Erie Railroad Company thereto, and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Erie Railroad Company by order of the said board of directors, and that thereupon he, the said Granville A. Richardson, signed his name thereto at the same time as a subscribing witness.

In witness whereof I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

336 STATE OF NEW YORK,
County of New York, ss:

I, Thos. L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 29th day of May, 1903.

[L. S.] THOS. L. HAMILTON, *Clerk.*

STATE OF NEW YORK,

County of New York, city of New York, ss:

Be it remembered, and I do certify, that on this 28th day of May, in the year one thousand nine hundred and three, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, and Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared William C. Lane the attorney named by The Standard Trust Company of New York in the foregoing mortgage deed, and William C. Cox, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the first day of April, 1903, as president and secretary, respectively, of The Standard Trust Company of New York, with whom I am personally ac-
337 quainted, and who are personally well known to me to be, and who, I am satisfied, are the president and attorney, and the secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of The Standard Trust Company of New York, the within named grantee, and one of the corporations described in and which executed the said mortgage deed, in the said city and county of New York, for themselves, and on behalf of said The Standard Trust Company of New York, and being by me informed of the contents of said mortgage deed, they, on this day, severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date; and further acknowledged that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed, individually and as such president and secretary, respectively, and as the free and voluntary act and deed of said The Standard Trust Company of New York, for the uses and purposes therein contained and set forth, and the said William C. Lane, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the same to be the act of the said The Standard Trust Company of New York, and the said William C. Lane and William C. Cox, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said William C. Lane in the city of New York, and the said William C. Cox in the city of New York, both in the State of New York, that the said William C. Lane is the president, and the said William C. Cox is the secretary, of said The Standard Trust Company of New York, one of the corporations described in and which executed the above instrument; that their names respectively signed in attestation of the foregoing mortgage deed are in the said deponent's own proper handwriting respectively, that they know the corporate seal of said The Standard Trust Company of New

York, the grantee in the foregoing mortgage deed named, that the seal affixed to the foregoing instrument is the common or corporate seal of said The Standard Trust Company of New York, and was thereto affixed by authority of the board of directors and by order of said The Standard Trust Company of New York as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority as president and secretary respectively of said company; and the said William C. Cox did further depose and say that he was personally present and saw said William C. Lane as such president sign the said mortgage deed and affix the common or corporate seal of said The Standard Trust Com-
338 pany of New York thereto, and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of said The Standard Trust Company of New York by order of the said board of directors, and that thereupon he, the said William C. Cox, signed his name thereto at the same time as a subscribing witness.

In witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

[L. S.] GEO. L. COREY,
Commissioner of Deeds for the State of Ohio.

STATE OF NEW YORK,
County of New York, ss:

I, Thos. L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify, that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 29th day of May, 1903.

[L. S.] THOS. L. HAMILTON, *Clerk.*

339 NEW YORK.

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 1, Liber 88, p. 1, and indexed under blocks number 2, 36, 130, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] JOHN H. J. RONNER, *Register.*

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 3, Liber 113, p. 1, and indexed under blocks number 663, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] JOHN H. J. RONNER, *Register.*

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 4, Liber 135, p. 1, and indexed under block number 1108 on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] JOHN H. J. RONNER, *Register.*

340 Recorded in the office of the clerk of the county of Allegany on the 9th day of June, 1903, in Liber 99 of mortgages, p. 183, at 2.30 p. m.

Witness my hand and official seal.

[L. S.] THOS. S. TEFFT,
Dep. Clerk of Allegany County.

Recorded in the office of the clerk of the county of Broome on the 6th day of June, 1903, in Liber 122 of mortgages, p. 373, at 10.45 a. m.

Witness my hand and official seal.

[L. S.] A. K. MAREAN,
Clerk of Broome County.

Recorded in the office of the clerk of the county of Cattaraugus on the 4th day of June, 1903, in Liber 141 of mortgages, p. 307, at 8 o'clock, and examined.

Witness my hand and official seal.

[L. S.] E. E. KELLEY,
Clerk of Cattaraugus County.

341 Recorded in the office of the clerk of the county of Chautauqua, on the 4th day of June, 1903, in Liber 255 of mortgages, p. 61, at 3.36 p. m.

Witness my hand and official seal.

[L. S.] E. J. MCCONNELL,
Dep. Clerk of Chautauqua County.

Recorded in the office of the clerk of the county of Chemung, on the 9th day of June, 1903, in Liber 116 of mortgages, p. 22—9 a. m.
Witness my hand and official seal.
[L. S.] EDWIN D. BURGESS,
Dep. Clerk of Chemung County.

Recorded in the office of the clerk of the county of Erie, on the 2nd day of June, 1903, in Liber 975 of mortgages, page 43, at 3.26 p. m.
Witness my hand and official seal.
[L. S.] J. H. PRICE,
Clerk of Erie County.

342 Recorded in the office of the clerk of the county of Delaware on the 5th day of June, 1903, in Liber 87 of mortgages, p. 161, at 4.55 o'clock p. m.
Witness my hand and official seal.
[L. S.] W. T. BLACK,
Clerk of Delaware County.

Recorded in the office of the clerk of the county of Genesee on the 4th day of June, 1903, in Liber 115 of mortgages, p. 1, 8 a. m.
Witness my hand and official seal.
[L. S.] C. B. PIXLEY,
Clerk of Genesee County.

Recorded in the office of the clerk of the county of Livingston on the 3rd day of June, 1903, in Liber 126 of mortgages, p. 64, 11.05 a. m.
Witness my hand and official seal.
[L. S.] H. B. CURTIS,
Clerk of Livingston County.

343 Recorded in the office of the clerk of the county of Monroe on the 3rd day of June, 1903, at 9.13 a. m., in Liber 469 of mortgages, p. 106.
Witness my hand and official seal.
[L. S.] JAMES COCHRANE,
Deputy Clerk of Monroe County.

Recorded in the office of the clerk of the county of Niagara on the 5th day of June, 1903, in Liber 286 of mortgages, p. 438, at 9.30 a. m.
Witness my hand and official seal.
[L. S.] HECTOR M. SLOCUM,
Clerk of Niagara County.

Recorded in the office of the clerk of the county of Orange on the 4th day of June, 1903, in Liber 404 of mortgages, p. 1, 1.50 p. m.
Witness my hand and official seal.
[L. S.] W. G. TAGGART,
Clerk of Orange County.

344 Recorded in the office of the clerk of the county of Rockland on the 4th day of June, 1903, in Liber 166 of mortgages, p. 15, at 10 o'clock a. m.

Witness my hand and official seal.

[L. S.]

CYRUS M. CRUM,
Clerk of Rockland County.

Recorded in the office of the clerk of the county of Steuben on the 8th day of June, 1903, in Liber 156 of mortgages, p. 408, &c., 2.30 p. m.

Witness my hand and official seal.

[L. S.]

J. D. WHEELER,
Clerk of Steuben County.

Recorded in the office of the clerk of the county of Sullivan on the 5th day of June, 1903, in Liber 96 of mortgages, p. 462, at 8.40 a. m.

Witness my hand and official seal.

[L. S.]

G. F. CURREY,
Clerk of Sullivan County.

345 Recorded in the office of the clerk of the county of Tioga on the 8th day of June, 1903, in Liber 71 of mortgages, p. 258, at 9 o'clock a. m.

Witness my hand and official seal.

[L. S.]

F. W. RICHARDSON,
Clerk of Tioga County.

Recorded in the office of the clerk of the county of Wyoming on the 3rd day of June, 1903, in Liber 66 of mortgages, p. 395, at 2.40 p. m.

Witness my hand and official seal.

[L. S.]

E. M. JENNINGS,
Clerk of Wyoming County.

NEW JERSEY.

Recorded in the office of the clerk of the county of Bergen on the 3rd day of June, 1903, in Liber 151 of mortgages, p. 307, at 1 p. m.

Witness my hand and official seal.

[L. S.]

JOHN R. RANNEY,
Clerk of Bergen County.

346 Recorded in the office of the register of the county of Essex on the 2nd day of June, 1903, in Liber 417 of mortgages, p. 1, at 2.27 p. m.

Witness my hand and official seal.

[L. S.]

GEORGE E. DECAMP,
Register of Essex County.

Recorded in the office of the register of the county of Hudson on the 2nd day of June, 1903, in Liber 497 of mortgages, p. 197, &c., at 9.20 a. m.

Witness my hand and official seal.

[L. S.] JAMES C. CLARKE,
Register of Hudson County.

Recorded in the office of the clerk of the county of Passaic on the 3rd day of June, 1903, in Liber P–6 of mortgages, p. 436, &c., at 2.30 p. m.

Witness my hand and official seal.

[L. S.] JNO. J. SLATER,
Clerk of Passaic County.

Received in the clerk's office of the county of Morris, New Jersey, on the second day of June, 1903, at 4.24 o'clock p. m., and recorded in Book Q–5 of mortgages for said county on pages 1, &c.

Witness my hand and official seal.

[L. S.] DANIEL S. VOORHEES,
Clerk of Morris County.

347 Recorded in the office of the secretary of the State of New Jersey on the 3rd day of June, 1903, in Liber L of corporations, p. 308.

Witness my hand and official seal.

[L. S.] S. D. DICKINSON,
Secretary of State.

PENNSYLVANIA.

Recorded in the office of the recorder of deeds of the county of Pike on the third day of June, 1903, in Liber 14 of mortgages, p. 473, etc.

Witness my hand and official seal.

[L. S.] JOHN C. WESTBROOK, Jr.,
Recorder of Pike County.

3.50 p. m.

Recorded in the office of the recorder of deeds of the county of Wayne on the 4th day of June, 1903, in Liber 19 of mortgages, p. 531.

Witness my hand and official seal.

[L. S.] F. H. CRAGO,
Recorder of Wayne County.

348 11.30 a. m.

Recorded in the office of the recorder of deeds of the county of Susquehanna on the 5th day of June, 1903, in Liber 28 of mortgages, p. 183.

Witness my hand and official seal.

[L. S.] B. B. BUFFEN,
Recorder of Susquehanna County.

Recorded in the office of the recorder of deeds of the county of Lackawanna on the 4th day of June, 1903, in Liber 139 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] EMIL BONN,
Recorder of Lackawanna County.

7.50 p. m.

Recorded in the office of the recorder of deeds of the county of McKean on the 9th day of June, 1903, in Liber 59 of mortgages, p. 50, &c.

Witness my hand and official seal.

[L. S.] H. M. CHOATE,
Recorder of McKean County.

349 Recorded in the office of the recorder of deeds of the county of Elk on the 9th day of June, 1903, in Liber P of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] A. M. ENT,
Recorder of Elk County.

Recorded in the office of the recorder of deeds of the county of Jefferson on the 9th day of June, 1903, in Liber Q of mortgages, p. 102.

Witness my hand and official seal.

[L. S.] GIL. C. REITZ,
Recorder of Jefferson County.

10.30 a. m.

Recorded in the office of the recorder of deeds of the county of Warren on the 10th day of June, 1903, in Liber 30 of mortgages, p. 50.

Witness my hand and official seal.

[L. S.] C. D. CRANDALL,
Recorder of Warren County.

350 Recorded in the office of the recorder of deeds of the county of Erie, on the 5th day of June, 1903, in Liber 48 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] WM. C. KRAEMER,
Recorder of Deeds of Erie County.

Recorded in the office of the recorder of deeds of the county of Crawford on the 6th day of June, 1903, in Mortgage Book 62, p. 265.

Witness my hand and official seal.

[L. S.] A. G. OSTER,
Recorder of Crawford County.

Recorded in the office of the recorder of deeds of the county of Venango on the 6th day of June, 1903, in Liber 97 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] D. K. BUCHANAN,
Recorder of Venango County.

Recorded in the office of the recorder of deeds of the county of Tioga, on the eighth day of June, 1903, in Liber 36 of mortgages, p. 183.

Witness my hand and official seal.

[L. S.]

CHARLES L. BABCOCK,
Recorder of Tioga County.

351 Recorded in the office of the recorder of deeds of the county of Mercer on the 8th day of June, 1903, in Liber 37 of mortgages, p. 280.

Witness my hand and official seal.

[L. S.]

G. G. LAFFERTY,
Recorder of Mercer County.

Recorded in the office of the recorder of deeds of the county of Lawrence on the 8th day of June, 1903, in Liber 58 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.]

ALFRED C. HYDE,
Recorder of Lawrence County.

OHIO.

16673.

Received for record June 5, 1903, at 1 p. m.

Recorded in the office of the recorder of the county of Trumbull on the 20th day of June, 1903, in volume 57 of mortgages, page 364 et seq.

Witness my hand and official seal.

[L. S.]

C. N. KYLE,
Recorder of Trumbull County.

352 Received for record June 5, 1903, at 10 a. m.

Recorded in the office of the recorder of the county of Mahoning on the 12th day of June, 1903, in volume 67 of mortgages, page 305, &c.

Witness my hand and official seal.

[L. S.]

W. H. MCGINNIS,
Recorder of Mahoning County.

3774.

Received for record June 11, 1903, at 1 p. m.

Recorded in the office of the recorder of the county of Columbiana on the 11th day of June, 1903, in volume 271 of mortgages, page 332, &c.

[L. S.]

E. M. CROSSER,
Recorder of Columbiana County.

12113.

Received for record June 5, 1903, at 4.35 p. m.

Recorded in the office of the recorder of the county of Portage on the 25th day of June, 1903, in volume 190 of mortgages, page 75 et seq.

Witness my hand and official seal.

[L. S.]

THOMAS RICHARDS,
Recorder of Portage County.

353 19469.

Received for record June 4, 1903, at 10 a. m.

Recorded in the office of the recorder of the county of Geauga on the 13th day of June, 1903, in volume 118 of mortgages, page 36, etc.

Witness my hand and official seal.

[L. S.]

F. E. FORD,
Recorder of Geauga County.

292585.

Received for record June 12, 1903, at 9.10 a. m.

Recorded in the office of the recorder of the county of Cuyahoga on the 29th day of June, 1903, in volume 883, mortgages, page 1 et seq.

[L. S.]

J. C. SIEGRIST,
Recorder of Cuyahoga County.

34838.

Received for record June 11, 1903, at 8 a. m.

Recorded in the office of the recorder of the county of Summit on the 25th day of June, 1903, in volume 283 of mortgages, page 459 et seq.

Witness my hand and official seal.

[L. S.]

W. ALLING,
Recorder of Summit County.

354 2729.

Received for record June 6, 1903, at 10 a. m.

Recorded in the office of the recorder of the county of Medina on the 25th day of June, 1903, in volume 38 of mortgages, page 42 et seq.

Witness my hand and official seal.

[L. S.]

FRED. BECK,
Recorder of Medina County.

Received for record June 6, 1903, at 2.45 p. m.

Recorded in the office of the recorder of the county of Wayne on the same day of June, 1903, in volume 135 of mortgages, page 228 et seq.

[L. S.]

LEWIS C. FRANKS,
Recorder of Wayne County.

482.

Received for record June 8, 1903, 7.30 a. m.

Recorded in the office of the recorder of the county of Ashland on the 22nd day of June, 1903, in volume 108 of mortgages, page 1 et seq.

Witness my hand and official seal.

[L. S.] B. F. PAULLIN,
Recorder of Ashland County.

355 Received for record June 8, 1903, at 9.45 a. m.

Recorded in the office of the recorder of the county of Richland on the 30th day of June, 1903, in volume 64 of mortgages, page 1 et seq.

Witness my hand and official seal.

[L. S.] W. E. O'DONNELL,
Recorder of Richland County.

Received for record June 8, 1903, at 1.05 p. m.

Recorded in the office of the recorder of the county of Crawford on the 30th day of June, 1903, in volume 54 of mortgages, page 354 et seq.

[L. S.] H. S. Z. MATTHIAS,
Recorder of Crawford County.

Received for record June 8, 1903, at 4.38 p. m.

Recorded in the office of the recorder of the county of Morrow on the 30th day of June, 1903, in volume 30 of mortgages, page 438 et seq.

Witness my hand and official seal.

[L. S.] G. J. YOUNG,
Recorder of Morrow County.

356 Received for record June 9, 1903, at 8.30 a. m.

Recorded in the office of the recorder of the county of Marion on the 30th day of June, 1903, in volume 60 of mortgages, page 150 et seq.

Witness my hand and official seal.

[L. S.] A. W. BRYANT,
Recorder of Marion County.

Received for record June 9th, 1903, at 12.40 p. m.

Recorded in the office of the recorder of the county of Union on the 25th day of June, 1903, in volume 50 of mortgages, page 246 et seq.

[L. S.] JOHN J. ANDREWS,
Recorder of Union County.

Received for record June 9th, 1903, at 4.30 p. m.
Recorded in the office of the recorder of the county of Champaign on the 30th day of June, 1903, in volume 53 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]
J. S. MOSES,
Recorder of Champaign County.

357 No. 588.
Received for record June 10, 1903, at 8.10 a. m.
Recorded in the office of the recorder of the county of Clarke on the 30th day of June, 1903, in volume 110 of mortgages, page 297 et seq.
Witness my hand and official seal.
[L. S.]
J. W. ALLEN,
Recorder of Clarke County.

Received for record June 10, 1903, at 10.10 a. m.
Recorded in the office of the recorder of the county of Greene on the 30th day of June, 1903, in volume 60 of mortgages, page 147 et seq.
Witness my hand and official seal.
[L. S.]
M. A. BROADSTONE,
Recorder of Greene County.

Received for record June 10, 1903, at 1.05 p. m.
Recorded in the office of the recorder of the county of Montgomery on the 15th day of June, 1903, in volume 254 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]
JOHN L. THEOBALD,
Recorder of Montgomery County,
By AL. STICKEL, *Deputy.*

263 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* ERIE RAILROAD COMPANY.	April session, 1908. No. 204.

It is stipulated and agreed between counsel in the above cause that its submission on petition and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or here-

after instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 204. April session, 1908. U. S. v. Erie Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. the Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.]

440 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY.
April sessions, 1908. At Law. No. 204.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above case having come on to be heard upon petition and answer, the petition is refused and judgment is entered in favor of defendant.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 204. U. S. vs. Erie Railroad Company. Order directing judgment. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

441 No. 204. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL.
the Attorney-General of the United States
vs.
ERIE RAILROAD COMPANY.

Now comes the plaintiff and, in connection with the petition for writ of error, assigns the following errors in the action and proceed-

ings of the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled case, that is to say:

1. That the Circuit Court erred in denying the petition for writ of mandamus in this case;

2. That the Circuit Court erred in refusing to grant an order for the issuance of a peremptory writ of mandamus and for the relief prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
442 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined or produced by the defendant prior to the enactment of the so-called "commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

443 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity

of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said plaintiff and petitioner prays that the said judgment and order of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 204. April session, 1908. At Law. The United States of America ex rel. the Attorney-General of the United States vs. Erie Railroad Company. Assignment of errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

444 No. 204. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States
vs.
ERIE RAILROAD COMPANY.

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

And now comes the United States of America, on relation of Charles J. Bonaparte, Attorney-General of the United States, plaintiff herein, and says: That on the sixth day of October, in the year nineteen hundred and eight, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated, October 6th, 1908.

445 (Endorsed: U. S. C. C., E. D. of Penna. No. 204. April session, 1908. At Law. The United States of America ex rel. the Attorney-General of the United States vs. Erie Railroad Company.

Petition for writ of error. The clerk will please file within petition for writ of error, the assignment of errors herewith, and order of court allowing the writ when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

446 No. 204. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States
vs.
ERIE RAILROAD COMPANY.

Before DALLAS, C. J.

This sixth day of October, in the year nineteen hundred and eight, comes the plaintiff, by Charles J. Bonaparte, Attorney-General of the United States, and files herein and presents to the court a petition praying for the allowance of a writ of error and an assignment of errors intended to be urged; praying also that a transcript of the record, proceedings, and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

In consideration whereof the court does allow the writ of error as prayed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 204. April session, 1908. At Law. The United States of America ex rel. the Attorney-General of the United States vs. Erie Railroad Company. Order allowing writ of error. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

447 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss.:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America ex rel. the Attorney-General of the United States v. Erie Railroad Company, No. 204, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia this seventh day of

October, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

448 (Indorsement on cover:) File No. 21356. E. Pennsylvania. C. C. U. S. Term No. 560. The United States of America ex rel. the Attorney-General of the United States, plaintiff in error, vs. Erie Railroad Company. Filed October 10th, 1908. File No. 21356.

3

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 561.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1907.

(21357.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 561.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Writ of error	2	1
Citation and service	3	2
Petition for mandamus	4	3
Notice of application for writ of alternative mandamus	15	7
Order to issue writ of alternative mandamus	17	8
Appearance for defendant	19	9
Answer	25	10
General mortgage of the Central Railroad Company of New Jersey to the Central Trust Company of New York, trustee, dated July 1, 1887	47	19
Agreement between the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey, dated June 28, 1887	117	56
Exhibit B. Agreement of May 29, 1883	149	72
Exhibit C. Agreement of January 27, 1887	156	76
Stipulation as to submission on petition and answer	171	81
Opinions (omitted in printing)	172	....
Gray, J. (omitted in printing)	173	....
Dallas, J. (omitted in printing)	227	....
Buffington, J. (omitted in printing)	233	....
Judgment	248	82
Assignment of errors	249	82
Petition for writ of error	252	84
Order allowing writ of error	254	85
Clerk's certificate	255	85

61446—08——1

1 April session, 1908.

Charles J. Bonaparte, J. Whitaker Thompson.	The United States of America ex rel. the Attorney-General of the United States.	Mandamus.
206	*vs.*	
Robert W. de Forest, John G. Johnson.	The Central Railroad Company of New Jersey.	

1908, June 5. Petition for alternative mandamus filed.
1908, June 5. Copy of notice of application for writ of alternative mandamus and affidavit of service of notice filed.
1908, June 5. Order granting alternative writ of mandamus.
1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.
1908, June 9. Writ of alternative mandamus exit returnable the sixteenth day of June, 1908.
1908, June 15. Return filed.
1908, June 16. Stipulation of counsel filed.
1908, June 26. Argued.
1908, September 10. Opinion denying petition for mandamus filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Order for judgment filed.
Assignments of error filed.
Petition for writ of error filed.
Order of court allowing writ of error filed.
Writ of error allowed and copy thereof lodged in clerk's office for adverse party.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 United States of America, *ss:*

The President of the United States to the honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you between the United States of America ex rel. the Attorney-General of the United States, plaintiff, and the Central Railroad Company of New Jersey, defendant, a manifest error hath happened, to the great damage of the said United States of America ex rel. the Attorney-General of the United States as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties afore-

said in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of October, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY B. ROBB,
Clerk of the Circuit Court of the United States.

Before DALLAS, C. J.
Allowed by THE COURT.
Attest:
HENRY B. ROBB, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*
The President of the United States to the Central Railroad Company of New Jersey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington within thirty days, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein the United States of America ex rel. the Attorney-General of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said defendant in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the Circuit Court of the United States this 6th day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*
Service accepted.
JOHN G. JOHNSON.
Per J. W. BAYARD,
Attorney for Defendant in Error.

4 No. 206. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY. | On information for writ of mandamus.

Petition.

Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 206.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the United States of America.

Petitioner respectfully states that he is the Attorney-General of the United States, and that, as such, he has been requested by the Interstate Commerce Commission to institute this suit against the Central Railroad Company of New Jersey, a common carrier as hereinafter particularly set forth, and to make application for a writ of mandamus as hereinafter prayed.

7 Petitioner therefore states that the said "the Central Railroad Company of New Jersey," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New Jersey, having its principal office in that State, at Jersey City, and also an office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight. That the defendant is, and has been during its corporate existence, a railroad company now and for some time *post* operating with its branches and connections a railroad whose lines extend through parts of the States of New Jersey, Pennsylvania, New York, and other States. That it is and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate com-

merce," and of all acts supplementary thereto or amendatory thereof, and that as such common carrier it is and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation in interstate commerce of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

Your petitioner further states, alleges, and charges against
8 the defendant a failure by the defendant to comply with and a violation by the defendant of that provision of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," as said act was amended by an act of the Congress of the United States, approved June 29, 1906, to be found in the first section of said "Act to regulate commerce," as amended by said act of June 29, 1906, which said provision is as follows, that is to say: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," in this:

(1) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of a large majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, a corporation of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal company.
9 That said coal company holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the president and the secretary and treasurer of said coal company, who are, and for a long time past have been, the president and the secretary and treasurer, respectively, of the defendant, with the assistance and cooperation of the directors of the said coal company a majority of whom are, and for a long time past have been, also directors of the defendant.

(2) That, by virtue of the ownership of a large majority of the capital stock of said coal company by the defendant, as hereinbefore stated, the defendant practically owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and is also owner thereof in part, and, likewise,

has an interest therein; and that, by virtue of the management of said coal company by the president and other officers and directors of the defendant, as hereinbefore stated, the operations of said coal company, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

10 (3) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of the president of said last-mentioned coal company who is, and for a long time past has been, the president of the defendant, and of the directors of said last-mentioned coal company a majority of whom are, and for a long time past have been, also directors of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal company by the president and other officers and directors of the defendant, as hereinbefore stated, the operations of said last-

11 mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant.

(4) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined, and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined, as aforesaid, and within said counties of Carbon, Lehigh, Luzerne, and Wyoming, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your petitioner unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not,

and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

12 (5) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of that provision of said "Act to regulate commerce" hereinbefore quoted.

(6) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, thus persisting in, and continuing, its failure to comply with, and its violation of, the provision of said "Act to regulate commerce" hereinbefore referred to and quoted.

(7) And so your petitioner alleges and says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as afore-

13 said, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier;" and your petitioner respectfully repeats and alleges that such transportation, and such continuing transportation, is, and will be, a failure, by the defendant, to comply with, and a violation, by the defendant, of that provision of the law hereinbefore quoted.

Petitioner therefore prays that your honors grant an order for the issuance of an alternative writ of mandamus commanding and directing the defendant, "The Central Railroad Company of New Jersey," to forthwith and hereafter comply with the provision of the law hereinbefore quoted by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, as is hereinbefore alleged, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, or to appear before this court on

14 some day to be named in said writ, and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring the defendant, the said "The Central Railroad Company of

New Jersey," to forthwith and hereafter comply with said provision of the "Act to regulate commerce;" that said alternative writ of mandamus be issued and directed to the defendant, the said "The Central Railroad Company of New Jersey; and he further prays for such other and general relief as he may be entitled to in the premises.

CHARLES J. BONAPARTE,
Attorney-General.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Aylett T. Robinson, a notary public in, for, and of the District of Columbia aforesaid, Charles J. Bonaparte, Attorney-General of the United States, and made oath, in due form of law, that he is the Attorney-General of the United States, that he is acquainted with the facts alleged in the foregoing petition, and that the same are true to the best of his knowledge, information, and belief.

CHARLES J. BONAPARTE.

Subscribed and sworn to before me, this 4th day of June, in the year nineteen hundred and eight.

[Notary's seal.]

AYLETT T. ROBINSON,
Notary Public, D. C.

15 *To "The Central Railroad Company of New Jersey:"*

You are hereby notified that I shall, on the fifth day of June, in the year nineteen hundred and eight, before the Honorable James B. Holland, one of the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, at his office in the city of Philadelphia, in said State of Pennsylvania, apply for alternative writ of mandamus, to be issued by the said Circuit Court against you, "The Central Railroad Company of New Jersey," requiring you to forthwith and hereafter comply with that provision of the "Act to regulate commerce," as said act was amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may by necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and

16 refraining from transporting, in interstate commerce, from the mines and mining lands in the said State of Pennsylvania to the markets of any other State, any anthracite coal manufactured, mined, or produced by you, or under your authority, or which you may own in whole or in part, or in which you may have any interest,

direct or indirect, except such of said anthracite coal as may be necessary and intended for your use in the conduct of your business as a common carrier.

Dated this fourth day of June, in the year nineteen hundred and eight.

CHARLES J. BONAPARTE,
Attorney-General of the United States.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Personally appeared before me, C. K. Klink, a notary public, L. Allison Wilmer, special assistant to the Attorney-General, and made oath that he, on the fifth day of June, in the year nineteen hundred and eight, delivered a copy of the foregoing notice to Mr. Robert W. de Forest, of counsel for the said "The Central Railroad Company of New Jersey."

L. ALLISON WILMER,
Special Assistant to the Attorney-General.

Sworn to and subscribed before me this fifth day of June, in the year nineteen hundred and eight.

[Notary's seal.]

C. K. KLINK,
Notary Public.

My commission expires April 18, 1911.

17 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 206.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF NEW Jersey.

Before HOLLAND, J.

On motion in behalf of Charles J. Bonaparte, Attorney-General of the United States, on petition this day filed praying for alternative writ of mandaums to issue against "The Central Railroad Company of New Jersey," requiring it to forthwith and hereafter comply with that provision of the "Act to regulate commerce," as amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport

from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign
18 country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the State of Pennsylvania to the markets of other States any anthracite coal manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such of said anthracite coal as may be necessary and intended for its use in the conduct of its business as a common carrier.

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition.

BY THE COURT.

Attest:

GEORGE BRODBECK, *Deputy Clerk.*

19–24 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA EX REL. Attorney-General *vs.* THE CENTRAL R. R. CO. OF NEW Jersey.	April session, 1908. No. 206.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for said Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 206. April session, 1908. U. S. of America ex rel. Attorney-General *v.* The Central R. R. Co. of New Jersey.

Filed Jun. 5, 1908. Henry B. Robb, clerk. B. L., deputy clerk. Order for appearance. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

25 No. 206. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* THE CENTRAL RAILROAD COMPANY OF New Jersey, Defendant.	On information for writ of mandamus.

Return of defendant, the Central Railroad Company of New Jersey.

JACKSON E. REYNOLDS, *Solicitor.*
ROBERT W. DE FOREST, *Counsel.*

Filed Jun. 15, 1908. Henry B. Robb. clerk. By L., deputy clerk.

27 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* THE CENTRAL RAILROAD COMPANY OF NEW Jersey.	Sessions, 1908. No. 206.

On information for writ of mandamus.

To the Honorable the Judges of the said Court:

The return of the Central Railroad Company of New Jersey, respondent, to the alternative writ of mandamus issued and served herein, while admitting that the relator or petitioner is the Attorney-General of the United States, and that he has been requested by the Interstate Commerce Commission to institute this suit, and to make application for a writ of mandamus as prayed, respectfully shows unto your honors that said petitioner or complainant, or its
28 relator, ought not to have or maintain the writ or writs prayed for herein, for the following reasons:

(1) This defendant avers, and to the extent of such averment admits, that it was incorporated by, and duly organized under an act of the State of New Jersey, entitled "An act to incorporate the Somerville and Easton Railroad Company," approved April 26, 1847, and the supplement to said act, approved February 22, 1849, whereby, inter alia, the corporate name of the said company was changed to "The Central Railroad Company of New Jersey," and that it is duly possessed of and may lawfully exercise all and every the corporate rights, powers, privileges, and franchises mentioned in and

conferred by the said acts and by divers other acts supplementary to and amendatory thereof, subsequently from time to time enacted, to all of which it prays leave to refer at the hearing of this cause, with the same force and effect as if the same were herein set out at length.

In addition to the powers conferred in and by the aforementioned acts, this defendant avers that it has been and is possessed of all the powers, privileges, and rights conferred by section 51 of the general corporation law of New Jersey, which reads as follows:

"Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock of, or any bonds, securities, or evidences of indebtedness created by, any other corporation or corporations of this or any other State, and while the owner of such stock may exercise all rights, powers, and privileges of ownership, including the right to vote thereon;"

29 and by two general statutes of the State of Pennsylvania, entitled, respectively, "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities, and fixing the time for holding elections for directors," approved March 31, 1868, and "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth," approved April 15, 1869, to each of which acts it prays leave to refer at the hearing of this cause with the same force and effect as if the same were herein set forth at length.

(2) This defendant admits that it has been during its corporate existence a railroad company, and for some time past operating, with its branches and connections, a railroad extending through parts of the States of New Jersey and Pennsylvania to New York, and by its connections to other States; that it is and has been since long before the first day of May, 1908, a common carrier within the meaning of the act of Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof, and that as such common carrier it is and has been for all the period aforesaid engaged in interstate transportation, particularly in the transportation in interstate commerce of the article or commodity known as anthracite coal from the mines and mining lands of the State of Pennsylvania to the markets of other States.

(3) This defendant admits that it is and has been continuously since long before the first day of May, 1908, the owner of a large majority of the capital stock of the Lehigh and Wilkes-Barre

30 Coal Company, a corporation of the State of Pennsylvania, and states that the said Lehigh and Wilkes-Barre Coal Company is a corporation organized in January, 1874, by the consolidation and merger under the general statutes of the State of Pennsylvania of the Honey Brook Coal Company and the Wilkes-Barre Coal and Iron Company, corporations organized respectively by an act of the legislature of the State of Pennsylvania, entitled "An act to incorporate the Honey Brook Coal Company," approved

April 23, 1864, and by an act of the legislature of the State of Pennsylvania, entitled "An act to incorporate the Wilkes-Barre Coal and Iron Company," approved June 8, 1864, and by the acts supplementary thereto and amendatory thereof. To all of said acts it prays leave to refer at the hearing of this cause with the same force and effect as if the same were herein set out at length.

Previous to the year 1874, when these two last-named companies were merged and consolidated into the present Lehigh and Wilkes-Barre Coal Company. this defendant owned, and for several preceding years had owned, a majority of the stock of each of the said Honey Brook Coal Company and Wilkes-Barre Coal and Iron Company. All of the said coal companies were authorized to acquire by purchase or lease coal lands in the State of Pennsylvania, and have acquired such lands, said Honey Brook and Wilkes-Barre Coal and Iron companies prior to their merger and consolidation as aforesaid, and the Lehigh and Wilkes-Barre Coal Company since.

This defendant further states and avers that it became the lawful owner of the shares of each of the said coal companies, as hereinabove stated, many years prior to the enactment of the act of Congress entitled "An act to amend an act to regulate commerce,
31 approved February 1st, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906.

This defendant further admits that it is and has been for a period long prior to the first day of May, 1908, the owner of some part, viz, a minority part, of the capital stock of the Temple Iron Company, a corporation of the State of Pennsylvania.

This defendant further admits that each of the above-mentioned coal companies holds, under conveyances and leases made long prior to the said first day of May, 1908, its anthracite coal lands situate in what is known as the "Anthracite coal regions" of Pennsylvania, and that said companies have been from a date long prior to the said first day of May, 1908, engaged in mining anthracite coal thereon and therefrom, such mining operations being carried on under the immediate and direct control of the executive officers of the respective companies, these, in turn, being subject to the power and control vested in the boards of directors of the said companies by their respective charters.

And this defendant also admits that at the present time, and for many years past, the president and the secretary and treasurer of the Lehigh and Wilkes-Barre Coal Company are and have been the same persons who at the same time were president, secretary, and treasurer of this defendant, and that a majority of the board of directors of the said Lehigh and Wilkes-Barre Coal Company are and have been also directors of this defendant; and this defendant also admits that as respects the Temple Iron Company the same person who is and for several years past has been president of said Temple
32 Iron Company is also president of this defendant, and that a

minority of the directors of the Temple Iron Company are also directors of this defendant.

This defendant denies that because or by virtue of its ownership of the aforesaid shares of stock of the said coal companies it has become the owner of the coal lands and coal mines, title to which is in the said companies, respectively, or of the coal therein or mined therefrom, or that it has any interest in said lands, mines, or coal; or that by virtue of its ownership of the shares of stocks of the said coal companies and the voting power incident thereto in the election of the managers or directors of each of said companies, and such other officers as under the character of each company are elected by the stockholders, the operations of said coal companies, or any of them, in the mining of anthracite coal are being carried on by and under the authority of this defendant.

(4) This defendant admits that from time to time since the first day of May, 1908, and at the present time, anthracite coals produced from mines of the several coal companies heretofore mentioned—a portion whereof is sold before, and a portion after, the transportation thereof begins—have been transported and are still being transported at lawfully established schedule rates on and over its lines of railroad, and that a considerable portion—approximately seventy-five per centum (75%) of the coal so mined—is carried to different destinations outside the State of Pennsylvania, the greater part of which is carried to the ports of New Jersey and New York, and that the transportation of such portion thereof by this defendant constitutes commerce between different States, and it also admits that the coal thus transported was not, and is not, necessary nor intended for the
33 use of the defendant in the conduct of its business as a common carrier.

(5) This defendant denies the correctness of the conclusions of law stated in paragraph 5 of the petition. Under advice of counsel, it denies that it results from its ownership of the shares of stock of the aforesaid coal companies, that the anthracite coals mined or produced from the mines of said coal companies have been or are being mined or produced by it or under its authority, or that it has any interest, direct or indirect, therein, within the purview, meaning, and intent of the clause of the act of Congress approved June 29, 1906, which is set out in the petition, but on the contrary it states and avers that it has, and can have no interest or benefit in the operation of said companies other than that of receiving such portion of the clear profits of each as may be by the board of directors of each of said companies from time to time declared as dividends and allotted to this defendant according to its ownership of the capital stock of each thereof.

(6) This defendant admits that it is now engaged in the interstate transportation of anthracite coal mined by the aforesaid companies, and that it is its purpose to continue such transportation unless it should be required to desist from the same by the order of this hon-

orable court, but it denies that in so doing it is acting in violation of law.

(7) This defendant admits that anthracite coal is an article or commodity other than timber and the manufactured products thereof, but it denies, under the advice of counsel, that any coal which
34 it transports other than that which may be intended for its use in the conduct of its business as a common carrier, is either owned by it in whole or in part, or that it has any interest, direct or indirect, therein.

(8) This defendant alleges that the majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, as hereinbefore set forth, constituted a part of its assets in 1877 when it was adjudged insolvent by the court of chancery of the State of New Jersey and a receiver appointed, and it was at that time the guarantor of bonds of a par value of $11,500,000 theretofore issued by said coal company. Pursuant to the plan and agreement of reorganization dated February 23, 1878, to which the receiver of the said court of chancery was a party, and which was duly approved by the said court of chancery by its order of December 19, 1877, in the suit in which the Lehigh Coal and Navigation Company was complainant, $6,600,000 of the capital stock of the said coal company was pledged as part of the security for its so-called "Adjustment mortgage," dated May 1, 1878, executed pursuant to said agreement and made to secure bonds of a par value of $5,550,000, payable May 1, 1903, and the said stock was on July 1, 1887, transferred and assigned to, and is now held by the Central Trust Company of New York as trustee under the general mortgage executed by this defendant, dated July 1, 1887, to secure an issue of $50,000,000 of bonds, the principal of which is due July 1, 1987, of which bonds to an aggregate amount of $45,091,000 have been issued and are now outstanding in the hands of the public. A copy of said mortgage is hereto annexed, marked "Exhibit A," and made a part of this answer.

35 (9) This defendant alleges that at and about the time of its acquisition of the capital stock of the Honey Brook and the Wilkes-Barre Coal and Iron companies, as hereinbefore set forth, and for the purpose of securing for itself the transportation of the anthracite coal produced by the mines owned by these companies and other companies in the State of Pennsylvania, this defendant on March 31, 1871, leased the railroad of the Lehigh Coal and Navigation Company, known as the Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of Pennsylvania, to Union Junction, in Luzerne County, Pennsylvania, together with various branches thereof connecting it with different anthracite coal mines. This lease was subsequently modified by agreement made May 29, 1883, between the Lehigh Coal and Navigation Company, this defendant, and the Philadelphia and Reading Railroad Company, and these two agreements were afterwards modified by a third, dated June, 1887, between the Lehigh Coal and Navigation Company and this defendant. Copies of the said lease and the two agreements modify-

ing the same are hereto annexed, marked "Exhibits B, C, and D," respectively, and form part of this answer.

Under these agreements it is provided amongst other things that the aggregate rental, which is fixed at one-third of the gross receipts from the operation of the demised premises, shall never in any year after May 1, 1883, be less than $1,414,400, and that whenever it shall exceed the sum of $2,043,300, after 1892, the surplus over one-third of the gross receipts shall be received by this defendant.

This lease constitutes a valuable asset of this defendant so
36 long as it continues to transport the coal of the Lehigh and Wilkes-Barre Coal Company in interstate commerce. Like its stock in the Lehigh and Wilkes-Barre Coal Company aforesaid, it is included in the assets covered by its said general mortgage. The lease would be valueless and involve this defendant in serious loss if it could not continue to transport over the leased railroad the coal mined by the Lehigh and Wilkes-Barre Coal Company.

(10) This defendant alleges that its gross earnings during its last fiscal year, ending June 30, 1907, were $25,687,403.37, of which $19,417,930.47 were derived from merchandise and anthracite coal traffic. Of the $19,417,930.47 gross earnings derived from merchandise and antharcite coal traffic $9,312,268.04 was derived from the transportation of anthracite coal, and $10,105,662.43 from the transportation of other commodities. During this period the receipts from anthracite coal transported by this defendant represented over 48 per cent of its entire freight receipts.

Its capitalization is as follows:

Stock	$27,436,800
Funded debt	$54,260,000

Of the aforesaid amount of gross earnings derived from the transportation of anthracite coal, the greater part was received by this defendant for the transportation of such coal for the Lehigh and Wilkes-Barre Coal Company, a majority of whose stock is owned by it.

Substantially the same proportionate part of this defendant's earnings in previous years has been derived from the transportation of anthracite coal, and substantially the same proportionate part of these earnings have come from the Lehigh and Wilkes-Barre Coal Company.

37 More than seventy-five per cent of the anthracite coal transported by this company during its last fiscal year ending June 30, 1907, and in previous years, constituted interstate commerce, of which the greater part was coal produced by the Lehigh and Wilkes-Barre Coal Company.

In addition to the portion of its earnings directly derived from the transportation of anthracite coal for the said coal companies in which it has a stock interest, a very large part of its earnings are derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of the said

coal companies. If this defendant were deprived of the earnings derived from the transportation of the coal of the said coal companies, its business could not be operated except at a very great net loss.

(11) This defendant alleges that throughout its corporate existence the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. Its railroad lines have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at great expense to meet the increasing demands of the markets of the United States for this coal, in reliance upon the rights and franchises conferred by the statutes of New Jersey and Pennsylvania, aforesaid, and upon the prospective earnings from the transportation of anthracite coal in interstate commerce. Large factories and other industries have been established, and cities and towns have grown up on its lines in New Jersey in reliance upon its continued ability to supply them with anthracite coal for fuel and power. The value of its property is and at
38 all times has been dependent upon its revenue from such transportation of anthracite coal, and this value would be greatly impaired if it could not so transport such coal from the mines of the coal companies in which it has a stock interest.

A very large proportion of the anthracite coal produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined markets over the railroads of this defendant, and many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic, and transportation uses, both without and within the State of Pennsylvania.

This defendant purchased an interest in the capital stock of aforesaid companies engaged in mining and dealing in coal, as hereinbefore set forth, for the purpose of securing to itself the transportation of the product of such companies in interstate commerce, and has expended large sums of money in extending its lines and constructing branches and sidings to the collieries of said coal companies, and in providing other facilities in order to receive and so transport the product of their collieries.

The value of the stocks of said companies is largely dependent upon the right and ability of this defendant to transport the coal owned or produced by them out of Pennsylvania to markets in other States, and such stocks would be greatly depreciated in value if this
39 defendant should be prohibited from transporting the product of said companies in interstate commerce.

It has also expended large sums in coal trestles, coal pockets, terminal facilities, storage yards, docks, and wharves at the ports of New Jersey and New York, in and about New York Harbor, for its present and prospective anthracite coal business.

It it should be deprived of the right to transport in interstate commerce the coal mined by the coal companies in which it has a stock interest, the value of such lines and branches and of these coal trestles, coal pockets, terminal facilities, storage yards, docks, and piers would be to a large extent destroyed.

(12) This defendant, further answering, says that anthracite coal is an article of prime necessity and is universally used for domestic purposes throughout New England and the Middle Atlantic States, and to a great extent throughout other sections of the country. The source of the entire supply, save a few small deposits of inferior quality, is located within the State of Pennsylvania, and the deposits extend over an area of only about 484 square miles, divided for trade purposes into three "regions," the Wyoming (sometimes called the Lackawanna) region, the Lehigh region, and the Schuylkill region. Ninety per cent, approximately, of the entire unmined area of anthracite coal is owned or controlled by the following-named companies, or by "subsidiary coal companies," so called; that is, companies in which they have an entire or controlling stock interest, viz, the Reading Company, the Pennsylvania Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the Lehigh Valley Railroad Company, The Central Railroad Company of New Jersey, the Delaware and Hudson Company, the Erie Railroad Company, and the New York, Ontario and Western Railroad Company, and from seventy to seventy-five per cent of the annual supply of anthracite coal in the United States is, and for many years past has been, produced either directly by said companies, as in the case of the Delaware, Lackawanna and Western Railroad and Delaware and Hudson Companies, or through the agency of the said "subsidiary" coal companies.

The entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905, the latest normal year in which there was no strike and for which complete statistics are at hand, was as follows:

	Tons.
New England States	8,692,504
New York	18,125,419
New Jersey	7,212,341
Supply coal to railroads	4,643,426
Southern States	2,080,088
Western States	6,904,314
Canada	2,187,450
Other foreign countries	42,533
Pacific coast	1,743
Pennsylvania	11,520,383
	61,410,201

Approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the railroads named from Pennsylvania to markets in other States and Canada. Approxi-

mately the same proportion of the entire production of anthracite coal has been so transported from Pennsylvania to other States and countries for many years before 1905 and ever since. The total output of anthracite coal for the year 1906 was 55,698,595 tons.
41 That for the year 1907 exceeds 68,000,000 tons. That part of the output of anthracite not consumed in the State of Pennsylvania is carried chiefly to tide water at New York Harbor, and is thence transported by water and by railroad to points in New England and the Middle Atlantic States, where the great bulk of the anthracite output is consumed. New York Harbor is the principal distributing point for anthracite coal.

(13) This defendant, while insisting that the interstate transportation of coal by it, which has been mined or produced by the aforesaid coal companies, is not prohibited by the act of Congress, approved June 29, 1906, further states and shows to the court that the clause of said act which it is averred it has violated because of the interstate transportation of such coal, is violative of and repugnant to the Constitution of the United States in the following particulars:

(a) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the several coal companies hereinbefore mentioned; but on the contrary, undertakes to absolutely prohibit transportation thereof, and therefore is not a "regulation" of interstate commerce, but a "prohibition" of such commerce; and consequently is not within the scope of the commerce clause of the Constitution.

(b) That the effect of said clause will constitute a taking of the defendant's property, corporate rights and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.
42 (c) That said clause is "Class legislation," unduly and unjustly discriminative in its results in that it expressly permits railroad companies to transport in interstate commerce timber and the manufactured products thereof, which may be manufactured or produced by any such company, or under its authority; or which it may own in whole or in part, or in which it may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "Class legislation," in that it arbitrarily denies to one class of common carriers under the act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities, but imposes no such restrictions or prohibition on other common carriers under said act and its amendments.

(d) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to such carriers to constitute a denial of the equal protection of the law.

(e) That the effect of said law is to prevent the transportation by interstate commerce out of the State of Pennsylvania of all the anthracite coal owned by railroad companies or by coal companies in the stock of which they have an interest, comprising between seventy and seventy-five per cent of the entire production of anthracite
43 coal, the greater part of which is and for many years has been transported to the ports of New York and New Jersey, and to cause the same, so far as it continues to be transported, to be brought for shipment to the ports of Pennsylvania, whereby preference would be given to the ports of one State over those of other States, contrary to article 1, section 9, clause 6, of the said Constitution.

Whereupon this defendant prays that its return and answer herein shall be held and taken to be sufficient, and that this defendant be dismissed with its reasonable costs in this behalf most wrongfully sustained.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By GEO. F. BAER, *President.*

Attest:
G. O. WATERMAN, *Secretary.* [SEAL.]

JACKSON E. REYNOLDS, *Solicitor.*
ROBERT W. DE FOREST, *Counsel.*

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this 13th day of June, 1908, personally appeared before me, the undersigned, a notary public of the State of Pennsylvania, in the said county of Philadelphia, George F. Baer, who, being by me duly sworn according to law, deposes and says that he is president of the Central Railroad Company of New Jersey, and that the facts set forth in the foregoing return of said com-
44 pany are correctly and truly stated according to the best of his knowledge, information, and belief.

GEO. F. BAER.

Sworn to and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.

[SEAL.] GEORGE GOWEN PARRY, *Notary Public.*

Commission expires Jan. 16th, 1911.

47 General mortgage of the Central Railroad Company of New Jersey to the Central Trust Company of New York, trustee. Dated July 1, 1887. To secure $50,000,000 bonds.

49 The Central Railroad Company of New Jersey.

GENERAL MORTGAGE.

Indenture made the first day of July, eighteen hundred and eighty-seven, between the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, herein called the

"Railroad Company," party of the first part, and the Central Trust Company of New York, trustee, herein called the "Trustee," party of the second part.

Whereas the Railroad Company is indebted to various individuals and corporations for the following amounts, amongst others:

(1) First mortgage bonds, dated December 15, 1868, due February 1, 1890, bearing interest at the rate of 7 per cent per annum, secured by mortgage of even date therewith, to John C. Green and Moses Taylor, trustees, of which there are now outstanding bonds of the par value of $5,000,000.

50 (2) Convertible bonds, dated November 1, 1872, due November 1, 1902, bearing interest at the rate of 7 per cent per annum, secured by the so-called "Consolidated mortgage," dated September 1, 1874, to the New York Guaranty and Indemnity Company, trustee, and by the so-called "Adjustment mortgage," dated May 1, 1878, to John S. Kennedy, John Edgar Johnson, and Jacob D. Vermilye, trustees, of which there are now outstanding bonds of the par value of $4,400,000.

(3) Consolidated bonds, dated September 1, 1874, due July 1, 1899, bearing interest at the rate of 7 per cent per annum, secured by the mortgages last above mentioned as securing the convertible bonds, of which there are now outstanding bonds of the par value of $15,000,000.

(4) Adjustment bonds, dated May 1, 1878, due May 1, 1903, or at any time prior thereto at the option of the Railroad Company, bearing interest at the rate of 7 per cent per annum, secured by mortgage of even date therewith, to John S. Kennedy, John Edgar Johnson, and Jacob D. Vermilye, trustees, whereof there are now outstanding bonds of the par value of $5,254,000.

(5) Convertible debenture bonds, dated September 15, 1883, due May 1, 1908, bearing interest at the rate of 6 per cent per annum, whereof there are now outstanding bonds of the par value of $3,264,000.

(6) Bonds of the Newark and New York Railroad Company, payment of which has been assumed by the Central Railroad Company of New Jersey, dated July 1, 1867, due July 1, 1887, bearing interest at the rate of 7 per cent per annum, of which there are now outstanding bonds of the par value of $600,000.

51 (7) Bonds of the Lehigh Coal and Navigation Company, due December 15, 1897, bearing interest at the rate of 6 per cent per annum, amounting in the aggregate to $2,310,000, payment of which has been assumed by the Central Railroad Company at New Jersey pursuant to the agreement between said companies made March 31, 1871.

(8) Certificates of the following-named car-trust associations, whereof there are now outstanding certificates of the par value affixed to the name of each car-trust association, viz:

Name.	Amount of certificates outstanding.
The Railroad Car Trust of Philadelphia	$52,800.00
The New Jersey Car Trust Association (Limited)	$50,000.00
Central New Jersey Car Trust Association	$80,000.00
Guarantee Car Trust Association	$700,000.00
Central Railroad Company of New Jersey Car Trust Association	$823,000.00

And whereas the Railroad Company is obligated to pay as portion of its fixed charges, interest or dividends at the rate of not less than 6 per cent per annum on the following bonds and stocks:

(1) Bonds of the New Jersey Southern Railway Company, dated July 15, 1879, due July 15, 1899, bearing interest at the rate of 6 per cent per annum, secured by mortgage of even date therewith, to Henry Day, Frederick W. Downer, and Henry S. Little, trustees, whereof there are now outstanding bonds of the par value of $1,590,600.

(2) Bonds of the Long Branch and Sea Shore Railroad
52 Company, dated December 1, 1869, due December 1, 1899, bearing interest at the rate of 7 per cent per annum, secured by mortgage to George B. Upton, Henry L. Gaw, and Abraham Browning, trustees, whereof there are now outstanding bonds of the par value of $200,000.

(3) Stock of the New York and Long Branch Railroad Company of the par value of $2,000,000, entitled to semiannual dividends at the rate of 7 per cent per annum, of which stock of the par value of $1,500,000 is owned by the Railroad Company, and stock of the par value of $500,000 is owned by various individuals and corporations, subject, however, to the right of the Railroad Company to purchase the same on notice, at par and accrued dividends.

(4) Stock of the South Branch Railroad Company of the par value of $438,300, entitled to quarterly dividends at the rate of 6 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

(5) Stock of the West End Railroad Company of the par value of $43,700, entitled to quarterly dividends at the rate of 10 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

(6) Stock of the Newark and New York Railroad Company of the par value of $87,350, entitled to quarterly dividends at the rate of 7 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

And whereas the board of directors of the Railroad Com-
53 pany have deemed it expedient, for the purpose of paying off the aforesaid and other obligations of the Railroad Company, and for the purpose of purchasing said stocks and bonds in order to reduce its fixed charges, and for other lawful purposes, to borrow money and issue bonds, not exceeding $50,000,000 in amount, payable not more than one hundred years from the date hereof, in gold coin of the United States of or equivalent to the present standard of weight and fineness, or in sterling money of Great Britain, bearing interest at such rates as may be fixed at the period of issue from time

to time, but not exceeding 5 per cent per annum, with coupon interest payable semiannually, and registered interest payable quarterly, such bonds to be secured by general mortgage covering all the property of the Railroad Company, including all the securities representing the control of the necessary constitutent companies, and all equipment now subject to special car trust liens, so conditioned as to preserve to the new bonds the protection of all existing liens by including in such general mortgage all bonds secured by prior mortgages which may be exchanged for said general mortgage bonds, and to give the additional security of all new property acquired by the proceeds thereof.

And whereas to that end the board of directors of the Railroad Company have duly authorized and directed an issue of coupon and registered bonds to an amount not exceeding fifty million dollars, payable on the first day of July, 1987, and bearing interest from the first day of July, 1887, at a rate not exceeding five per cent per annum, payable semiannually as to the coupon bonds on the first days of January and July in each year, and payable quarterly as to the registered bonds on the first days of January, April, July,
54 and October in each year, to be sealed with the corporate seal of the Railroad Company, signed by its president or vice-president and secretary and duly authenticated by the certificate of the trustee under this mortgage securing payment thereof, such coupon bonds to be for $1,000 each and to have interest coupons thereto attached with the signature of the treasurer of the Railroad Company engraved thereon, and such registered bonds to be in denominations of $500, $1,000, $5,000, $10,000, and $50,000, which coupon bonds are to be numbered from 1 to the highest number thereof issued, and which registered bonds are to be lettered differently, according to their denomination, and those of each denomination numbered from 1 to the highest number of such denomination issued, those of the denomination of five hundred dollars being indicated by the numeral "D," those of the denomination of one thousand dollars by the numeral "M," those of the denomination of five thousand dollars by the numeral "$\overline{\text{V}}$," those of the denomination of ten thousand dollars by the numeral "$\overline{\text{X}}$," and those of the denomination of fifty thousand dollars by the numeral "$\overline{\text{L}}$." Said bonds, coupons, and certificates are to be substantially in the forms following respectively:

[Form of coupon bond.]

UNITED STATES OF AMERICA.

$1,000. No. .

The Central Railroad Company of New Jersey. General mortgage 5 % one hundred year gold bond. Principal payable July 1, A. D. 1987. Interest payable semiannually January 1st and July 1st.

For value received the Central Railroad Company of New
55 Jersey promises to pay to the bearer hereof, at its office in the

city of Jersey City, or at its office or agency in the city of New York, on the first day of July, 1987, one thousand dollars in gold coin of the United States of or equivalent to the present standard of weight and fineness, and, on presentation and surrender of the annexed coupons as they shall severally become due, to pay interest on such principal sum in like gold coin at the rate of five per cent per annum, payable semiannually on the first days of January and July in each year at the said offices or agency until such principal shall be paid.

This bond is one of an issue of coupon and registered bonds, limited in the aggregate to $50,000,000, the payment of the principal and interest of which is equally secured by a mortgage or deed of trust of even date herewith, conveying unto the Central Trust Company of New York, in trust, the railroad property, equipment, and franchises of the said Railroad Company, and other property described and mentioned in said mortgage or deed of trust, upon the terms and conditions therein set forth.

The holder of this bond may at any time convert the same into a registered bond of like amount upon surrender hereof at the said office or agency in the city of New York.

If default be made in the payment of any interest on any of said bonds, the principal hereof may be made due and payable as provided in said mortgage or deed of trust.

The principal and interest of this bond are payable without any deduction for any taxes now or hereafter levied by the United States, or by any State, county, or municipal authority, which the said company may be required to deduct therefrom, the company hereby agreeing to pay the same.

56 This bond shall not be valid until authenticated by the certificate of the trustee endorsed hereon.

In witness whereof the Central Railroad Company of New Jersey has caused its corporate seal to be hereunto affixed and attested by its secretary, and this bond to be signed by its president, or vice-president, this first day of July, 1887.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

[SEAL.] By , *President.*

Attest:

, *Secretary.*

[Interest coupon.]

$. No. .

On the first day of (January or July) , the Central Railroad Company of New Jersey will pay to bearer at its office or agency in Jersey City or in the city of New York twenty-five dollars in gold coin of the United States, being six months' interest then due on its general mortgage bond No. .

,

Treasurer.

[Trustee's certificate.]

This bond is one of the issue of bonds within mentioned, secured by the mortgage or deed of trust, dated July 1, 1887, executed by the Central Railroad Company of New Jersey to the undersigned
57 as trustee, which has been duly recorded, and the holder hereof is entitled to the benefit of the trust therein created.

CENTRAL TRUST COMPANY OF NEW YORK, Trustee,
By , *President.*

[Form of registered bond.]

UNITED STATES OF AMERICA.

$. No. .

Registered bond certificate. The Central Railroad Company of New Jersey. General mortgage 5 % one hundred year gold bond. Principal due July 1, A. D. 1987. Interest payable quarterly—January 1st, April 1st, July 1st, and October 1st.

For value received, the Central Railroad Company of New Jersey promises to pay to at its office in the city of Jersey City, or at its office or agency in the city of New York, on the first day of July, 1987, dollars in gold coin of the United States, of or equivalent to the present standard of weight and fineness, and to pay interest on such principal sum in like gold coin at the rate of five per cent per annum, payable quarterly on the first days of January, April, July, and October in each year, at the said offices or agency until such principal shall be paid.

This bond is one of an issue of coupon and registered bonds, limited in the aggregate to $50,000,000, the payment of the principal
58 and interest of which is equally secured by a mortgage or deed of trust, dated July 1, 1887, conveying unto the Central Trust Company, of New York, in trust, the railroad property, equipment, and franchises of the said Railroad Company, and other property described and mentioned in said mortgage or deed of trust, upon the terms and conditions therein set forth.

This bond is transferable only on the books of the said Railroad Company by the registered owner in person or by attorney upon surrender hereof.

If default be made in the payment of any interest on any of said bonds, the principal hereof may be made due and payable as provided in said mortgage or deed of trust.

The principal and interest of this bond are payable without any deduction for any taxes now or hereafter levied by the United States or by any State, county, or municipal authority, which the said company may be required to deduct therefrom, the company hereby agreeing to pay the same.

This bond shall not be valid until authenticated by the certificate of the trustee endorsed hereon.

In witness whereof the Central Railroad Company of New Jersey has caused its corporate seal to be hereunto affixed and attested by its secretary, and this bond to be signed by its president or vice-president, this day of .

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By , *President.*

[SEAL.]

Attest:

, *Secretary.*

59 [Trustee's certificate.]

This bond is one of the issue of bonds within mentioned, secured by the mortgage or deed of trust, dated July 1, 1887, executed by the Central Railroad Company of New Jersey to the undersigned as trustee, which has been duly recorded, and the holder hereof is entitled to the benefit of the trust therein created.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustee*,
By , *President.*

And whereas the execution of this mortgage or deed of trust has been duly authorized by the board of directors of the Railroad Company to secure the payment of said bonds and of the interest thereon:

Now therefore this indenture witnesseth that the said the Central Railroad Company of New Jersey, party of the first part, in consideration of the premises and of one dollar to it paid by the said Central Trust Company of New York, party of the second part, receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all the bonds aforesaid at any time outstanding, has given, granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents does give, grant, bargain, sell, alien, remise, release, convey and confirm, assign, transfer and set over unto the said party of the second part, its successors, heirs, and assigns, forever, all and singular the railroads, property, franchises, rights, and privileges of the Railroad Company, which are more particularly described as follows:

60 First. All the railroads of the Railroad Company, viz, its railroad from the Hudson River, in the county of Hudson, to the Delaware River, in the county of Warren, in the State of New Jersey; also its branch railroad from Jersey City, in the county of Hudson, to the city of Newark, in the county of Essex; also its branch railroad from the city of Elizabeth, in the county of Union, to the city of Perth Amboy, in the county of Middlesex; which branch railroads were purchased and are owned by it, by the authority conferred upon it by its charter; also all its right, title, and interest in and to the telegraph lines on and along said railroads and branches; also all lands, grants of lands, lands under water, water rights, rights

of way, buildings, improvements, tenements and hereditaments now owned by it, and used or necessary to retain for future use for operating the said railroads, branches, or any of them; together with all rights of way and trackage over other lines than the line of said company, station grounds, tracks, side tracks, switches and spurs, bridges, viaducts, culverts, fences and other structures, water stations, station houses, engine houses, car houses, wood houses, warehouses, machine shops, work shops, ferry houses, wharves, docks, piers, superstructures, erections, furniture and fixtures; also all rails, ties, machinery, tools, implements, fuel, material, and supplies whatsoever, now or hereafter owned by the railroad company, or now or hereafter acquired and used for the locating, constructing, operating, renewing, replacing, repairing, and maintaining said railroads and telegraph lines, or any part thereof, or which are necessary to retain for future use for such purposes; together also with all betterments, additions, improvements, repairs, renewals, and replacements made to, on, or upon said railroads and telegraph lines, or any part or portion thereof, and all outstanding claims and dues, books, maps,
61 surveys, profiles, engineers' notes, vouchers, receipts, muniments of title, and letters patent, as well as all other papers and documents relating to said railroads or to the business thereof; together with all and singular the corporate rights, privileges, and franchises of the Railroad Company, acquired or to be acquired, connected with or relating to the said railroads, or any of them; and together with all the streets, ways, alleys, passages, waters, water courses, easements, rights, liberties, privileges, hereditaments, and appurtenances whatsoever unto any of the hereby granted and mentioned premises and estates belonging and appertaining, or to belong and appertain, and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand, of every nature and kind whatsoever of the said party of the first part, as well at law as in equity, of, in, and to the same and every part and parcel thereof.

Second. The four tracts, lots, or parcels of land next hereinafter described, all situate in the county of Hudson in the State of New Jersey, as hereinafter stated, that is to say:

1st. All that certain tract or parcel of land and premises situate in the city of Jersey City: Beginning at a point in the centre line of Washington street, distant two hundred and ninety (290) feet northerly from the centre line of the Central Railroad of New Jersey; thence, (1st) northerly through the centre line of Washington street a distance of one hundred and fifty-five (155) feet, more or less, to a point twenty-three hundred and thirteen (2,313) feet southerly from the southerly side of Grand street; thence, (2d) north seventy-three degrees and fifty minutes west (N. 73° 50′ W.), as the needle
62 pointed in 1872, and parallel with Grand street, to the centre line of Jersey avenue; thence, (3d) southerly along the centre line of said avenue, one hundred and sixty-five (165) feet, more or less, to a point distant two hundred and ninety (290) feet northerly

at right angles from the centre line of the Central Railroad of New Jersey; thence, (4th) westerly and parallel with the centre line of said railroad, five hundred (500) feet, more or less, to the original high-water mark on the west shore of Communipaw Bay, or Cove; thence, (5th) southeasterly along said high-water mark to a point distant fifty (50) feet northerly at right angles from the centre line of the Central Railroad of New Jersey; thence, (6th) easterly and parallel with the centre line of said railroad to the centre line of Jersey avenue; thence (7th) northerly along the centre line of said avenue, two hundred and forty-seven (247) and sixty-two one-hundredths ($\frac{62}{100}$) feet to the end of the third course in this description; thence (8th) easterly and parallel with the centre line of said Central Railroad to the centre line of Washington street, the point or place of beginning.

2d. Also all that other certain tract or parcel of land and premises partly above and partly below the tide waters of New York Bay, situate in the city of Jersey City, described as follows: Beginning at a point in the centre line of Washington street, distant two hundred and ninety (290) feet southerly from the centre line of the Central Railroad of New Jersey; thence (1st) southerly along the centre line of Washington street, two hundred and eighty-three (283) and four-tenths ($\frac{4}{10}$) feet to the bulkhead put down by the Central Railroad Company of New Jersey on the riparian commissioners' exterior line for solid filling; thence (2d) diverging from the centre line of Washington street produced, sixty-two de-
63 grees and eighteen minutes (62° 18′) to the southeast, one thousand three hundred and eighty-five (1,385) feet, more or less, to the new exterior line for piers established by the riparian commissioners of the State of New Jersey, October first, eighteen hundred and seventy-four; thence (3d) returning to the place of beginning, and running westerly and parallel with the centre line of the Central Railroad of New Jersey, to the centre line of Jersey avenue; thence (4th) southerly along the centre line of Jersey avenue, four hundred and seven (407) and thirty-six one-hundredths ($\frac{36}{100}$) feet; thence (5th) southeasterly and parallel with the second course in this description, three thousand three hundred and twenty-five (3,325) feet, more or less, to the exterior line for piers aforesaid; thence (6th) easterly along said exterior pier line, two thousand five hundred and thirty-five (2,535) feet, to the end of the second course in this description.

Also, and it is intended to include in the foregoing descriptions, all the lands lying between the south line of the first tract and the north line of the second tract last hereinbefore described, and the lands lying east of said first and second tracts and the land between the same extending to the exterior line for piers on the Hudson River and New York Bay.

3d. Also all that other certain tract or parcel of land and premises situate in the city of Bayonne, described as follows: Beginning at a point on the southeast side of the right of way of the Central Rail-

road of New Jersey, and in the division line between lands formerly belonging to John J. Van Buskirk on the northeast, and Elizabeth Young and Christopher her husband, on the southwest; thence (1st) southeasterly along said division line, four hundred and eighty-
64 seven (487) feet, more or less, to lands now or formerly of Richard Cadmus; thence (2d) southwesterly along said Richard Cadmus' land two hundred and sixty-eight (268) feet, more or less, to a point in the centre of the north branch of the Platty Kill Creek, said point being the end of the second course in the conveyance from Richard Cadmus and wife and Hartman Vreeland and wife to the Central Railroad Company of New Jersey, by deed dated the 24th day of February, 1864, and recorded in book 107 of deeds, pages 72, &c.; thence (3d) southeasterly along the centre of said north branch one hundred and seventy-two (172) feet to a point; thence (4th) southwesterly still along the centre of said north branch one hundred and ninety (190) feet; thence (5th) still along the centre of said north branch, the general course being southerly seventeen hundred and twenty (1,720) feet, more or less, to the intersection of the centre line of the Platty Kill Creek and its north and south branches; thence (6th) up to the centre of the south branch of the Platty Kill Creek, its general course being northwest along the southerly line of lands conveyed by Peter C. Westervelt and wife to the Central Railroad Company of New Jersey, by deed dated November the 9th, 1862, and recorded in book 97 of deeds, page 396, one thousand three hundred and seventy (1,370) feet, more or less, to a point; thence (7th) still along the last mentioned line north sixty-nine degrees and forty-four minutes west (N. 69°, 44′ W.), three hundred and seventy (370) feet, more or less, to a point; thence (8th) south forty degrees and four minutes west (S. 40°, 04′ W.), one hundred and thirty-six (136) feet to a point, which point is the most northerly corner of the lot of land conveyed by John J. Van Buskirk and wife to the Central Railroad Company of New Jersey, by deed dated July 29th, 1863, recorded in book 102 of deeds, page 37; thence (9th) southeast-
65 erly along the northeasterly line of said lot three hundred and seventy (370) feet, more or less, to lands formerly belonging to E. M. Patterson; thence (10th) southwesterly along the southeasterly line of said lot and the southeasterly side of a lot conveyed by John Van Buskirk, jr., and wife to the Central Railroad Company of New Jersey, by deed dated December 7th, 1863, and recorded in book 106 of deeds, page 199, three hundred and seventy-eight (378) feet, more or less, to the southerly corner of the last-mentioned lot; thence (11th) north forty-eight degrees and sixteen minutes west (N. 48°, 16′ W.), nine hundred and five (905) feet, more or less, to the southeasterly side of the right of way of the Central Railroad Company of New Jersey; thence (12th) northeasterly along the southeasterly side of the right of way of said company, two thousand and seventy-five (2,075) feet, more or less, to the point or place of beginning.

4th. Also all that other certain tract or parcel of land and premises situate in the city of Bayonne, described as follows: Beginning at a point in the high-water line of the Kill von Kull River, distant eight hundred (800) feet northeasterly at right angles from the centre line of coal pier No. 1, belonging to the Central Railroad Company of New Jersey; thence, (1st) northwesterly and parallel with the centre line of said coal pier No. one, eleven hundred and thirty-five (1,135) feet, more or less, to one of the division lines of the property formerly belonging to Nicholas, James, and John Van Buskirk; thence, (2d) northwesterly along said division lines, four hundred and sixty-five (465) feet, more or less, to a point where a right angle would strike the intersection of the centre lines of the Platty Kill Creek and its north and south branches; thence (3d) northeasterly and at
66 right angles to the last mentioned line, three hundred and seventy (370) feet, more or less, to the intersection of the centre lines of the Platty Kill Creek, and its north and south branches; thence (4th) southeasterly along the centre line of the Platty Kill Creek ten hundred and twenty-five (1,025) feet, more or less, to a point distant fifteen hundred (1,500) feet northeasterly at right angles from the centre line of coal pier No. 1 aforesaid; thence (5th) southeasterly and parallel with the centre line of said coal pier No. 1 ten hundred and ninety-five (1,095) feet to the high-water line of the Kill von Kull River; thence (6th) southwesterly along said high water line seven hundred (700) feet at right angles to the last mentioned line to the point or place of beginning.

Together with the lands under water in the Kill von Kull in front of the above-described tract between the high-water line and the exterior line for solid filling and for piers, respectively.

Third. A certain lease made by the New York and Long Branch Railroad Company to the Railroad Company, bearing date the sixth day of October, eighteen hundred and seventy-three, by which the said the New York and Long Branch Railroad Company leased its railroad from its intersection near Perth Amboy, with the Perth Amboy branch of the Railroad Company, on the north side of the Raritan River, and thence to Long Branch, in the county of Monmouth, for and during the continuance of the charters of both of the parties to said lease, and during the continuance of any renewals of both of said charters, and during the continuance of any re-charter of both of the companies parties to said lease, at and for certain rents, and on certain terms and conditions in said lease specified, and also all the leasehold estate, right, title, and interest vested in
67 or in any wise belonging unto the Railroad Company, in or to the demised premises by virtue of the said lease; subject, however, to the terms of a certain agreement by and between the Central Railroad Company of New Jersey, the New York and Long Branch Railroad Company, the New Jersey Southern Railway Company, and the Pennsylvania Railroad Company, dated January 3rd, 1882. Also fifteen thousand (15,000) shares of the capital stock of the New

York and Long Branch Railroad Company, amounting at par to fifteen hundred thousand dollars, now belonging to the Railroad Company.

Fourth. A certain lease made by the South Branch Railroad Company to the Railroad Company, bearing date the eighteenth day of March, eighteen hundred and sixty-two, by which the said South Branch Railroad Company did lease to the Railroad Company its railroad from a point on the Central Railroad of New Jersey, at Somerville, to and into the town of Flemington, in the county of Hunterdon, New Jersey, for and during the continuance of the charters of both the parties to the last mentioned lease and for and during the continuance of any recharter of both of the companies to the said last mentioned lease, for and upon certain rents to be paid by the Railroad Company to the said last mentioned lessor, and upon certain terms and conditions in the said last mentioned lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company in and to the said last mentioned railroad, by virtue of the said last mentioned lease, or otherwise, in any way.

Fifth. A certain tripartite agreement made between the Delaware and Bound Brook Railroad Company, the North Pennsylvania Railroad Company, and the Railroad Company, for a continuous
68 line of travel between New York and Philadelphia, bearing date the thirtieth day of March, eighteen hundred and seventy-six, and also all the rights, privileges, benefits, and advantages of the Railroad Company by virtue of the said tripartite agreement.

Sixth. Bonds made and heretofore issued by the Lehigh and Wilkesbarre Coal Company to the amount of six millions one hundred and sixteen thousand dollars, including all coupons thereon which may remain from time to time unpaid, being the same bonds mentioned in the third item of the agreement for the equitable adjustment of the affairs of the Central Railroad Company of New Jersey without a foreclosure, dated 23d February, 1878.

Seventh. One hundred and thirty-two thousand shares of the capital stock of the said Lehigh and Wilkesbarre Coal Company of the par value of fifty dollars each, amounting in the aggregate, at par, to six millions six hundred thousand dollars, now belonging to the Railroad Company.

Eighth. Thirty thousand shares of the capital stock of the American Dock and Improvement Company of the par value of one hundred dollars each, amounting in the aggregate, at par, to three millions of dollars, now belonging to the Railroad Company.

Ninth. Eight thousand five hundred shares of the capital stock of the High Bridge Railroad Company of the par value of one hundred dollars each, amounting in the aggregate, at par, to eight hundred and fifty thousand dollars, now belonging to the Railroad Company.

Tenth. Three thousand shares of the capital stock of the Longwood Valley Railroad Company of the par value of one hundred

69 dollars each, making in the aggregate, at par, three hundred thousand dollars, now also belonging to the Railroad Company.

Eleventh. A certain lease bearing date the thirty-first day of March, A. D. eighteen hundred and seventy-one, made by the Lehigh Coal and Navigation Company to the Railroad Company, by which the said Lehigh Coal and Navigation Company did lease and demise unto the Railroad Company all the railroads of the said "The Lehigh Coal and Navigation Company within the State of Pennsylvania, including their bridge across the Delaware River, as follows, to wit:

"The Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of New Jersey, to Union Junction, in Luzerne County, Pennsylvania, where it connects with the railroad built by the Union Coal Company, a distance of one hundred and five miles, more or less. Also the railroad known as the Nanticoke Railroad, situate in said Luzerne County, extending from the Lehigh and Susquehanna Railroad at Ashley to the Newport mines, a distance of eight and one-half miles, more or less, with a branch from the same extending to the Lee mines, a distance of two miles, more or less, extending also from Ashley to Gardner's switch, a distance of four and one-half miles, more or less, also extending from Union Junction to the Everhart mines, a distance of three miles, more or less, and also extending from Mill Creek to the Enterprise mines, a distance of four miles, more or less; also the branch railroad in the county of Luzerne, known as the Nescopec Branch, extending from White Haven to Upper Lehigh, a distance of nine miles, more or less; also the Nesque-
70 honing Valley Railroad, situate in the counties of Carbon and Schuylkill, extending from Nesquehoning Junction to Tamanend, where it connects with the Catawissa Railroad, a distance of sixteen and one-half miles, more or less; also the Tresckow Railroad, in the counties of Schuylkill, Carbon, and Luzerne, extending from the Catawissa Railroad at Silver Brook to the Honey Brook mines, a distance of six and one-half miles, more or less; also the branch railroad in the counties of Northampton and Lehigh, known as the Coplay Branch, extending from Laubach station to the furnaces of the Thomas Iron Company, a distance of one mile, more or less; also the branch railroad in the county of Lehigh, extending from the railroad near Bethlehem, across the Lehigh River to a connection with the North Pennsylvania Railroad at South Bethlehem, a distance of fourteen hundred and twenty-eight feet, more or less; also the inclined planes in Luzerne County, with all the machinery connected therewith, extending from Ashley to Solomon's Gap station, a distance of three miles, more or less; together with all sidings, station houses, machine shops, and other appurtenances of said roads and branches, and also all and singular the roadways and also all the franchises of the Lehigh Coal and Navigation Company for maintaining and working the same and taking tolls thereon, and for demanding and receiving compensation for the use of the same; excepting and reserving out of the said

demise the Nesquehoning tunnel, and the railroads or railways laid therein, and extending beyond the same, and also all railroads and railways extending from breakers into mines. To have and to hold the premises by said lease demised to said party of the first part, its successors and assigns, from the first day of April, eighteen
71 hundred and seventy-one, for and during the continuance of the charters of said companies, and any renewals of the same, under and subject nevertheless to all the mortgages existing on the said demised premises. Provided, however, that the term of the lease of the Nesquehoning Railroad above mentioned, shall not extend beyond the term of nine hundred and ninety-nine years, from the fourth of November, eighteen hundred and sixty-eight, less one day," at and for certain rents and conditions, in the said last-mentioned lease specified, and also all the leasehold estate, right, title, and interest vested in or in any wise belonging unto the said party of the first part in and to the said last-mentioned and demised premises, or any part thereof, by virtue of the said last-mentioned lease or otherwise.

Also a certain agreement modifying said lease, bearing date the 28th day of June, 1887, made between the Lehigh Coal and Navigation Company and the Railroad Company.

Twelfth. All the locomotives, tenders, passenger cars, baggage cars, freight cars, coal cars, and all other engines, cars, carriages, rolling stock, equipments, and all contracts and agreements for the purchase thereof; also all tools and machinery owned or to be owned by the Railroad Company, and all renewals thereof by substitution, repair or otherwise, and used or necessary to retain for future use on any of the railroads included in this indenture of mortgage, or on any railroad, any interest in which as owner, lessee, stockholder, or otherwise, is hereby conveyed, assigned and transferred to the said party of the second part.

Also all the tolls, rents, revenues, issues, profits, and income from said railroads and property, and all the corporate and other rights, privileges, franchises and appurtenances of or belonging to the
72 Railroad Company, and now owned, acquired, or possessed, or that may be hereafter owned, acquired or possessed by the Railroad Company, including every privilege of exemption and immunity from taxation.

Thirteenth. All the tugboats, ferryboats, steamboats, floats, barges, and other floating equipment now belonging to the Railroad Company, and also every ferry and right of ferriage belonging or in anywise appertaining to the Railroad Company, its successors or assigns, or used in connection with the aforesaid railroads, or with any of them; and also all the lands and real estate of the Railroad Company, situate in the City of New York, on the west side of West street, opposite to, or nearly opposite to the foot of Liberty street, now belonging to the Railroad Company, and used as and for its ferry, and for its transportation and other business carried on and in connection with said ferry, with the hereditaments and appurtenances thereunto belonging, or in anywise appertaining.

Fourteenth. Eight hundred and fourteen shares of the capital stock of the Constable's Hook Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to eighty-one thousand four hundred dollars.

Fifteenth. Seven hundred and ninety-six shares of the capital stock of the Manufacturers' Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to seventy-nine thousand six hundred dollars.

Sixteenth. One thousand seven hundred and seventy-three shares of the capital stock of the Lake Hopatcong Railroad Company,
73 of the par value of one hundred dollars each, amounting in the aggregate at par to one hundred and seventy-seven thousand three hundred dollars.

Seventeenth. Fifteen thousand nine hundred and six shares of the preferred capital stock of the New Jersey Southern Railway Company, of the par value of one hundred dollars each, amounting in the aggregate at par to one million five hundred and ninety thousand six hundred dollars.

Eighteenth. Two thousand four hundred shares of the capital stock of the Tom's River Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to two hundred and forty thousand dollars.

Nineteenth. Six thousand shares of the capital stock of the Vineland Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to six hundred thousand dollars.

Twentieth. All of the hereinbefore recited issues of bonds, stocks, and certificates, for the purchase of which bonds are reserved as herein provided, which may from time to time be transferred and delivered to the trustee under the terms of this mortgage, viz:

Name of securities.	Total par value of amount outstanding.
First mortgage bonds of the C. R. R. Co. of N. J	$5,000,000
Convertible bonds of the C. R. R. Co. of N. J	4,400,000
Consolidated bonds of the C. R. R. Co. of N. J	15,000,000
Adjustment bonds of the C. R. R. Co. of N. J	5,254,000
74 Bonds of the Newark & New York R. R. Co	600,000
Bonds of the New Jersey Southern Railway Co	1,590,600
Bonds of the Long Branch & Sea Shore R. R. Co	200,000
Bonds of the Lehigh Coal and Navigation Company	2,310,000
Stock of the New York & Long Branch R. R. Co	500,000
Stock of the South Branch R. R. Co	438,300
Stock of the West End R. R. Co	43,700
Stock of the Newark and New York R. R. Co	87,350
Certificates of the Railroad Car Trust of Philadelphia	52,800
Certificates of the New Jersey Car Trust Association, Limited	50,000
Certificates of the Central New Jersey Car Trust	80,000
Certificates of the Guarantee Car Trust	700,000
Certificates of the Central Railroad Company of New Jersey Car Trust	823,000
	$37,129,750

Twenty-first. The interest of the Railroad Company in a certain lease made by the Dover and Rockaway Railroad Company, bearing

date April 26th, 1881, to the Longwood Valley Railroad Company, the entire capital stock of which is owned by the Railroad Company, by which lease the Dover and Rockaway Railroad Company leased its railroad for and during the continuance of the charters of both parties to the said lease, for and upon certain rents to be paid to the said lessor, and upon certain conditions in the said lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company in and to the said last-mentioned railroad by virtue of the said last-mentioned lease, or otherwise, in any way.

75 Twenty-second. A certain lease made by the Ogden Mine Railroad Company to the said party of the first part, bearing date November 4th, 1881, by which the said Ogden Mine Railroad Company leased its railroad to the Railroad Company, for and during the continuance of the charters of both parties to the said last-mentioned lease, for and upon certain rents to be paid by the Railroad Company to the said last-mentioned lessor, and upon certain conditions in the said last-mentioned lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company, in and to the said last-mentioned railroad, by virtue of the said last-mentioned lease, or otherwise, in any way.

Twenty-third. All the property, real, personal, and mixed, which may at any time hereafter be acquired by the Railroad Company, with the proceeds of bonds secured hereby.

To have and to hold all and singular the property hereinbefore described, real, personal, and mixed, and all the railroads, premises, property, rights, franchises, and estates hereby conveyed, or intended to be conveyed, with all and singular the reversions, remainders, tolls, rents, revenues, issues, and profits, privileges, and appurtenances, now or hereafter belonging or in anywise appertaining thereto, unto the said party of the second part, its successor and successors, heirs, and assigns forever, in trust, nevertheless, under the terms and provisions hereinafter set forth, for the persons and corporations, firms, and partnerships, and for their benefit, security, and protection, who shall hold the aforesaid coupon and registered bonds, or any or either of them, and for the enforcing of the

76 payment thereof, when payable, in accordance with the true intent and meaning of the stipulations of this mortgage and of said bonds and interest coupons, and without preference of any of said bonds over any of the others by reason of difference in the rates of interest, in the time of the issue or negotiation thereof, or otherwise. Provided, however, and these presents are upon the express condition, that if the Railroad Company, its successors or assigns, shall well and truly pay, or cause to be paid, unto the holders of said bonds and interest coupons to be issued as aforesaid, the principal and interest to become due at the times and in the manner stipulated in said bonds and in said interest coupons, according to the true intent and meaning thereof, and shall well and truly keep, perform, and observe all and singular the covenants, promises, and

conditions in said bonds and in this mortgage expressed, to be kept, performed, and observed by the Railroad Company, then this mortgage and the estate and rights hereby granted shall cease, determine, and be void, otherwise to be and remain in full force.

It is hereby declared, covenanted, and agreed, by and between the parties hereto, and the Railroad Company for itself, its successors and assigns, doth hereby covenant and agree to and with the respective persons and corporations, firms, and partnerships, who shall hold the bonds and interest coupons aforesaid, or any or either of them, that the further trusts, uses, purposes, conditions, and covenants for and upon which the rights, franchises, and property, real and personal, hereinbefore described, are conveyed to, and are to be held and disposed of by the Trustee, are as follows:

First. The Railroad Company will fully and entirely pay off
77 and satisfy the whole of the said bonds, principal and interest, according to the terms thereof, without delay and without deductions from either said principal or interest for any taxes, assessments, and governmental or other charges now or hereafter lawfully imposed upon the premises, franchises, and property hereby conveyed, or intended so to be, or upon the said bonds or any interest thereon, either by the United States, or by any State, county, or municipal authority, which the Railroad Company may be required to deduct therefrom. When and as the interest coupons annexed to the bonds secured hereby mature and are paid, they shall be canceled. No purchase or sale of any of the said coupons, or interest, nor any advance or loan upon the same, and no redemption of the said coupons or interest, by or on behalf of the Railroad Company, shall, as between the purchasers or assignees of such coupons or interest and the holders of said bonds, operate as keeping the said coupons or interest alive or in force as a lien upon the mortgaged premises against the holders of said bonds, after the sale or assignment of said coupons or interest separate from the bonds from which such coupons are detached or on which such interest shall accrue. Until default shall be made in the payment of the principal or interest of the bonds hereby secured, or of some of them, or in respect to something herein required to be done, observed, kept, or performed by the Railroad Company, it and its successors and assigns shall be permitted, except as herein otherwise specially provided, to possess, manage, operate, and enjoy the railroads, equipment, and other property, rights, and franchises hereby conveyed, or intended so to be, and to receive and use the tolls, income, rents, revenues, issues, and profits thereof.

Second. If default shall be made in the payment of any
78 interest on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, then and thereupon the principal sum of all of said bonds shall, at the option of the trustee, become immediately due and payable, anything in said bonds or herein to the contrary notwithstanding; and, if requested to do so by a majority in interest of the holders of the bonds hereby secured and then outstand-

ing, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, or by vote at a meeting duly held, it shall be the duty of, and it is hereby made obligatory upon the trustee to declare said entire principal sum due and payable as aforesaid, and the same shall thereupon become immediately due and payable; and a majority in interest of such bondholders may in like manner direct the trustee to refrain from making such declaration, upon such terms and conditions as such majority shall deem proper; and a majority in interest of such bondholders may in like manner annul or reverse the declaration if already made by the trustee, and such principal sum shall thereupon cease to be due, anything herein contained to the contrary notwithstanding; but the action of the trustee or of the bondholders, in case of any default, shall not affect or impair the right of a majority in interest of such bondholders, in manner aforesaid, at any time while such default continues, to direct the trustee to declare such principal sum due, nor shall it in anywise affect any subsequent default on the part of the Railroad Company or impair any right resulting therefrom.

Third. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, or in
79 the performance of any other covenant of the Railroad Company herein contained, it shall be lawful for the trustee, at any time after payment or performance shall have been duly demanded, in writing, such default continuing, to proceed to enforce the rights of the trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court for that purpose as they, being advised by counsel learned in the law, shall deem most expedient for the interests of such bondholders.

Fourth. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, it shall be lawful for the Trustee, such default continuing, either personally or by its agent or agents, attorney or attorneys, to enter into and upon all of the property, franchises, rights, and privileges hereby conveyed or intended so to be, and each and every part thereof, and exclude the said company, its agents and servants, wholly therefrom, and having and holding the same to use, operate, manage, and control said railroads and other mortgaged premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, servants, or attorneys, to the best advantage of the interests as well of the public as of the holders of bonds secured hereby, in accordance with law. Such right of entry shall include the right to vote on all the shares of stock included in this mortgage, and to perform any acts and to make and execute any requests, requisitions, or other instruments as holders of the bonds included therein. Upon
80 such entry it shall be lawful for the Trustee from time to time to insure or keep insured, at the expense of the trust

estate, the rolling stock, tools and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railroads, and whereof they shall become possessed as aforesaid, in the same manner and to the same extent as is usual with railroad companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and replacements thereto and thereon, as well in respect of the rolling stock or equipment as in respect of the railroad and appurtenances, and other property as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, revenues, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railroads and other mortgaged premises, and conducting the business thereof, and of all repairs, renewals, replacements, and all payments which may be made for taxes, assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents, clerks, servants, and other employees by it properly engaged and employed, the Trustee shall apply the moneys arising as aforesaid to the payment of the interest in arrear (if any) or which shall after such entry become due and payable on the bonds outstanding and secured hereby, ratably to the person or parties entitled to receive the same, without any discrimination or preference between them on account of the date and dates of maturity or of the rate of interest of such bonds, or the times of their actual issue or otherwise.

Whenever, after entry as aforesaid, the net income from the
81 mortgaged property under the management of the Trustee has been sufficient to pay all the interest in arrear on the bonds outstanding and secured hereby, the Trustee shall, upon requisition in writing of the Railroad Company, restore said property to the Railroad Company, to possess, manage, operate, and enjoy the same in like manner as before said entry. But such restoration shall not in any way affect the right of the Trustee to enter, as herein provided, for any subsequent default.

Fifth. If default shall be made in the payment of any money, principal, or interest on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, it shall be the duty of, and it is hereby made obligatory upon, the Trustee, upon requisition of one-eighth in interest of the holders of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, and upon reasonable indemnity as hereinafter provided, to proceed forthwith to enforce the rights of the Trustee and of the bondholders under this mortgage by foreclosure or by any other appropriate proceedings in any proper court or otherwise, according to such requisition.

Sixth. If default shall be made in the performance of any covenant of the Railroad Company herein contained other than the payment of any money, principal or interest, on any of the bonds hereby

secured, and such default shall continue for ninety days after performance shall have been duly demanded in writing, it shall be the duty of, and it is hereby made obligatory upon, the Trustee, upon like requisition of one-eighth in interest of the holders of the bonds hereby secured and then outstanding, and upon indemnity
82 as aforesaid, to proceed forthwith to enforce the rights of the Trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court, or otherwise, according to such requisition, subject to the power of a majority in interest of the holders of the said bonds, by requisition in writing signed and proved as hereinafter provided, or by vote at a meeting duly held, to instruct and require the Trustee to waive such default and withdraw such proceedings, if begun, or to enforce the rights of the Trustee and the bondholders by reason of such default, according to such requisition of said majority; provided that no action of the Trustee or bondholders, or both, in waiving such default or otherwise, shall extend to or be taken to affect any subsequent default or to impair the rights resulting therefrom.

Seventh. Upon the filing of a bill in equity, or other commencement of foreclosure, or other appropriate proceedings in any proper court, to enforce the rights of the Trustee and of the bondholders under this mortgage, unless satisfactory cause to the contrary shall be shown, the Trustee shall be entitled to the appointment by such court of a receiver or receivers of the property hereby mortgaged, and of the earnings, income, rents, revenues, issues, and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

Eighth. In case of any default on its part, as aforesaid, the Railroad Company shall not and will not set up, claim, or seek to take advantage of any appraisement, valuation, stay, extension, or redemption law now existing, or which may hereafter exist in any State wherein any part of the mortgaged property is situated, in order to prevent or hinder the enforcement or foreclosure of this
83 mortgage, or the absolute sale of the railroads, equipment, and other property, rights, privileges, and franchises hereby conveyed, or the final and absolute putting into possession thereof, immediately after such sale, of the purchaser or purchasers thereat, but hereby waives the benefit of all such laws.

Ninth. In case of any sale of the mortgaged property under the provisions hereof, any purchaser at such sale shall be entitled, in making settlement for or payment of the purchase money bidden, to turn in toward the payment thereof any of the bonds and matured and unpaid interest secured hereby held by such purchaser, counting such bonds and interest for that purpose at the sum which shall be payable to the holder thereof out of the net proceeds of such sale, as his just share of such net proceeds, after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale; and if such share of net proceeds shall be less than the amount then due upon such bonds, to make such settlement by receipting on such bonds the amount to be credited thereon.

Tenth. The Railroad Company, for itself and all persons and corporations lawfully claiming through or under it, or who may at any time become holders of liens junior to the lien of this mortgage, hereby expressly waives and releases all right to have the mortgaged property marshaled upon any sale thereof under the provisions of this mortgage; and the Trustee hereunder and any court in which foreclosure of this mortgage is sought, shall have the right, in their discretion, to sell the entire mortgaged property of every description, as a whole, subject to the right of a majority in interest of the holders of the bonds hereby secured then outstanding, by requisition in
84 writing or by vote at a meeting duly held, to direct the Trustee to sell said property in such manner as they may deem best.

Eleventh. The rights and remedies secured to the holders of the said general mortgage bonds by this mortgage and the trusts therein declared, shall, as against the mortgaged premises and property and every part thereof, be exclusive of all other rights and remedies, and no part of the mortgaged premises shall be levied upon, taken in execution, or sold under any judgment or decree obtained by the holder or holders of any of the said bonds or interest thereon against the Railroad Company for the payment of either principal or interest of the bonds hereby secured, unless such judgments or decrees shall have been entered for the purpose of enforcing the trusts herein contained, it being intended for the better securing the largest possible price for the mortgaged premises and property in the event of the sale thereof that the mode of sale hereinbefore provided shall be exclusive of all others.

Twelfth. The Railroad Company shall and will pay and discharge all taxes, assessments and governmental or other charges lawfully imposed upon the premises, franchises and property hereby conveyed, or intended so to be, or upon any part thereof, and all such taxes, assessments and charges upon the bonds secured hereby or any interest thereon, as the Railroad Company may be required to deduct therefrom, and will not suffer any matter or thing whatsoever whereby the lien hereof might or could be impaired.

Thirteenth. The Railroad Company shall maintain always, during the currency of the bonds secured hereby, a public office or
85 agency in the city of New York for the transfer and registration of the name and post-office address of the owner or owners of the registered bonds provided for in this mortgage, and shall always keep in said office proper books for such registration, which shall, at any proper time, be made by a transfer agent of the Railroad Company on demand of the owner of any such bonds entitled to such transfer and registration presenting the same, and recording with such transfer agent his name and post-office address; and the holder of any coupon bonds secured hereby may, at any proper time, surrender the same at said office for an equivalent amount of the registered bonds of the Railroad Company; all such transfers, registrations, and exchanges of bonds to be without any charge or expense therefor to such owner or holder. Such books shall at all proper

times be open to the inspection of the Trustee, and to the holder or holders of not less than $500,000 of bonds, whenever requested.

Fourteenth. Whenever, and as often as any contingency shall arise on which the action of the holders of bonds secured hereby shall be controlling, or in which the said bondholders have by the provisions hereof, any discretionary voice or power, the Trustee hereunder may, and at the written request of the holder or holders of not less than $500,000 of such bonds, or of the Railroad Company, shall call a meeting of the holders of the bonds secured hereby at the time outstanding, in manner hereinafter provided; and until otherwise prescribed by said bondholders, such meetings shall be held at the city of New York, and notice of the objects, time and place of such meeting shall be given by publishing the same in a newspaper of good circulation in the city of New York, twice a week for four successive weeks (the last publication to take place on the day in such
86 notice mentioned for such meeting), and by depositing in the post-office in the city of New York, at the time of, or previous to, the first publication of such notice, a written or printed copy thereof, properly enveloped and directed, postage prepaid, to each and every registered owner or owners of any one or more of said bonds, at his or their registered address; and in case the said Trustee shall fail to call such meeting in manner aforesaid, within ten days after a request in writing therefor shall have been made by the holder or holders of not less than five hundred thousand dollars ($500,000) of such bonds, or by the Railroad Company, or if said Trustee shall have resigned or been removed, or otherwise have become incapacitated, the President of said Railroad Company or the holder or holders of said bonds to the amount aforesaid, may call such meeting in manner aforesaid; provided further, that the expense of publishing and giving such notice shall be a liability of said Railroad Company hereunder, and may be defrayed if necessary out of any trust funds in the hands of the Trustee; and that nothing herein contained shall be held to require the Trustee to incur any personal liability in the calling and holding of such meeting; and at any meeting a majority in interest of the holders of said bonds outstanding may prescribe and establish such rules and by-laws as they may deem proper for the calling of future similar meetings, and the regulation of proceedings thereof, and alter, repeal or amend the same at pleasure. And it is hereby declared and agreed, that at any meting so convened, the holders of said bonds shall be competent to exercise, in person or by proxy, all the powers and authorities conferred upon them by these presents, and that holders of the amount of bonds necessary for any action or requisition shall constitute a quorum for such action
87 or requisition, provided, that less than a quorum may adjourn from time to time, and that each holder of a bond or bonds shall be entitled to one vote for every $1,000 of the principal sum mentioned in his bond or bonds, and that a majority of votes represented shall govern in all cases wherein a majority in interest of all bonds outstanding is not hereby required.

And it is hereby declared and provided, that at any meeting of bondholders held in pursuance of the provisions hereof any bondholder present may require the ownership of bonds by the persons claiming to be such owners to be evidenced by the production of those bonds, excepting in the case of bonds standing registered in the name of such holder, and that whenever, under any provisions of this indenture, effect is to be given to the election, act, appointment, requisition, or assent of a majority, or any specified amount or proportion of the bondholders secured hereby, any person whose interests are to be affected by such action may require that the ownership of such bonds by the person claiming to be such owner, excepting registered bonds as aforesaid, shall be vouched for by the affidavit of such person or his duly authorized agent or attorney having possession of the bonds, stating such ownership of the bonds and giving their numbers, dates, and amounts; which affidavit shall be received as prima facie evidence of the fact, but subject to the question of its verity, and subject to demand for the production of the bonds in any legal proceeding or controversy.

The Trustee or any bondholder attending any such meeting shall have a right to require that any act or resolution of such bondholders affecting the rights or remedies of, or for the benefit of the bondholders, or the duties of the Trustee, or the interests of the
88 trusts hereby created, shall be authenticated by the signature of all the persons assenting thereto, as well as by a minute of the proceedings at any such meeting.

The term majority in interest as used in this indenture shall be held to mean holders having a majority of votes on bonds issued and outstanding for the time being, according to the number of votes to which each holder is entitled as aforesaid and not a majority of individuals.

Any request, requisition, or other instrument signed by bondholders pursuant to the provisions of this indenture shall be proved or acknowledged as deeds approved or acknowledged for record in the States of New Jersey or New York.

Fifteenth. Certificates representing all the stock of the different companies hereby assigned by way of mortgage to the Trustee, except fifty shares of the st of each of said companies, or so many thereof as may be retained by the Railroad Company to qualify directors in each of said companies, shall as such stock comes under the control of the Railroad Company from time to time be forthwith transferred to and new certificates issued in the name of the Railroad Company, which certificates shall be stamped with the words, "This certificate is deposited with and held by the Trustee pursuant and subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887."

The Railroad Company shall duly execute a transfer endorsed on such certificates in the following form: "For the consideration set forth in the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887, said company does hereby bargain,

sell, assign, and transfer unto the Trustee of said mortgage for
89 the time being, all the capital stock named in the within certificate, and does hereby constitute and appoint the Trustee its true and lawful attorney irrevocable, for and in its name and stead, but to its use to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like power; provided, however, that the powers hereby granted shall not be exercised by the Trustee until after it shall have proceeded to enforce its rights and those of the bondholders under said mortgage, by foreclosure, entry, or otherwise, according to the terms thereof."

The said certificates so transferred shall be delivered to and deposited with the Trustee, but no certificate for the shares of stock represented thereby shall be issued to the Trustee until after it shall have proceeded to enforce its rights and those of the bondholders under this mortgage by foreclosure, entry, or otherwise, according to the terms hereof.

The stamping of such certificates shall be entered upon the transfer book and register of each of said companies issuing the same.

The Railroad Company, its successors and assigns, until such proceedings shall have been taken, shall have the right to sell or transfer the shares of stock hereinbefore excepted from assignment to such persons as it shall deem fit, but in trust for and subject to this mortgage, to enable the persons to whom such transfers shall be made to serve as directors in the said companies respectively, but such transfers shall be of no force and effect after such proceedings shall have been taken. The certificates of stock so sold or transferred shall be stamped as follows: "This certificate is held subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887."

90 The Railroad Company will, upon the request of the Trustee, procure the execution of an agreement with the Trustee by each of said companies, whereof a majority of the stock is mortgaged, that it will not hereafter authorize or execute any mortgage or incumbrance of or upon any of its property until thirty days after written notice of its intention to authorize and execute the same has been served on the Railroad Company and the Trustee, and not then if written objection to such mortgage or incumbrance shall be made and served on such company by either the Railroad Company or the Trustee, on the ground that such mortgage or incumbrance will impair the security of these presents.

All dividends on any of the said stocks hereby mortgaged shall belong and be paid to the Railroad Company so long as and whenever it shall be in possession of the Central Railroad of New Jersey, in conformity with the provisions of this mortgage.

No assignment of such dividends by the Railroad Company in advance of their payment shall affect the right of the Trustee to re-

ceive the same after it shall have proceeded to enforce its rights and those of the bondholders under this mortgage.

There shall be no return, cancellation, or special transfer of the certificates of stock pledged by the "Adjustment mortgage" of the Railroad Company, dated May 1, 1878, until after the satisfaction of said mortgage.

The assignment of the aforesaid shares of stock shall not prevent the consolidation and merger of any one or more of the companies, the stock of which is hereby mortgaged, with any other or others of said companies or with the Central Railroad Company of New Jersey, or the purchase of the railroad and property of any one
91 or more of said companies by the Central Railroad Company of New Jersey, but such consolidation and merger or purchase may be made under any existing or future laws, anything in this mortgage contained to the contrary notwithstanding.

Upon such consolidation and merger or purchase, the Railroad Company shall duly execute and deliver a supplemental mortgage conveying to the Trustee all the railroad and other property so consolidated and merged or purchased, to be held by it under the terms hereof, with like effect as if specifically described herein, and the Trustee shall, upon the request of the Railroad Company, deliver up to it all the certificates of stock of the company so consolidated and merged or the railroad of which has been purchased which may have been deposited under this mortgage.

Sixteenth. All the bonds of this company or other companies hereby assigned by way of mortgage to the Trustee, as they come under the control of the Railroad Company from time to time, shall be deposited with the Trustee, stamped with the words "This bond is deposited with and held by the Trustee pursuant and subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887," and shall remain in its custody and possession; yet so long as no proceedings shall have been taken by the Trustee to enforce its rights and those of the bondholders under this mortgage, by foreclosure, entry, or otherwise, according to the terms hereof, the Trustee, as the holder of said bonds, shall have no right, against the written objection of the Railroad Company, to do or perform any act or to make or execute any request, requisition, or other instrument which, by the terms of the mortgages securing such bonds, the owners thereof shall be entitled to perform, make,
92 or execute, but all the rights of the owners of such bonds may, at the option of the Railroad Company and upon its request, remain with and be exercised by the Railroad Company, its successors and assigns, and the Trustee shall at any time and from time to time, on the request of the Railroad Company, make and deliver to the Railroad Company powers of attorney or proxies authorizing and empowering the Railroad Company, its successors, and assigns to do and perform any and all lawful acts and to make or execute all lawful requests, requisitions, or other instruments, which the owners of said

bonds could do, perform, make, or execute if the said bonds were registered in their name and were in their custody and possession.

So long as and whenever the Railroad Company shall be in possession of the Central Railroad of New Jersey, in conformity with the provisions of this mortgage, all coupons that may be attached to said bonds, shall, as they fall due, be delivered to the Railroad Company and any interest which may be or become due and payable thereon shall belong and be paid to it: Provided, however, that coupons now or hereafter in default upon the bonds of the Lehigh and Wilkesbarre Coal Company shall be held by the Trustee, subject to the lien of this mortgage, until the obligor shall be ready to pay the same, when they shall be delivered to the Railroad Company for collection as in other cases.

The bonds pledged in the adjustment mortgage of the Railroad Company, dated May 1, 1878, shall not be deposited with the Trustee, or stamped pursuant to the terms hereof, until after the satisfaction of said mortgage.

Seventeenth. In case the Trustee shall have proceeded to enforce its rights and those of the bondholders under this mortgage,
93 by foreclosure, entry, or otherwise, according to the terms hereof, and such proceedings shall have been discontinued or abandoned, or shall have been determined adversely to the Trustee, the Railroad Company shall be restored to the same position and rights which it had as to the stocks and bonds mortgaged hereby before such proceedings were taken, and the Trustee shall, upon the written request of the Railroad Company, do, make, execute, acknowledge, and deliver such acts, deeds, instruments, and assurances in the law as may be reasonably advised or required to effectuate such purpose.

Eighteenth. Any or all of the bonds of this company or other companies and any or all the certificates of car trust associations hereby assigned by way of mortgage to the Trustee shall, upon the request of the Railroad Company, be surrendered by the Trustee for extension, payment and cancellation or either, according to such request, and any or all of the mortgages given to secure said bonds may be satisfied, anything herein contained to the contrary notwithstanding; provided, however, that such surrender for cancellation shall not be made in the case of any issue of bonds or certificates all of which have not been deposited with the Trustee, except on proof that the security of this mortgage will not be thereby diminished or impaired; and provided further, that all moneys received in payment for the bonds of other companies shall be applied in like manner as is prescribed by the twentieth article of this mortgage respecting the proceeds of any part of the mortgaged premises that may be sold.

Nineteenth. The Trustee shall certify and deliver to the Railroad Company from time to time on its written request all the bonds secured by this mortgage, except an amount of bonds equal to the par
94 value of the hereinafter named bonds, stocks, and certificates at any time outstanding and not made subject to the lien of

this mortgage, which bonds, stocks, and certificates are intended to be either purchased from time to time and made subject to the lien of this mortgage, or to be paid off and canceled, viz:

Name of securities.	Total par value of amount outstanding.
First mortgage bonds of the C. R. R. Co. of N. J	$5, 000, 000
Convertible bonds of the C. R. R. Co. of N. J	4, 400, 000
Consolidated bonds of the C. R. R. Co. of N. J	15, 000, 000
Adjustment bonds of the C. R. R. Co. of N. J	5, 254, 000
Convertible debenture bonds of the C. R. R. Co. of N. J	3, 264, 000
Bonds of the Newark & New York R. R. Co	600, 000
Bonds of the New Jersey Southern Railway Co	1, 590, 600
Bonds of the Long Branch & Sea Shore R. R. Co	200, 000
Bonds of the Lehigh Coal and Navigation Company	2, 310, 000
Stock of the New York & Long Branch R. R. Co	500, 000
Stock of the South Branch R. R. Co	438, 300
Stock of the West End R. R. Co	43, 700
Stock of the Newark and New York R. R. Co	87, 350
Certificates of the Railroad Car Trust of Phialdelphia	52, 800
Certificates of the New Jersey Car Trust Association, Limited	50, 000
Certificates of the Central New Jersey Car Trust	80, 000
Certificates of the Guarantee Car Trust	700, 000
Certificates of the Central Railroad Company of New Jersey Car Trust	823, 000
Total	40, 393, 750

95 The general mortgage bonds so excepted from certification and delivery shall, nevertheless, be certified by the Trustee and delivered to the Railroad Company from time to time upon its written request in exchange for an equal amount of any of the said bonds, stocks, and certificates as they shall be so purchased and made subject to the lien of this mortgage, or as the same shall be paid off and cancelled, or upon deposit with the Trustee of moneys sufficient to pay the entire amount due thereon; provided, however, that there shall always remain unissued and uncertified an amount of said general mortgage bonds equal at par to the par value of such of said bonds, stocks, and certificates as have not been either cancelled or deposited with the Trustee under the terms of this mortgage, or for the payment of which moneys have not been deposited, as aforesaid.

Twentieth. If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to exchange for other property or to sell any part of the mortgaged premises, it shall be lawful for the Trustee, and it is hereby authorized and directed to release such part of said mortgaged premises from the lien and operation of this mortgage, unless within thirty days after notice in writing to be given by the Railroad Company to the Trustee, specifying the property intended to be exchanged or sold and the price or other consideration to be received therefor, the Trustee shall serve upon the Railroad Company objections thereto in writing, on the ground that such price or other consideration is not a fair and just equivalent for the property to be exchanged or sold. In case of the service of such written objections and continued differ-

ence of opinion between the Railroad Company and the Trustee
96 as to the adequacy of such price or other consideration, it shall be lawful for them, and they are hereby authorized and empowered to appoint an impartial arbitrator or arbitrators to determine the adequacy of such price or other consideration, and in case such arbitrator or arbitrators shall determine that such price or other consideration is a fair and just equivalent for the property to be exchanged or sold, the Trustee, notwithstanding such written objections, shall execute and deliver such release.

The proceeds of any sale so made shall be applied by the Railroad Company at its option, to the improvement of any remaining part of the mortgaged premises or to the purchase of other property, real or personal, or to the purchase of the general mortgage bonds secured hereby, which bonds so purchased shall forthwith be cancelled, and all property so purchased, as also all property that may be acquired in exchange as aforesaid, shall be subject to all the trusts, including that of sale or exchange, hereby declared, and shall be conveyed in mortgage by the Railroad Company to the Trustee, to be so held.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to lease any part or parts of the mortgaged premises, it shall be lawful for the Trustee, and it is hereby authorized and directed to consent to such leases, and to join therein in such manner as to make this mortgage subject thereto, or to execute any agreements that may be necessary to that end, unless within thirty days after notice in writing to be given by the Railroad Company to the Trustee, specifying the property intended to be leased, the Trustee shall serve upon the Railroad Company objections thereto in writing, upon the ground that such lease
will impair the security of this mortgage and the value of the
97 mortgaged premises, in which case like proceedings may be taken as in the case of objections to any proposed sale or exchange with like effect if the arbitrator or arbitrators shall determine that the proposed lease does not impair the security of this mortgage, and the value of the mortgaged premises.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to compromise, adjust, or settle any disputed title or claim to any part of the mortgaged premises, it shall be lawful for the Trustee, and it is hereby authorized and directed, to release and discharge such part of the mortgaged premises from the lien of this mortgage, unless within thirty days after notice in writing to be given by the Railroad Company to the Trustee, the Trustee shall serve upon the Railroad Company objections thereto in writing, on the ground that such compromise, adjustment, or settlement would impair the security of this mortgage, in which case like proceedings may be taken with like effect as in the case of objections to any proposed lease. Any consideration received upon such compromise, adjustment, or settlement shall be applied in like manner as the consideration received upon any exchange or sale.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to make any change in the location of any of the tracks or of any of the station houses, or other buildings or structures upon any part of the mortgaged premises, it shall be lawful for it so to do, and the Trustee, upon conveyance to it under the terms of this mortgage of such new tracks, station houses, buildings, or other structures, and the premises on which the same may be erected, shall, at the request of the Broadila Company, release the former tracks, station houses,
98 buildings, and other structures and the premises on which they were erected, from the lien of this mortgage, and execute and deliver any and all instruments necessary and proper to effect such purpose.

Twenty-first. This mortgage shall be a continuing lien to secure the full and final payment of all bonds to be issued from time to time as herein provided, not exceeding $50,000,000 in amount, irrespective of the date of issue, rate of interest, or form of bond, or whether payable in gold coin of the United States or sterling money of Great Britain; and the certificate of the Trustee, substantially in the form provided herein, on any bond issued under the corporate seal of the Railroad Company upon the security of this mortgage, shall be conclusive evidence that the lawful holder of the said bond is entitled to share in the security of this mortgage.

Twenty-second. It shall be lawful for the Railroad Company, anything herein contained to the contrary notwithstanding, to cancel any lease included under this mortgage whenever all the stock of the lessor company shall be deposited with the Trustee under the terms hereof, and to agree to any modification or change in the terms of any contract or lease included herein, whenever such modification or change shall, in the opinion of its board of directors, be advantageous to its interests; and such contract or lease so modified shall be subject to this mortgage with like effect as if the change or modification had been made prior to the execution hereof.

Twenty-third. It is hereby mutually covenanted and agreed between the parties hereto, that the Trustee need not take any action
99 which, by the terms of this mortgage, is made obligatory upon it in the execution of the trusts hereby created, if, in its opinion such action will be likely to involve it in personal expense or liability, unless one or more of said bondholders shall, as often as required by the Trustee, give it reasonable indemnity against the same, anything herein to the contrary notwithstanding; that the Trustee, and its agents, attorneys and counsel, shall be entitled to a reasonable compensation for all services properly rendered in pursuance of the provisions of this mortgage, or in connection with the trusts hereby created, to be paid by the Railroad Company, or out of the income or proceeds of the mortgaged property; and that the Trustee may resign and discharge itself of the trust

hereby created, by notice in writing to the Railroad Company, to be given at least three months before such resignation shall take effect, or within such shorter time as shall be accepted by the Railroad Company as adequate.

The said Trustee may be removed by a vote of the majority in interest of the holders of all the aforesaid bonds at any time outstanding voting, in person or by proxy, the said vote being had at a meeting duly held of the said bondholders, to be specially called for this purpose. In case at any time hereafter the said Trustee, or any Trustee hereafter appointed, shall resign, or be removed as herein provided, or by a court of competent jurisdiction, or otherwise, or shall become incapable or unfit to act in the said trust, a successor or successors to such Trustee shall be appointed by the holders for the time being of a majority in amount of the said bonds then outstanding, by instrument in writing signed and proved as herein provided, or by the vote of a meeting duly held of the holders of the said bonds.

Provided nevertheless, and it is hereby agreed and declared,
99¼ that in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint in the manner hereinbefore provided a successor in the event of a vacancy which may have happened in said trust, application in behalf of all the holders of the bonds secured hereby may be made, by the holders of one-eighth of the aggregate amount of bonds outstanding, to any court of competent jurisdiction in which any part of the aforesaid property may be situated, for the appointment of a new Trustee.

The Trustee so appointed shall thereupon become vested with all the estate, property, rights, powers and trusts granted to or conferred upon the party of the second part by these presents, and all the rights and powers requisite to enable it to execute the purposes of this trust, without any further assurance or conveyance, and with like effect as if named as Trustee herein, and the Trustee so resigning, or being removed, shall, on the written request of the new Trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new Trustee, upon the trusts herein expressed, all the property, privileges, rights and franchises which may at that time be held upon the said trusts.

Twenty-fourth. The Railroad Company shall and will at any time, upon the request of the trustee, do, make, execute, acknowledge and deliver all such further acts, deeds and assurances in the law as may reasonably be advised or required for effectuating the intention of this mortgage, and for the better assuring and confirming unto the Trustee and its successors in the trust hereby created, upon the trusts and for the purposes herein expressed, all and singular the railroads,
equipment and other property, rights and franchises hereby
99¼ conveyed or intended so to be, whether now owned or possessed, or hereafter acquired by the Railroad Company; and shall and will deliver to the Trustee certificates representing all the stock of the different companies, stock of which is included in this mortgage,

which may from time to time hereafter be acquired and owned by it, to be held by the Trustee under the terms hereof; and shall and will execute and deliver with these presents, and from time to time hereafter when occasion shall require, and when requested by the Trustee, such bills of sale and transfers, and other documents, in due form of law, as may be necessary and proper under the laws of the United States, to vest in the Trustee all and every of the tug boats, ferry boats, floats, barges and other floating equipment hereby mortgaged, or intended so to be, to the end that the title of said party of the second part may be duly registered and recorded according to the laws of the United States.

Twenty-fifth. The word "Trustee," as used in this mortgage, shall be held and construed to mean the trustee, party of the second part, or its successor or successors for the time being, and such successor or successors shall be vested with, and be entitled to exercise, all the estate, property, rights, powers, and trusts hereby granted to or conferred upon the party hereto of the second part.

Twenty-sixth. Upon payment of the principal and interest of all the general mortgage bonds secured hereby or upon deposit with or to the satisfaction of the trustee of the entire amount of such principal and interest remaining due, the trustee shall forthwith enter satisfaction of this mortgage upon the records, and transfer and deliver up all bonds and stocks deposited with it pursuant to the
100 terms hereof, and shall do, make, execute, and deliver such deeds, acts, instruments, or assurances as may, in the opinion of the counsel of the Railroad Company, be necessary to vest all the mortgaged premises and property in the Railroad Company as of its former estate therein.

In witness whereof the said The Central Railroad Company of New Jersey has caused to be hereunto affixed its common or corporate seal, and the president of said company, by virtue of the authority vested in him, has hereunto affixed his signature, and the secretary of the said company has duly attested the execution hereof in duplicate, this the day and year first above written.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By J. ROGERS MAXWELL, *President.*

[Seal, C. R. R. Co. of N. J.]

Attest:

SAM'L KNOX, *Secretary.*

Signed, sealed, and delivered in the presence of—

ALEX. T. McGILL, Jr.,
JOHN L. CONOVER.

101 The Central Trust Company of New York, trustee named in the foregoing mortgage or deed of trust, do hereby accept the trusts therein contained, and do hereby covenant and agree to perform the same.

In witness whereof the said company has caused its corporate seal to be hereunto affixed, duly attested, the day and year in said mortgage first written.

THE CENTRAL TRUST COMPANY OF NEW YORK,
By G. SHERMAN, *Vice-President.*
[Seal C. T. Co. of N. Y.]

Attest:
C. H. P. BABCOCK, *Secretary.*

102 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, Alexander T. McGill, junior, chancellor of the State of New Jersey, personally appeared Samuel Knox, of full age, who, being by me duly sworn according to law, on his oath, saith: That he is secretary of the Central Railroad Company of New Jersey; that J. Rogers Maxwell is president of the same; that the seal affixed to the foregoing mortgage is the common seal of the company; and that the said J. Rogers Maxwell, by authority of a resolution of the board of directors of said company, as such president, signed said mortgage and affixed said seal thereto, and delivered the said mortgage as the voluntary act and deed of the said corporation for the uses and purposes therein expressed; and that he, the said Samuel Knox, did at the execution thereof witness and attest the same and subscribe his name as a witness thereto.

SAM'L KNOX.

Sworn and subscribed at Jersey City, New Jersey, before me, the date aforesaid, which to me is satisfactory proof of the due execution of said mortgage.

ALEX. T. McGILL, JR.,
Chancellor of the State of New Jersey.

103 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, George W. Cassedy, a commissioner of the State of Pennsylvania, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and recorded therein, personally appeared the above-named J. Rogers Maxwell, president of the above-named corporation, who, being duly sworn, according to law, on his oath, saith: That he was personally present at the execution of the above-written instrument, and saw the common seal of the said the Central Railroad Company of New Jersey duly affixed thereto; that the seal so affixed is the common seal of the said the Central Railroad Company of New Jersey; that the above-written mortgage was duly sealed and delivered by him, as and for the act and deed of

the said corporation of the Central Railroad Company of New Jersey, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to said mortgage as the president of said corporation, in attestation of the due execution and delivery of said mortgage, is of this deponent's proper handwriting.

J. ROGERS MAXWELL.

Sworn and subscribed to before me at Jersey City, New Jersey, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Commissioner's seal.] GEO. W. CASSEDY,
Commissioner for Pennsylvania in New Jersey.

104 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me personally came Samuel Knox, secretary of the Central Railroad Company of New Jersey, with whom I am personally acquainted, who being duly sworn according to law, saith: That he resides in the city of Elizabeth, New Jersey; that he was at the date of the foregoing mortgage, and is now, secretary of the Central Railroad Company of New Jersey; that he knows the common seal of said Railroad Company; that the seal affixed to the above mortgage is the common seal of said Railroad Company; that the seal affixed to the above mortgage was so affixed by order of the board of directors of said Railroad Company; that he signed his name thereto as secretary by the like order of said board of directors; that he is well acquainted with J. Rogers Maxwell, and knows him to be the president of said Railroad Company; that the signature of said J. Rogers Maxwell subscribed to said mortgage is in the genuine handwriting of said J. Rogers Maxwell, and was thereto subscribed by order of the board of directors of said Railroad Company, in his presence.

SAM'L KNOX.

Sworn and subscribed before me, at the city of New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Notarial seal.] ARCHIBALD C. WEEKS,
Notary Public, Kings County.

Certificate filed in New York County.

105 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, a master of the court of chancery of the State of New Jersey, personally appeared C. H. P. Babcock, of full age, who, being by me duly sworn according to law, on his oath, saith: That he is secretary

of the Central Trust Company; that George Sherman is vice-president of the same; that the seal affixed to the foregoing acceptance of trust is the common seal of the company, and that the said George Sherman, as such vice-president, signed said acceptance of trust and affixed said seal thereto, and delivered the same as the voluntary act and deed of the said corporation for the uses and purposes therein expressed, and that he, the said C. H. P. Babcock, did at the execution thereof witness and attest the same and subscribe his name as a witness thereto.

C. H. P. BABCOCK.

Sworn and subscribed at the city of New York before me, the date aforesaid, which to me is satisfactory proof of the due execution of said acceptance of trust.

JOHN L. CONOVER,
Master in Chancery of New Jersey.

106 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, Charles Edgar Mills, a commissioner of the State of Pennsylvania, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and recorded therein, personally appeared the above-named George Sherman, vice-president of the above-named corporation, who, being duly sworn according to law, on his oath, saith: That he was personally present at the execution of the above-written instrument, and saw the common seal of the said the Central Trust Company duly affixed thereto; that the seal so affixed is the common seal of the said the Central Trust Company; that the above-written acceptance of trust was duly sealed and delivered by him, as and for the act and deed of the said corporation of the Central Trust Company, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to said mortgage as the vice-president of said corporation, in attestation of the due execution and delivery of said acceptance of trust, is of this deponent's proper handwriting.

G. SHERMAN.

Sworn and subscribed to before me at New York City, New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Commissioner's seal.] CHARLES EDGAR MILLS,
Commissioner for Pennsylvania in New York.

107 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me personally came C. H. P. Babcock, secretary of the Central

Trust Company, with whom I am personally acquainted, who, being duly sworn according to law, saith: That he resides in the city of New York; that he was, at the date of the foregoing acceptance of trust, and is now, secretary of the Central Trust Company; that he knows the common seal of said trust company; that the seal affixed to the above acceptance of trust is the common seal of said trust company; that he is well acquainted with George Sherman, and knows him to be the vice-president of said trust company; that the signature of said George Sherman subscribed to said acceptance of trust is in the genuine handwriting of said George Sherman and was thereto subscribed in his presence.

C. H. P. BABCOCK.

Sworn and subscribed before me, at the city of New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[NOTARIAL SEAL.] ARCHIBALD C. WEEKS,
Notary Public, Kings County.

Certificate filed in New York County.

108 Recorded in the office of the register of the city and county of New York, in liber 2223 of mortgages, page 50, on the 28 day of Sept., A. D. 1887, at 3 o'clock p. m. Min.

Witness my hand and official seal.

[SEAL.] JAMES J. SLEVIN, *Register.*

Received in the office of the register of the county of Hudson, N. J., at 12 o'clk., Sept. 19, 1887, a. m., and recorded in book 200 of mortgages for said county on page 223, &c.

[SEAL.] GEO. B. FIELDER, *Register.*

Received in the office of the register of the county of Essex, N. J., on the 19th day of September, A. D. 1887, at 4 o'clock p. m., and recorded in book G9 of mortgages for said county on pages 567, &c.

[SEAL.] EMIL TOERING, *Register.*

Received in the clerk's office of the county of Union, N. J., on the 20 day of Sept., A. D. 1887, at 11.30 o'clock in the forenoon, and recorded in book 76 of mortgages for said county on pages 1 to 61.

[SEAL.] JNO. L. CROWELL, *Clerk.*

Received in Middlesex County clerk's office on the 20th day of September, A. D. 1887, at 3.45 p. m., and recorded in book 102 of mortgages, pages 7, &c.

[SEAL.] C. M. SLACK, *Clk.*

109 Received in Somerset County clerk's office on the 21st day of September, A. D. 1887, and recorded in book F No. 3 of mortgages for said county, on pages 149, &c.

[SEAL.] WM. A. SCHOMP, *Clerk.*

Received in the clerk's office of the county of Hunterdon, N. J., on the 21st day of September, A. D. 1887, at 3.45 p. m., and recorded in vol. 65 of mortgages for said county, on page 33, &c.

[SEAL.] PETER VOORHEES, *Clerk.*

Received in Warren County clerk's office on the 22d day of September, A. D. 1887, and recorded in book of mortgages, vol. 48, page one, &c., for said county.

[SEAL.] THEO. P. HOPLER, *Clk.*

Received in the office of the secretary of state of the State of New Jersey, on the twenty-second day of September, A. D. 1887, at 3 o'clock p. m., and recorded in book G of corporations, page 82, &c.

[SEAL.] HENRY C. KELSEY, *Secretary of State.*

Received September 22, 1887, at six o'clock p. m., and recorded in Monmouth County clerk's office at Freehold, N. J., in book 125 of mortgages for said county, on page 223.

[SEAL.] JAMES H. PATTERSON, *Clk.*

110 Received in the clerk's office of the county of Morris, New Jersey, on the 23d day of September, A. D. 1887, and recorded in book A4 of mortgages for said county, on pages 475, &c.

[SEAL.] MELVIN S. CONDIT, *Clerk.*

Received in the clerk's office of the county of Sussex, New Jersey, on the 23d day of September, A. D. 1887, at 3.20 o'clock p. m., and recorded in book H3 of mortgages, on page 1, &c.

[SEAL.] JOHN H. WELDEN, *Clerk.*

LACKAWANNA COUNTY, *ss:*

Recorded in the office for recording deeds, &c., in and for said county, in mortgage book number 18, page 353, &c. Witness my hand and seal of office this 24th day of September, 1887.

[SEAL.] ELIEZER D. JENKINS, *Recorder.*

LUZERNE COUNTY, *ss:*

Rec'd in the recorder's office in and for said county, at 5.25 p. m., this 24th September, 1887, recorded in mortgage book No. 54, page 269, &c. In testimony whereof I have hereunto set my hand and affixed the seal of the said recorder's office the day and year above written.

[SEAL.] JOS. J. MCGUITY, *Recorder.*

111 STATE OF PENNSYLVANIA, *Carbon County, ss:*

Recorded in the office for recording of deeds at Mauch Chunk, in and for the said county and State, in mortgage book No. 14, page 12. Witness my hand and seal of office this 24th day of September, 1887.

[SEAL.] JAMES H. HANDWERK,
Recorder of Deeds, &c.

STATE OF PENNSYLVANIA, *County of Schuylkill, ss:*

Recorded on this 26th day of Sept., A. D. 1887, in the office of the recorder of deeds in and for said county, in mortgage book No. 4 O, page 348, &c. Witness my hand and seal of office the day and year aforesaid.

[SEAL.] A. J. SHORTALL, *Recorder.*

LEHIGH COUNTY, *ss:*

Recorded in the office for the recording of deeds, &c., in and for said county, in mortgage book, volume No. 44, page 1, &c. Witness my hand and seal of office this 27th day of Sept., Anno Domini 1887, at 8 a. m.

[SEAL.] HENRY J. GACKENBACK, *Recorder.*

Recorded in recorder's office, Easton, Pa., September 27, 1887, at 11.25 a. m., in mortgage book No. 57, page 334, &c.

Witness my hand & seal.

[SEAL.] GEO. R. HESS, *Recorder.*

112 September 27, 1887, received in Ocean County clerk's office at Tom's River at five-thirty o'clock p. m., and recorded in book No. 43 of mortgages, page 148.

[SEAL.] WM. I. JAMES, *Clerk.*

Received October 3rd, 1887, at 10.35 a. m., and recorded in the clerk's office of the county of Burlington at Mount Holly, N. J., in book K 3 of mortgages, folio 570.

[SEAL.] LEVI FRENCH, *Clerk.*

Received October 3rd, 1887, at 2.10 p. m., and recorded in the register of deeds office of Camden County at Camden, New Jersey, in mortgage book No. 43, p. 301, &c.

[SEAL.] ROBERT F. S. HEATH, *Register.*

Received October 3rd, 1887, and recorded in the clerk's office of Gloucester County at Woodbury, in book A3 of mortgages, page 210.

[SEAL.] H. C. LOUDENSLAGER, *Clerk,*
Per B.

Received Oct. 4, 1887, and recorded in Salem County clerk's office, in book No. 9 of mortgages, folio 383, &c.

[SEAL.] C. D. COLE, *Clerk.*

113 STATE OF NEW JERSEY, *Cumberland County, ss:*

Received October 4, 1887, and recorded in the clerk's office of the county of Cumberland, and recorded in book No. 40 of mortgages, folio 264, &c.

[SEAL.] F. S. GODFREY, *Clerk.*

STATE OF NEW JERSEY, *Atlantic County, ss:*

Received Oct. 6, 1887, and recorded in the clerk's office of the county of Atlantic, and recorded in book No. 20 of mortgages, folio 194.

[SEAL.] LEWIS EVANS, *Clerk.*

117 Agreement between the Lehigh Coal and Navigation Co. and the Central Railroad Company of New Jersey. Dated June 28, 1887.

119 This indenture, made the twenty-eighth day of June, A. D. 1887, between the Lehigh Coal and Navigation Company of the first part, and the Central Railroad Company of New Jersey, of the second part.

Whereas by deed bearing date March 31, 1871, a copy of which in hereto annexed marked "Exhibit A," a contract was made between the parties to this indenture, among other things, for the lease of the Lehigh and Susquehanna Railroad and branches to the parties of the second part and for the working of the said railroad by the party of the second part in connection with its railroad in the State of New Jersey; and

Whereas the party of the second part in the year 1883, desiring to transfer that contract to the Philadelphia and Reading Railroad Company, a deed bearing date May 29, 1883, a copy of which is hereto annexed marked "Exhibit B," was executed between the parties to this indenture and the Philadelphia and Reading Railroad Company, by which deed the contract and lease then subsisting under the deed of March 31, 1871, was converted into a contract and lease defined by the provisions of the deed of March 31, 1871, as the same were modified by the deed of May 29, 1883, and thereupon by another deed of the same date the contract and lease were transferred by the Central Railroad Company of New Jersey to the Philadelphia and Reading Railroad Company; and

120 Whereas on the first day of January, 1887, the parties of the second part under and by virtue of proceedings in the Circuit Court of the United States took possession of the Lehigh and Susquehanna Railroad and branches, and assumed the control and management of the said railroad and of the property which prior to that time had been held by the Philadelphia and Reading Railroad Company under the contract of March 31, 1871, as modified by that of May 29, 1883; and

Whereas proceedings have been commenced in the Circuit Court of the United States for the Eastern District of Pennsylvania, to declare that the right of the party of the second part to the said contracts and to the lease and control of the Lehigh and Susquehanna Railroad and branches, has ceased and determined; and alternatively to ascertain and declare the terms of the lease and contract under which the said railroad is and shall be held and managed; and

Whereas it is deemed advantageous to both the parties to this indenture that the Lehigh and Susquehanna Railroad and branches should be controlled and worked by the Central Railroad Company of New Jersey, in connection with its railroad from Phillipsburg to tidewater, if the terms and conditions of the contract under which the same is to be done are satisfactory to both parties, and if they can agree on the same;

It is therefore mutually covenanted and agreed, that on and after January 1, 1887, the contract, grant or agreement by which the Central Railroad Company of New Jersey holds, or claims, or can
121 hold or claim any right to the Lehigh and Susquehanna Railroad, or to the control or management of the same, or to any property described in or to any rights created or granted by the deed of March 31, 1871, or by the deed of May 29, 1883, is set forth and contained in and is defined by the two written instruments above mentioned; and that the terms, conditions, covenants, and agreements of every kind set forth or contained in the deed of May 29, 1883, wherever the same differ from the terms, conditions, covenants, and agreements set forth and contained in the deed of March 31, 1871, shall be taken as the terms, conditions, covenants, and agreements of the contract and lease between the parties to this indenture subsisting on and after January 1, 1887. And all covenants or agreements which by the deed of May 29, 1883, were made on the part of the Philadelphia and Reading Railroad Company, are to be deemed to have been made by and to be performed by the Central Railroad Company of New Jersey, and all conditions, duties or obligations assumed by the Philadelphia and Reading Railroad Company or imposed on their estate or property, and all rights accruing to that company by the deed of May 29, 1883, are to be deemed to be assumed by and to accrue to the Central Railroad Company of New Jersey, and to be imposed on their estate and right in the premises, contract, and property derived from the Lehigh Coal and Navigation Company; and all rights conferred on the Lehigh Coal and Navigation Company, and all duties and obligations accruing to them, and all conditions and obligations imposed on them are to be deemed and taken to be as they are defined in the deed of May 29, 1883, when the terms of that instrument differ from those of the deed of March 31, 1871, excepting only that such of the provisions of the third covenant of the deed of May
29, 1883, as relate to the development of the Lehigh and
122 Wilkesbarre Coal Company's lands, and to the mode of compensation for a deficiency in the stipulated production of those lands, and to the causing of the production of the said lands to pass to or toward its market over the lines of the Lehigh and Susquehanna Railroad and branches, shall be so modified as to read as follows: "will cause the development of the anthracite lands that may be owned, leased or controlled by the Lehigh and Wilkesbarre Coal Company and the Central Railroad Company of New Jersey to proceed pari passu with the general development of the anthracite region of Penn-

sylvania, and in such manner that the said lands shall produce at least six per cent of the total production of the anthracite region in each year till the year ending December 31, 1896, and thereafter shall produce in each year at least five and one-half per cent of the total production of the anthracite region so long as it shall be possible for them to produce at that rate.

"If the Central Railroad Company of New Jersey and the Lehigh Coal and Navigation Company should differ as to the possibility of maintaining the production of the said lands at the stipulated amount, the question of possibility shall be referred to arbitrators, one to be appointed by the Lehigh Coal and Navigation Company and one by the Central Railroad Company of New Jersey, and the two thus chosen shall select a third, and their decision, or that of a majority of them, shall be final and conclusive and binding on the parties hereto.

"If in any year prior to the time at which the Central Railroad Company of New Jersey shall be entitled to claim that the anthracite lands aforesaid can no longer produce anthracite in the stipulated ratio, the production of the said lands shall fall below the stipulated
123 amount, the Central Railroad Company of New Jersey shall and will use all means that shall be reasonably possible to make up the deficiency in the production of that year by a corresponding excess of production in the next year over the stipulated production for the said next year; and if the said deficiency of production of the preceding year shall not be so compensated, then the Central Railroad Company of New Jersey shall and will pay to the Lehigh Coal and Navigation Company the sum of money which the Lehigh Coal and Navigation Company would have received from the business of the said preceding year if the guaranteed production of the anthracite lands aforesaid had been made; excepting only that if in any such year in which the Central Railroad Company of New Jersey shall be bound as aforesaid to make up the deficiency of production of the preceding year, the failure to produce sufficient anthracite to make up such deficiency from the anthracite lands aforesaid shall have been caused by the occurrence in such year or in the preceding year of a general strike of workmen, or an extensive fire in the collieries, or an extensive flooding of the collieries, and not by the inability of the collieries to produce the required amount of coal under ordinary circumstances, the Central Railroad Company of New Jersey shall for those years be relieved of its obligation to pay to the Lehigh Coal and Navigation Company the sum of money which the Lehigh Coal and Navigation Company would have received from the business of the said years if the guaranteed production of anthracite had been made; and the Central Railroad Company of New Jersey shall and will cause the production of the anthracite lands aforesaid to pass over the lines of the Lehigh and Susquehanna Railroad and branches
124 to markets that can be reached by way of the said railroad lines, and as far as it can be carried toward such markets over said lines, from which lines it shall not be diverted except for an equivalent that shall be satisfactory to the Lehigh Coal and Naviga-

tion Company, and that shall have been accepted by them in writing before such diversion shall be made, the Lehigh Coal and Navigation Company agreeing on its part to consent to such diversion when it shall clearly appear that the interests of the Lehigh and Susquehanna Railroad and branches will be thereby promoted," and

Whereas it is important for the interests of both the parties hereto (as tending to secure enough business for the Lehigh and Susquehanna Railroad and branches to enable the Central Railroad Company of New Jersey to earn sufficient revenues on the Lehigh and Susquehanna Railroad and branches to pay the stipulated rental), that so much as possible of the coal product of the Lehigh Coal and Navigation Company's lands shall be sent to market over the lines of the Lehigh and Susquehanna Railroad and branches and the Central Railroad of New Jersey, it is agreed between the parties hereto that the proviso in the first of the covenants of the party of the first part in the agreement of March 31, 1871, shall be changed so as to read as follows:

"Provided, that one-fourth and no more of the coal to be mined annually by the Lehigh Coal and Navigation Company from lands owned, leased, or controlled by it may be sent to market over railroad lines other than the Lehigh and Susquehanna Railroad and branches in case that by so doing the Lehigh Coal and Navigation Company can realize a larger price or profit than it would have realized
125 from the price at the mines together with its proportion of the freight earnings on such coal on the Lehigh and Susquehanna Railroad and branches if it had been shipped over that railroad; but the Central Railroad Company of New Jersey shall have the option in such cases of buying such coal of the Lehigh Coal and Navigation Company at its mines, paying therefor a price which added to the proportion of the freight earnings on such coal accruing to the Lehigh Coal and Navigation Company shall not be less than that which the Lehigh Coal and Navigation Company would have realized if its coal had been shipped over other lines of railroad. But nothing in this proviso shall be held to limit the shipment of coal by the Lehigh Coal and Navigation Company over the Lehigh and Hudson River Railway to points in the interior of New England, except that the amount of coal shipped by the Lehigh Coal and Navigation Company over the Lehigh and Hudson River Railway, added to the amount that may be sent to market by railroad lines other than the Lehigh and Susquehanna Railroad and branches, shall not in any year exceed twenty five per cent of the total production if its mines;" and

Whereas it is important for the interests of both the parties hereto as tending to the development of the business of the Lehigh and Susquehanna Railroad and branches that an independent connection with the city of Scranton and with the railroads centering there should be secured for the said railroad, it is agreed between the parties hereto that the Lehigh Coal and Navigation Company shall assign to the Central Railroad Company of New Jersey the contract with the

Delaware and Hudson Canal Company of January 27, 1887, a copy of which is hereto annexed, marked "Exhibit C," under which
126 it has the right to the unrestricted use of the Delaware and Hudson Canal Company's Railroad between Union Junction and Minooka Junction, and shall procure a lease to the Central Railroad Company of New Jersey of the railroad which the Wilkesbarre and Scranton Railway Company is building from Minooka Junction to Scranton; and that the Central Railroad Company of New Jersey shall assume all the duties to the Delaware and Hudson Canal Company which under the said agreement of January 27, 1887, were assumed by the Lehigh Coal and Navigation Company, and shall lease the railroad of the Wilkesbarre and Scranton Railway Company upon terms which shall be generally similar to those of the existing lease of the Lehigh and Susquehanna Railroad and branches, except that the annual rental shall be fixed at the rate of six per cent on the cost of the Wilkesbarre and Scranton Railway as the same shall from time to time appear on the books of the said railway company, the Central Railroad Company of New Jersey assuming and paying all taxes that may by any lawful authority be assessed on the property of the Wilkesbarre and Scranton Railway Company, and on the rent or revenue derived by the Lehigh Coal and Navigation Company from said lease, so that the Lehigh Coal and Navigation Company shall receive the rent of six per cent on the cost of the Wilkesbarre and Scranton Railway free of all charges whatever; the lease of the Wilkesbarre and Scranton Railway and the assignment of the contract with the Delaware and Hudson Canal Company being terminable by the party of the first part whenever the lease of the Lehigh and Susquehanna Railroad and branches shall terminate; and that the Central Railroad Company of New Jersey shall operate in connection with the Lehigh and Susquehanna Railroad the aforesaid roads connecting the Lehigh and Susquehanna Railroad with
127 the city of Scranton and with the railroads centering there; and

Whereas it has been the purpose of the agreements heretofore made between the parties hereto, as is plainly declared in the deed of March 31, 1871, and elsewhere, that for the public convenience and accommodation and for the interest of the parties hereto, the railroads of the parties hereto forming a continuous line of railroad from the Wyoming and Lehigh coal fields of Pennsylvania to the waters of the Hudson River at Jersey City, should be worked as one line and under one direction, it is agreed between the parties hereto that if at any time it shall be necessary for the purpose of maintaining the continuity of the said line of railroad and the unity of its management that the Lehigh and Susquehanna Railroad and branches should be operated by the Lehigh Coal and Navigation Company, then the Central Railroad Company of New Jersey shall and will request the Lehigh Coal and Navigation Company to operate the Lehigh and Susquehanna Railroad and branches, and the Lehigh Coal and Navigation Company shall accede to the request and

shall operate the Lehigh and Susquehanna Railroad and branches for the account of the Central Railroad Company of New Jersey and at its charge and risk so long as it may remain necessary so to do in order to carry out the purpose of the existing agreements. In that event the Central Railroad Company of New Jersey shall furnish the equipment required, and shall in all other respects carry out the provisions of this agreement and of the deeds of March 31, 1871, and of May 29, 1883, the only change contemplated in the duties of the Central Railroad Company of New Jersey being that in the operation of the Lehigh and Susquehanna Railroad and branches
128 it shall act through the Lehigh Coal and Navigation Company instead of through its own officers. And it is further agreed that when in the opinion of the Central Railroad Company of New Jersey there shall be no longer any necessity for the purposes hereinbefore set forth that the Lehigh Coal and Navigation Company shall continue to operate the Lehigh and Susquehanna Railroad and branches, then the Lehigh Coal and Navigation Company shall surrender to the Central Railroad Company of New Jersey possession of the Lehigh and Susquehanna Railroad and branches and of the equipment belonging to the Central Railroad Company of New Jersey, and the Central Railroad Company of New Jersey shall assume and shall continue the operation of the Lehigh and Susquehanna Railroad and branches under the deeds of March 31, 1871, and of May 29, 1883, and this agreement.

The parties hereto respectively agree that the Central Railroad Company of New Jersey shall and will on or before the first day of January, 1888, deposit with the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia two millions three hundred and ten thousand dollars of the five per cent bonds to be secured by the proposed general mortgage of the Central Railroad Company of New Jersey, and that these bonds shall be pledged for the payment at maturity of two millions three hundred and ten thousand dollars of the gold loan of the Lehigh Coal and Navigation Company falling due December 15, 1897, the payment of the principal and interest on which amount was assumed by the Central Railroad Company of New Jersey in the second of the covenants of the party of the second part in the agreement of March 31, 1871, these bonds being an additional security to that of the equipment which by the
129 agreement just recited is charged with the payment of the above recited sum; and this being done, that the Lehigh Coal and Navigation Company shall and will on or before the first day of March, 1888, pay to the Central Railroad Company of New Jersey, in cash, such sum as may then stand to the credit of the Central Railroad Company of New Jersey on the books of the Lehigh Coal and Navigation Company for expenditures made on the Lehigh and Susquehanna Railroad and branches under the provisions of the first of the mutual covenants of the agreement of March 31, 1871, and the Lehigh Coal and Navigation Company shall and will thereafter pay the Central Railroad Company of New Jersey in cash for all ex-

penditures that may be made under the provisions of the first of the mutual covenants of the agreement of March 31, 1871, as aforesaid, within twelve months from the end of the year in which such expenditures shall have been made; provided, that the Central Railroad Company of New Jersey shall not, at the time when such payments may become due, be in default under the provisions of the agreement of March 31, 1871, or of the agreement of May 29, 1883, or of this agreement.

The parties hereto agree that in case of any breach of covenant or contract by the Central Railroad Company of New Jersey if the same shall not be fully compensated within a reasonable time the party of the first part may, at its option, declare the deed of March 31, 1871, and the deed of May 29, 1883, and this agreement to be determined, and may exercise all the remedies for enforcing its rights and for the possession of the demised property as the same are conferred by the deed of May 29, 1883.

The parties hereto agree that if any one claiming under the Central Railroad Company of New Jersey, by virtue of any mortgage
130 or prior grant or agreement, shall at any time set up or pretend that he is entitled to any property or contract or to any benefit or interest in any property which is the subject of the deed of March 31, 1871, or of the deed of May 29, 1883, or of this agreement, but is not bound by the covenants in the deed of May 29, 1883, or by the terms of this agreement, nothing herein contained or which may be done under this agreement shall in any manner affect the right of the Lehigh Coal and Navigation Company to set up any matters in avoidance of that claim which it might do if this deed had never been executed nor the possession and control of the Lehigh and Susquehanna Railroad and branches enjoyed by the Central Railroad Company of New Jersey or acquiesced in by the Lehigh Coal and Navigation Company after January 1, 1887.

And the parties hereto agree that in case of any difference of opinion between them in relation to any of the provisions of this agreement which may be proper subjects of arbitration, the matters in dispute shall be referred to arbitrators, one to be appointed by the Lehigh Coal and Navigation Company and one by the Central Railroad Company of New Jersey, and the two thus chosen shall select a third, and their decision or that of the majority of them shall be final and conclusive.

This agreement shall be binding upon the parties hereto during the continuance of the estate granted and the contract made by the deeds of March 31, 1871, and of May 29, 1883, and shall, together with the said deeds, constitute one contract between the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey, but all the rights and duties created by this agreement or under its provisions shall absolutely cease and determine whenever those
131 deeds shall cease and determine for any consideration, whether by limitation or on account of the act or omission of the Central Railroad Company of New Jersey.

In witness whereof the parties hereto have caused their corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

By order of the Board of Managers of
the Lehigh Coal & Navigation Co.

[Seal L. C. & N. Co.] J. S. Harris, *President.*
Attest:
S. Shepherd, *Secretary.*

The Central R. R. Co., of New Jersey.
[Seal C. R. R. Co. of N. J.] J. R. Maxwell, *Pt.*
Attest:
Saml. Knox, *Sec'y.*

132 State of Pennsylvania,
City of Philadelphia, ss:

Be it remembered, that on this thirteenth day of July, A. D. one thousand eight hundred and eighty-seven, before me, the subscriber, a notary public in and for said city, personally came and appeared S. Shepherd, esquire, secretary of the foregoing-named corporation, the Lehigh Coal and Navigation Company, who, being duly sworn according to law, deposes and says, that he was personally present at the excution of the foregoing indenture, and saw Joseph S. Harris, esquire, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of the said company; and that the name of this deponent subscribed to the said indenture, as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

S. Shepherd.

Sworn to and subscribed before me, this the day and year first aforesaid, at Philadelphia.
Witness my hand and seal.
[Notarial seal.] Wm. C. Alderson,
Notary Public.

133 State of New York,
City and County of New York, ss:

Be it remembered that on this eleventh day of July, A. D. one thousand eight hundred and eighty-seven, before me, the subscriber, a commissioner for the State of Pennsylvania, resident in the State of New York, duly authorized to take the acknowledgment and proof of deeds, personally came and appeared Samuel Knox, esquire, secretary of the foregoing-named corporation, the Central Railroad Company of New Jersey, who, being duly sworn according to law, deposes and says, that he was personally present at the execution of the foregoing indenture, and saw J. Rogers Maxwell, es-

quire, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of the said company; and that the name of this deponent subscribed to the said indenture, as secretary of the said corporation in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

SAML. KNOX.

Sworn to and subscribed before me, this the day and year aforesaid, at New York. Witness my hand and seal.

CHARLES EDGAR MILLS, [Commissioner's seal.]
A Commissioner for Pennsylvania, in New York,
No. 115 Broadway, N. Y. City.

134 EXHIBIT A.

Articles of agreement made this thirty-first day of March, A. D. 1871, between the Lehigh Coal and Navigation Company, a corporation created by and existing under the laws of Pennsylvania, parties of the first part; and the Central Railroad Company of New Jersey, a corporation created by and existing under the laws of the State of New Jersey, parties of the second part.

Whereas the parties of the first part are the owners of a railroad extending from a point at or near Wilkesbarre in the State of Pennsylvania to a point at or near Phillipsburg in the State of New Jersey, having various branches within the said State, which are hereinafter mentioned, and the parties of the second part are the owners of a railroad beginning at the terminus of the said railroad of the parties of the first part at Phillipsburg aforesaid and extending in the State of New Jersey to a point on the Hudson River, at Jersey City, and the said roads so connected form a continuous line of railroad from the Wyoming and Lehigh coal fields of Pennsylvania, to the Hudson River aforesaid, and it is deemed desirable for the public convenience and accommodation, and for the interest of the parties hereto, that the said railroads should be worked as one line and under one direction.

And whereas the parties of the first part are willing to contract for the working of their said railroad and the branches thereof hereinafter mentioned by the parties of the second part at the cost and risk of the parties of the second part and on fair and equita-
135 ble terms, and the parties of the second part are willing on such terms to undertake the same.

Now, therefore, this agreement witnesseth, that the parties of the first part, in consideration of the premises and of the faithful performance of the covenants and agreements of the parties of the second part hereinafter mentioned and contained, and by the parties of the second part to be kept and performed, have granted, leased, and demised, and by these presents do grant, lease, and demise unto the parties of the second part all the railroads of the parties of the first

part within the State of Pennsylvania, including their bridge across the Delaware River at Easton, as follows, to wit:

The Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of New Jersey, to Union Junction, in Luzerne County, Pennsylvania, where it connects with the railroad built by the Union Coal Company, a distance of one hundred and five miles more or less. Also, the railroad known as the Nanticoke Railroad, situated in said Luzerne County, extending from the Lehigh and Susquehanna Railroad at Ashley to the Newport mines, a distance of eight and one-half miles more or less, with a branch from the same extending to the Lee mines, a distance of two miles more or less; extending also from Ashley to Gardner's Switch, a distance of four and one-half miles more or less; also extending from Union Junction to the Everhart mines, a distance of three miles more or less; and also extending from Mill Creek to the Enterprise mines, a distance of four miles more or less; also the Branch Railroad, in the county of Luzerne, known as
the Nescopec Branch, extending from White Haven to Upper
136 Lehigh, a distance of nine miles more or less. Also, the Nesquehoning Valley Railroad, situated in the counties of Carbon and Schuylkill, extending from Nesquehoning Junction to Tamanend, where it connects with the Catawissa Railroad, a distance of sixteen and one-half miles more or less. Also, the Tresckow Railroad in the counties of Schuylkill, Carbon, and Luzerne, extending from the Catawissa Railroad at Silver Brook to the Honey Brook mines, a distance of six and one-half miles more or less. Also, the Branch Railroad, in the counties of Northampton and Lehigh, known as the Coplay Branch, extending from Laubach station to the furnaces of the Thomas Iron Company, a distance of one mile more or less. Also, the Branch Railroad, in the county of Lehigh, extending from the railroad near Bethlehem across the Lehigh River to a connection with the North Pennsylvania Railroad at South Bethlehem, a distance of fourteen hundred and twenty-eight feet more or less. Also, the inclined planes in Luzerne County, with all the machinery connected therewith, extending from Ashley to Solomon's Gap station, a distance of three miles more or less, together with all sidings, station houses, machine shops, and other appurtenances of said roads and branches; and also all and singular the roadways, and also the franchises of the parties of the first part for maintaining and working the same and taking tolls thereon and for demanding and receiving compensation for the use of the same. Excepting and reserving out of this demise the Nesquehoning Tunnel and the railroads or railways laid therein and extending beyond the same; and also all railroads and railways extending from breakers into mines.

To have and to hold the said demised railroad and premises unto the parties of the second part, their successors and assigns, from the
first day of April next ensuing the date hereof for and during
137 the continuance of the charters of the said companies and of any renewals of the same; under and subject, nevertheless, to all the mortgages existing on the said demised premises: Provided, how-

ever, That the term of the lease of the Nesquehoning Railroad above mentioned shall not extend beyond the term of nine hundred and ninety-nine years from the 4th of November, 1868, less one day.

And the parties of the second part, in consideration of the premises and of the faithful performance of the covenants and agreements of the parties of the first part hereinafter mentioned and contained to be kept and performed by the parties of the first part, have covenanted and agreed, and by these presents do covenant and agree, to and with the parties of the first part as follows, to wit:

First. That they, the parties of the second part, shall and will take and well and efficiently operate at their own cost and risk the said demised premises, and all such extensions and additions as may be hereafter made of and to the same under the provisions of this agreement; and shall and will pay to the parties of the first part for the use of the same, at the times hereinafter mentioned, one-third of the gross receipts from the traffic or business of the said demised premises and extensions and additions thereto, without any other deductions therefrom than are hereinafter mentioned.

Second. The parties of the second part shall and will, on the first day of April next, purchase all the railroad equipment of the parties of the first part mentioned and described in the inventory hereunto annexed, at the prices mentioned or fixed in said inventory,
138 amounting in the aggregate to the sum of two millions three hundred and ten thousand dollars, and in payment of said purchase-money the parties of the second part shall and will assume and pay or discharge, at or before the maturity thereof, two millions three hundred and ten thousand dollars of the six per cent bonds of the five millions dollars gold loan of the parties of the first part falling due December 15th, 1897, secured by the mortgage of the demised premises and of said equipment bearing date the 27th of November, 1867, subject to which mortgage this sale is made, the payment or discharges of the said bonds by the parties of the second part to be made by surrender of the same, from time to time, to the trustees of the said last-mentioned mortgage for cancellation, as the said bonds may be purchased or paid by the said parties of the second part, and an equal amount in value of said equipments to be released by the said trustees simultaneously with such surrender, till the whole is released on the surrender of the whole amount of bonds assumed as aforesaid. And the parties of the second part shall and will assume the payment of the interest on said amount of the said bonds from and after the first day of April next, and shall and will pay or provide for the payment of the interest or coupons of said bonds or of such amount thereof as may be from time to time outstanding, as well as the taxes thereon, according to the true intent and meaning of the said bonds. And they also agree to maintain and perpetuate the said equipment and to replace such parts as may be destroyed by accident or use, so far as the same may be required to keep the said equipment not released as aforesaid subject to the said mortgage equal in value

to the amount of bonds assumed as aforesaid still outstanding: and the said equipment unpaid for shall be subject to annual inspection by the parties of the first part.

139 Third. The parties of the second part shall and will, on the first day of April next, take and pay for at a fair valuation to be agreed on by the respective superintendents of the parties hereto, all the shop tools and machinery, all tools used in the maintenance of the road, all rails, ties, spikes, and chairs on hand for repairs, and all materials and supplies on hand in the shops or elsewhere, belonging to the parties of the first part.

Fourth. The parties of the second part shall and will, at their own cost and charges, maintain and perpetuate the railroad and premises demised, and shall and will keep and maintain the same in good order and repair and fit for efficient use, and will so return and re-deliver up the same at the termination of this lease: Provided, That in case of damage to the said demised premises by freshet to the extent of five thousand dollars or more at any one time, the repairs shall be made promptly by the parties of the second part, but at the cost and expense of the parties of the first part.

Fifth. The parties of the second part shall and will furnish, from time to time, at their own cost, the nec'ssary machinery, rolling stock, and equipment of all kinds required for all the business of the demised premises, and carry on the said business at fair prices and with due reference to the interests of both companies. It being the true intent and meaning of this agreement, that the demised premises shall be so worked and maintained by the parties of the second part as to secure the largest amount of revenue possible therefrom; but they shall not be bound to perform or do any act or thing which may divert from the railroad of the Lehigh Valley Railroad Company business which naturally belongs to the said railroad.

140 Sixth. It being understood that the parties hereto of the first part and the Lehigh Valley Railroad Company are competitors in the general railroad business of the Wyoming and Lehigh valleys, the parties of the second part do further covenant and agree, that the Lehigh Valley Railroad Company shall not, by any act of the parties of the second part, have or obtain any interest in this agreement which shall be at any time asserted or exercised to the detriment of the parties of the first part, or of the revenues derived from the business of the demised premises, or the future increase thereof; but in case of any contract between the parties of the second part and the Lehigh Valley Railroad Company for merger, lease, or other combination of their interests, the annual revenue or gross receipts of the parties of the first part shall never be less than the one-ninth of the aggregate gross receipts derived from the Lehigh Valley Railroad and its branches and the premises hereby demised.

Seventh. The parties of the second part shall and will furnish, from time to time, on reasonable notice, all the cars that may be required by the parties of the first part, or their assigns, to transport the coal that may be mined by them, or their lessees for the time

being, on lands of the said parties of the first part, including their collieries shipping through the Nesquehoning Tunnel, and to transport the same as consigned without unnecessary delay. All coal consigned by the parties of the first part, or their assigns, to points not reached by the roads controlled by the parties of the second part, or by the canals of the parties of the first part, shall be delivered by the parties of the second part to such other roads as will enable it to reach its ultimate destination.

141 Eighth. The parties of the second part shall and will furnish, on reasonable notice, all cars that may be required for the transportation of coal from any colliery on the line of the said demised roads, or any roads connecting therewith, destined for shipment at Coalport or Mauch Chunk or other shipping point by the canal of the parties of the first part. The rates on said coal from the collieries to the canal, over the road worked by the parties of the second part, shall not exceed the rates charged at the same time on the same portions of said road on coal from the same collieries when destined to same points by railroad: Provided, The aggregate charges shall not be less than sixteen cents per ton, and that all expenses of shipping from the cars into boats, maintaining the tracks and sidings at the shipping points on said canal, and transferring the coal by shifting engines at said points, shall be borne by the parties of the first part.

Ninth. The parties of the second part covenant and agree that on all business passing in whole or in part over said demised railroad and branches, and in whole or in part over the railroad or railroads owned or controlled by the parties of the second part, the said parties of the second part shall and will credit to the said road and branches hereby demised their full pro rata proportion (according to the distance carried on said roads) of all gross receipts derived from such business, subject only to such terminal and other charges as are usual and general, and in prorating the distances to and from the Wyoming Valley they shall be computed as if over the "back track," even when the business is carried over the planes.

Tenth. The parties of the second part further covenant and agree, that on coal delivered for transportation by the parties of the
142 first part on sidings at the northern end of the Nesquehoning Tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points, on coal from the Lehigh region, either by the parties of the second part or by the Lehigh Valley Railroad Company.

Eleventh. The parties of the second part further covenant and agree that the provisions of the contract with the Wilkesbarre Coal and Iron Company, as far as they relate to transportation, shall extend to all coal mined in the Wyoming Valley by the parties of the first part, or from their lands by their lessees or assigns, and to coal from collieries in said valley whose product is controlled under existing contracts by the parties of the first part, and upon the termination of the said contract with the said Wilkesbarre Coal and Iron

Company, as therein provided, the parties of the second part shall and will transport the said coal at rates not higher than those charged to other parties shipping coal from said region, such rates, if unsatisfactory, to be submitted to arbitration as hereinafter provided.

Twelfth. The parties of the second part shall and will assume and well and faithfully perform all the obligations of the parties of the first part under contracts set out in the schedule annexed to this agreement, as far as they relate to transportation upon the said demised premises, and so far as they are binding on the said parties of the first part, receiving in consideration therefor all the benefits of the said contracts.

Thirteenth. The parties of the second part shall and will keep in proper books, to be provided by them, full and accurate and separate accounts of the business of the road and its branches hereby
143 demised, which shall be open to the inspection and examination of the parties of the first part at all times upon reasonable request and notice.

Fourteenth. The parties of the second part covenant and agree, that all persons traveling over the roads hereby demised in the prosecution of the business of the parties of the first part, shall be allowed to pass free of charge, subject to the rules and regulations of the parties of the second part applicable to other persons having the like privileges.

And the parties of the first part do hereby covenant and agree to and with the parties of the second part as follows, to wit:

First. That all coal mined by the parties of the first part on lands now owned by them, or that may be hereafter acquired by them, shall be sent to market over the roads of the parties to this agreement, when destined to points or markets reached by the said roads; and when destined for markets not so reached, it shall be sent as far as practicable over said roads, excepting always coal destined for shipment by canal, and excepting all coal covered by contracts now existing and mentioned in the twelfth of the foregoing covenants of the parties of the second part: Provided, That one-fourth of the coal mined annually by the parties of the first part in the Wyoming region may be sent to markets not reached by lines running towards the Delaware River.

Second. The parties of the first part covenant and agree, that in case the coal lands now owned and held by them, or that may be hereafter acquired by them, shall be sold, leased, or transferred
144 by them to other parties, all such lands shall nevertheless be subject to the provisions of this agreement.

Third. The parties of the first part covenant and agree, that the rates for the transportation of coal and other freights upon their canal, between points common to both railroad and canal, shall be arranged from time to time by the parties hereto; and shall conform as nearly as possible to the rates at the time on the railroad between the same points, it being understood that the canal rates may be reasonably below the rates to the same points on the railroad, as here-

tofore accustomed, so that each shall be used to reach markets and points which can be best supplied by the respective works.

Fourth. The parties of the first part covenant and agree that their corporate rights and privileges shall, at all times, be used in the construction of additional roads and branches when required as herein stipulated, or to aid the parties of the second part in carrying out the provisions of this agreement.

Fifth. The parties of the first part covenant and agree that the parties of the second part shall have the option, at any time within three years from the first day of August next, to lease the canal and its appurtenances, excepting ground and water rents now existing, at a net annual rent of three hundred thousand dollars, assuming in connection therewith the lease of the Delaware Division Canal.

Sixth. The parties of the first part covenant and agree that in case of the non-payment of interest by them on any of the mortgages now existing on the demised premises, or if necessary to provide
145 the sums due at any time to any sinking fund stipulated for in any of the said mortgages, the parties of the second part shall have the right to pay directly to the trustees of any such mortgage so much of the rent due and payable to the parties of the first part under this agreement as may be necessary for the said purposes.

Seventh. The parties of the first part covenant and agree, that they have full power and authority, under the laws of Pennsylvania, to make and execute this lease, transfer, and contract, so as to fully vest the said demised premises and property in the parties of the second part as herein provided; and that the parties of the second part shall have full right to take, occupy, and use the said railroad, with its appurtenances, under the lease, transfer, and contract.

And it is mutually covenanted and agreed by the parties hereto, as follows:

First. That all expenditures required for extending the road or its branches hereby demised, or for additional branches, second track, additional sidings, stations, shops, or other buildings, for improving the alignment of the road at Stony Creek at a cost not exceeding two hundred thousand dollars, and for masonry walls as a protection against freshets, shall be at the expense of the parties of the first part; but no such expense shall be incurred without the consent in writing of the said parties of the first part, which consent shall not be withheld without reasonable cause. All such improvements shall be made by the parties of the second part, and the cost thereof advanced by them if required, they receiving on such advances a semi-annual
146 percentage equivalent to the dividends declared during the same period on the stock of the parties of the first part: Provided, That such percentage shall not be less than seven per cent per annum: And provided also, That the parties of the first part may at any time refund such advances.

Second. That all railroads or railways with their branches, extensions, sidings, and buildings connected therewith, hereafter constructed under the franchises of the parties of the first part and with

the concurrence of both the parties hereto, shall, when and as the same are constructed, be deemed and taken to pass under this agreement as part of the premises hereby demised, and all necessary deeds to carry this covenant into effect shall be executed by the parties hereto upon request of either.

Third. That the parties of the first part shall and will, by and with the consent of the board of managers of the Railroad Car Trust of Philadelphia and of the Lehigh Equipment Trust of Philadelphia, respectively, assign and transfer to the parties of the second part, and the parties of the second part shall and will take by such assignment, all the leases of cars and locomotives made by the said trusts, respectively, to the parties of the first part, and all the cars and locomotives mentioned in the said leases respectively, and described or mentioned in the second inventory hereto annexed. And such assignment being made, the parties of the second part shall and will thereupon assume and pay all the obligations of the parties of the first part under the said trusts and leases, respectively.

Fourth. That all dwelling houses, except station houses, are
147 excepted from this lease. But the parties of the second part may at their own cost erect additional houses on any part of the demised premises and receive the rents of such houses to their own use.

Fifth. That all settlements between the parties and payments of rent by the parties of the second part for the said demised premises, shall be made monthly on the fifteenth day of the month, or as soon thereafter as possible.

Sixth. That in case of any difference of opinion between the parties hereto in relation to any of the provisions of this contract, or in case either party shall be dissatisfied with the manner in which the business is done by the other party, the matters in dispute shall be referred to arbitrators to be appointed in the usual manner, whose decision or a majority of them shall be final and conclusive.

Seventh. That in case of any breach of covenant on the part of the parties of the second part, their successors or assigns, and notice thereof given by the parties of the first part, or their assigns, to the parties of the second part, if the same cannot or shall not be fully compensated within a reasonable time thereafter, then and in such case the parties of the first part, or their assigns, may, at their option, declare this lease to be terminated and the agreements herein contained to be rescinded, and may thereupon enter on the demised property and premises as and for condition broken, and repossess themselves as of their old and former estate, and may resume, take, use, and enjoy all the rights, privileges, and franchises hereby demised or granted, as if this agreement had never been made; and this contract shall from henceforward be deemed and taken to be utterly ended, saving and excepting the right of the parties of the
148 first part or their assigns to sue for and recover, by any proceedings at law or in equity, compensation for all damages for, or by reason of, any breach or breaches of any covenant or

covenants on the part of the parties of the second part, as fully as if this agreement continued in full force; and saving and excepting the rights of the parties of the second part to the previous repayment of all advances made by them for improvements; and also saving and excepting the personal property purchased and paid for by the parties of the second part; but no such option of declaring this lease terminated shall be exercised by the parties of the first part, or their assigns, while there exists any default under this agreement on their part.

In witness whereof the said parties have caused their corporate seals to be hereunto affixed, duly attested, the day and year first above written.

By order of the board of managers of the Lehigh Coal and Navigation company:

[L. S.] E. W. CLARK, *President.*
F. MITCHELL, *Secretary.*

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
[L. S.] Per JOHN TAYLOR JOHNSTON, *President.*
Attest:
SAM'L KNOX, *Secretary.*

149 EXHIBIT B.

Articles of agreement, made this twenty-ninth day of May, 1883, by and between the Lehigh Coal and Navigation Company of the first part, the Central Railroad Company of New Jersey of the second part, and the Philadelphia and Reading Railroad Company of the third part.

Whereas the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey entered into certain articles of agreement under date of March 31st, 1871, a copy of which is hereto annexed, marked "Exhibit A;"

And whereas the parties hereto are willing to covenant and agree to and with one another as hereinafter set forth:

Now, therefore, this agreement witnesseth, that the parties hereto have covenanted and agreed, and do hereby covenant and agree to and with each other as follows:

First. This agreement is to be deemed and taken to have been incorporated into the contract of March 31st, 1871 (but only to be operative from and after June 1st, 1883), as if originally there written, and each party is to have the same remedies as are provided in the original contract for all rights secured by the contract as thus modified, and as if the said original contract had been herein recited and set forth at length as part hereof; and wherever in this agreement the expression

"Lehigh and Susquehanna Railroad and branches" is used, it
150 shall be taken to include all the railroads now or hereafter to be operated under the original contract of March 31st, 1871, and this supplemental agreement.

Second. The Central Railroad Company of New Jersey agrees that inasmuch as the Philadelphia and Reading Railroad Company, after

it takes possession of the Lehigh and Susquehanna Railroad and branches, will also become responsible for the proper conduct of the business under the provisions of the aforesaid agreement of March 31st, 1871, any breach of the covenants of the original contract or of this supplemental agreement by the Philadelphia and Reading Railroad Company shall have the same effect in all respects as if the breach had been committed by the Central Railroad Company of New Jersey.

Third. The Philadelphia and Reading Railroad Company agrees that it will assume and become liable for the faithful execution of all the covenants in the said agreement contained, and on the part of the said the Central Railroad Company of New Jersey to be kept and performed, and will keep, maintain, and fulfill the same according to their full intent and meaning, and will carry out all other contracts made by or on behalf of the Central Railroad Company of New Jersey, in which the Lehigh Coal and Navigation Company may have an equitable interest; will develop the business of the Lehigh and Susquehanna Railroad and branches in accordance with the provisions of the said agreement of March 31st, 1871, and the terms of this supplemental agreement; and where additional railroads shall be necessary to develop and secure business in the anthracite coal fields east of the line of the Little Schuylkill and Catawissa railroads, will cause them to be built under the provisions of the first and second mutual
151 covenants of the contract of 1871; will cause the development of the Lehigh and Wilkesbarre Coal Company's lands to proceed pari passu with that of the lands of the Philadelphia and Reading Coal and Iron Company, so that the production of the two coal estates shall bear to each other the numerical relation of twenty-eight for the Lehigh and Wilkesbarre Coal Company to seventy-two for the Philadelphia and Reading Coal and Iron Company, at least until the production of the Lehigh and Wilkesbarre Coal Company's lands shall reach three million tons per annum, beyond which it shall not be required to be increased, but which shall be maintained till it shall be no longer possible to make the said mines produce at that rate; and if the production of the said lands shall in any one year bear a less ratio to the production of the Philadelphia and Reading Coal and Iron Company's lands than the aforesaid ratio, will send such an amount of coal from the Philadelphia and Reading Coal and Iron Company's, or other anthracite coal lands lying west of Tamanend, over the Lehigh and Susquehanna Railroad from Tamanend, as shall bring the coal tonnage-mileage of the Lehigh and Susquehanna Railroad system up to what it would have been if the above stipulation in regard to the production of the Lehigh and Wilkesbarre Coal Company's lands had been carried out, and will cause the production of the Lehigh and Wilkesbarre Coal Company's lands to pass to or towards its market over the lines of the Lehigh and Susquehanna Railroad and branches. And it further agrees that the rates of transportation of coal, or other freight, from or to any property in the anthracite region which may at any time be owned, controlled, or operated by the Lehigh Coal and Navigation Company, shall never be higher than the lowest rates given to any other producer or shipper of anthracite coal for similar

152 consignments and like distances, and that it will join with the Central Railroad Company of New Jersey in carrying out the provisions of the contract between the Central Railroad Company of New Jersey and the Alliance Coal Mining Company, of August 10th, 1881, a copy of which, marked " Exhibit B," is hereto annexed.

Fourth. And the said the Philadelphia and Reading Railroad Company further covenants and agrees that the aggregate rental of the Lehigh and Susquehanna Railroad, after the date of this agreement, shall never in any year be less than one million four hundred and fourteen thousand four hundred dollars, but if the one-third of the gross receipts from the operation of the Lehigh and Susquehanna Railroad (settlements for which shall be made monthly as heretofore), shall not amount in any year to the said sum, the Philadelphia and Reading Railroad Company will nevertheless pay at the end of the calendar year such additional sum as will make the rental of the Lehigh Coal and Navigation Company from the said Lehigh and Susquehanna Railroad and branches equal thereto; and in consideration of this undertaking, the Lehigh Coal and Navigation Company covenants and agrees that after it shall have received from its one-third of the gross receipts derived from the operation of the said Lehigh and Susquehanna Railroad and branches, during any calendar year prior to December 31st, 1887, the sum of one million seven hundred and twenty-eight thousand seven hundred dollars, or in any calendar year thereafter prior to December 31st, 1892, the sum of one million eight hundred and eighty-five thousand eight hundred dollars, or in any calendar year thereafter the sum of two million and forty-

153 three thousand dollars, together with a further sum in each year equal to seven per cent upon the amounts which shall be charged after December 31st, 1882, upon the books of the Lehigh Coal and Navigation Company for payments for right of way, or for expenditures made or to be made by the Central Railroad Company of New Jersey or the Philadelphia and Reading Railroad Company, for construction as shown by the accounts rendered or to be rendered by either of the said corporations under the first and second of the mutual covenants in the original agreement of March 31st, 1871, it will waive, relinquish, and release, and does hereby waive, relinquish, and release the surplus or excess of its one-third share of the said gross receipts to the said the Philadelphia and Reading Railroad Company, but nothing herein contained shall be deemed or taken to release the Lehigh Coal and Navigation Company from paying seven per cent on the amount already advanced by the Central Railroad of New Jersey, and on the amounts hereafter expended, and which are repayable by the Lehigh Coal and Navigation Company, as provided by the agreement of March 31st, 1871, until the Lehigh Coal and Navigation Company shall have refunded such advances. And the Central Railroad Company of New Jersey hereby agrees that the sums herein stipulated to be paid and which it agrees may be paid to the Lehigh Coal and Navigation Company shall be in lieu and satisfaction of the rent reserved in the agreement of May 29th, 1883, between the Central Railroad Company of New Jersey and the Phila-

delphia and Reading Railroad Company (a copy of which, marked "Exhibit C," is hereto annexed) as accruing under the provisions of the agreement of March 31st, 1871; and upon the payment
154 by the Philadelphia and Reading Railroad Company to the Lehigh Coal and Navigation Company, its successors and assigns, of the sums herein stipulated to be paid the said the Philadelphia and Reading Railroad Company, shall be relieved from said portion of the rental reserved in the agreement of May 29th, 1883, aforesaid, and the excess or remainder, if any, of said gross receipts, after making the payments herein stipulated to the Lehigh Coal and Navigation Company, shall be retained by the Philadelphia and Reading Railroad Company for its own use and benefit.

Fifth. And the parties hereto further agree, that in case of any difference of opinion between the parties hereto in relation to any of the provisions of this agreement, or in case either party shall be dissatisfied with the manner in which the business is done by the other party, the matters in dispute shall be referred to arbitrators, one to be appointed by the Philadelphia and Reading Railroad Company and one by the Lehigh Coal and Navigation Company, and the two thus chosen to select a third, and their decision or that of a majority of them shall be final and conclusive.

Sixth. And all the parties hereto agree that in case of any breach of covenant on the part of the parties of the second or third part, if the same shall not be fully compensated within a reasonable time, the party of the first part may at its option declare the agreement of March 31st, 1871, to be terminated and the agreements therein contained and this agreement to be rescinded, and may thereupon enter on the demised premises as and for condition broken and repossess itself of its old and former estate, and may resume, take, use, and enjoy all its original rights, privileges, and franchises, as if
155 this agreement and the said agreement of March 31st, 1871, had never been made.

In witness whereof the parties hereto have caused their corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

Sealed and delivered in the presence of us.
As to the signature of Joseph S. Harris, president.
S. SHEPHERD.

SAML. KNOX.

ALBERT FOSTER.

J. S. HARRIS, *Presdt.*
Attest: [Seal
S. SHEPHERD, *Secretary.* L. C. & N. Co.]

H. S. LITTLE, *President.*
Attest: [Seal
SAML. KNOX, *Secy.* C. R. R. Co. of N. J.]

FRANKLIN B. GOWEN, *Prest.*
Attest: [Seal
ALBERT FOSTER, *Secty.* P. & R. R. R. Co.]

156 EXHIBIT C.

This agreement, made this twenty-seventh day of January, A. D. one thousand eight hundred and eighty-seven (1887), between the president, managers, and company of the Delaware and Hudson Canal Company, hereinafter referred to as the Delaware Company, and the Lehigh Coal and Navigation Company, hereinafter referred to as the Lehigh Company.

Whereas the Delaware Company did, on the seventh day of November, 1886, take control of the Union Coal Company's railroad, hereinafter called the Union Railroad, which railroad had theretofore been operated jointly by the Lehigh Company and the Delaware Company, and has furnished the connection between Union Junction, the terminus of the Lehigh and Susquehanna Railroad of the Lehigh Company, and Scranton; and

Whereas the Lehigh Company, itself or through the Wilkes-Barre and Scranton Railway Company, a corporation controlled by it, has purchased ground for terminal facilities at Scranton, and has located and proposes to build a line between Scranton and a point near Minooka Station, hereinafter called Minooka Junction, and proposes also to build or to procure the building of, and to use, when built, a cut-off line from Laurel Run Station on the Lehigh and Susquehanna Railroad of the Lehigh Company, to a connection with the Union Railroad near Pittston station, at a point hereinafter called Pittston Junction; and

157 Whereas both parties hereto agree that it is desirable to make such use of the existing lines of railroad as to meet the requirements of the public in the matter of transportation, and for this purpose the Delaware Company is willing to grant permanent rights to the Lehigh Company for so much of the said Union Railroad as the Lehigh Company may desire to use as hereinafter provided; and

Whereas the object of this agreement is to furnish the Lehigh Company with a line of railway connecting its present railway at Union Junction with the proposed railway from Minooka Junction to Scranton, and also with the proposed railway from Laurel Run Station to Pittston Junction, over which connecting line its traffic shall pass freely, and from which it cannot be excluded by reason of any adverse interest obtaining control of the management of the Delaware Company's line:

Now this agreement witnesseth:

First. That the Delaware Company has granted, demised, and let, and by these presents doth grant, demise, and let, unto the Lehigh Company, for a period of nine hundred and ninety-nine years from the date of this agreement, subject to the reasonable regulation and control of the lessor as to the movement and government of trains, the right to pass with its trains and locomotives over the aforesaid line of the lessor between Union Junction and Minooka Junction, and vice versa, with the right to use in connection with such trains all present or future water stations, sidings, and other facilities necessary for the accommodation of such trains and the traffic to be trans-

ported by them, as freely as if the lessee was the owner of the
158 railroad hereby demised, paying to the lessor as rent for the demised premises, forty-two and one-half per cent of the gross earnings on all coal, passengers, express, parcel, and freight traffic that shall accrue to such portion of the Union Railroad as it, the lessee, shall use; the total gross earnings in each case being divided in proportion to the actual mileage used of the Union Railway and the Lehigh Company's railroad, provided that if the Lehigh Company shall take water from any of the Delaware Company's water stations, it shall share in the expense of maintaining such stations in proportion to the consumption of water by each of the parties hereto. But the right to haul such traffic over the Union Railroad by the Lehigh Company's locomotives shall not apply to business originating at points north of Scranton on the Delaware Company's lines, or on the connecting lines forming the extensions thereof and destined to points south of Pittston Junction or Wilkes-Barre on the Lehigh Company's lines, or on connecting lines forming the extensions thereof, or originating at points south of Pittston Junction or Wilkes-Barre on the Lehigh Company's lines, or on connecting lines forming extensions thereof, and destined to points north of Scranton, on the Delaware Company's lines, or on connecting lines forming extensions thereof; all of which business shall be hauled by the Delaware Company's locomotives, as provided in section third.

Second. The Lehigh Company shall have the right to make a connection between the Union Railroad tracks and the tracks of the line to be built from Laurel Run Station to Pittston Junction, and also a connection between the Union Railroad tracks and the tracks of the Spring Brook Railway near Moosic Station; and also a connection between the Union Railroad tracks and the tracks of the Lacka-
159 wanna and Bloomsburg Railroad at such point between Moosic and Minooka as may be agreed on with the Delaware, Lackawanna and Western Railroad Company, it being the true intent of this stipulation to enable the Lehigh Company to secure business from the roads just named; but this right of connecting is not intended to permit it to secure business from other points on the Delaware Company's lines by means of lateral or auxiliary tracks leading thereto from the said Lackawanna and Bloomsburg Railroad and the said Spring Brook Railway, nor to take over the Union Railroad business which having originated at points south of the parallel of latitude passing through Wilkes-Barre, shall reach Wilkes-Barre by other roads than the Lehigh and Susquehanna Railroad, and shall be destined to points on the Union Railroad east of Wilkes-Barre or to other points on the Delaware Company's lines.

Third. It is agreed for the present that through freight traffic originating at or destined to points on the Delaware Company's lines north of Scranton or on connecting lines forming extensions of the Delaware Company's lines; and through freight traffic destined to or originating at points on the Lehigh Company's line south of Wilkes-Barre or on connecting lines forming extensions of the Lehigh Company's lines, shall be exchanged at Wilkes Barre, and shall be hauled

by the Delaware Company's locomotives over the Union Railroad, and that the Delaware Company, for all such freight hauled by its locomotives over the Union Railroad, shall be entitled in the division of the through rate to be credited with at least forty miles from Wilkes Barre, though the distance so hauled may have been less; and similarly, that on all freight so exchanged and hauled by the Lehigh Company's locomotives south of Wilkes Barre, the Lehigh Com-
160 pany shall be entitled to be credited with at least forty miles; but it is further agreed that after the cut-off line from Laurel Run Station to Pittston Junction shall have been completed, the said exchange shall be made at Pittston Junction, in which case each party hereto shall, as before, be entitled to at least forty miles in the division of the through-freight rate. But nothing in this section shall be so construed as to require the Lehigh Company to receive less in the division of the freight rate on business of the Western co-operative lines than it now receives, except it should assent to such a change.

Fourth. Each party hereto will provide its own time tables for the running of such trains over its lines as it may desire in carrying out the provisions of this agreement, it being understood that the Delaware Company's trains are to have preference over the Lehigh Company's trains of the same class on the Union Railroad.

Fifth. It is agreed that the parties hereto will extend each to the other as good facilities and rates in every respect as it accords to the most favored of the lines with which it may become connected.

Sixth. Each of the parties hereto shall be permitted to examine such of the books and records or other documents or papers of the other party as may be necessary to verify or confirm settlements proposed or made in accordance with the terms of this agreement.

Seventh. It is intended that the rights of trackage hereinbefore granted by the Delaware Company to the Lehigh Company shall continue during the term of this agreement; and that the successors
161 and assigns of either of the parties hereto shall have the rights and privileges and shall be charged with the duties herein assumed by the parties to this agreement, but the basis of compensation to the Delaware Company for the use of the railroad and other facilities specified in the first section, and the basis of the minimum distances to be charged by either party on through freights as specified in the third section, may be readjusted on the first day of January, 1892, and each five years thereafter: Provided, That either of the parties hereto shall give ninety days' notice to the other before the expiration of each period of its desire for such readjustment. The basis on which such readjustments shall be made shall be the usual railroad practice existing at the time of such readjustments, and if the two parties shall not be able to agree on this question or on any other question arising under this agreement, the matters in dispute shall be referred to arbitrators, one to be appointed by the Delaware Company and one by the Lehigh Company, and the two thus chosen to select a third, and their decision or that of a majority of them shall be final and conclusive.

Eighth. The Lehigh Company shall have the right to assign its interest in this contract to the Central Railroad Company of New Jersey for the term during which that company shall be the lessee of the Lehigh and Susquehanna Railroad of the Lehigh Company, and the Central Railroad of New Jersey shall thereupon be entitled to have and exercise all the rights and privileges herein granted by this agreement to the Lehigh Company; and the Lehigh Company, upon the termination of the said lease of the Lehigh and Susquehanna Railroad to the Central Railroad Company of New Jersey, shall have
the right to resume its rights under this agreement as fully as
162 if they had never been assigned to any other company, but
neither of the parties hereto shall have the right to otherwise assign any of its rights under this agreement without the consent in writing of the other party.

Ninth. In case of accident to the trains passing over any part of the Union Railroad that may be used by the Lehigh Company, the Lehigh Company and the Delaware Company shall each be held liable for any damage done by such accidents occurring through the neglect or misconduct of its own employés, or through the failure or defect of its own equipment. The Delaware Company shall be liable for any damage done through the failure or defect of its roadway or the appurtenances thereto. When damage occurs to the property of the parties hereto through the joint negligence of their employés, neither party shall have recourse against the other, but where damage occurs to the public and one of the parties is compelled to pay the same, the other party contributing to such negligence shall contribute equally to such loss.

Tenth. In case either of the parties hereto shall willfully violate the terms of this agreement, the other party may terminate the same upon giving six months' notice of its election to do so.

Eleventh. It is agreed that if at any time hereafter the Lehigh Company shall construct or operate any other line beyond Scranton, except as herein provided, this agreement shall cease and determine.

In witness whereof the said parties hereto have caused their
163 respective corporate seals, duly attested, to be hereunto affixed the day and year first above written.

Sealed and delivered in the presence of—

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY.

[SEAL.] (Signed) By R. M. OLYPHANT, *President.*

(Signed) J. C. HARTT, *Treasurer.*

BY ORDER OF THE BOARD OF MANAGERS OF THE LEHIGH COAL AND NAVIGATION COMPANY.

[SEAL.] (Signed) J. S. HARRIS, *President.*

(Signed) S. SHEPHERD, *Secretary.*

STATE OF NEW YORK, *City and County of New York*, *ss:*

On this fourth day of February, 1887, before me personally came James C. Hartt, with whom I am personally acquainted, who, being by me duly sworn, said, that he resided in the city of New York; that he was the treasurer of the president, managers, and company of the Delaware and Hudson Canal Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the board of managers of the said company; and that he signed his name thereto by the like order as treasurer of the said company; and the said James C. Hartt further said that he
164 was acquainted with R. M. Olyphant, and knew him to be the president of said company; that the signature of the said R. M. Olyphant, subscribed to the said instrument, was in the genuine handwriting of the said R. M. Olyphant, and was thereto subscribed by the like order of the said board of managers, and in the presence of him the said James C. Hartt.

[SEAL.] (Signed) F. M. OLYPHANT,
(30)
Notary Public, New York County.

STATE OF NEW YORK, *City and County of New York*, *ss:*

I, James A. Flack, clerk of the city and county of New York, and also clerk of the Supreme Court for the said city and county, the same being a court of record, do hereby certify that F. M. Olyphant, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county, the fourth day of February, 1887.

(Signed) JAMES A. FLACK, *Clerk.*

165 STATE OF PENNSYLVANIA,
City of Philadelphia, *ss:*

Be it remembered, that on this fifth day of February, A. D. one thousand eight hundred and eighty-seven (1887), before me the subscriber, a notary public in and for said city, personally came and appeared S. Shepherd, secretary of the foregoing-named corporation, the Lehigh Coal and Navigation Company, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the foregoing indenture, and saw J. S. Harris, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of

the said company; and that the name of this deponent, subscribed to the said indenture as a witness thereto, and as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

(Signed) S. SHEPHERD.

Sworn to and subscribed before me, this the day and year first aforesaid. Witness my hand and seal.

[SEAL.] (Signed) WM. C. ALDERSON,
Notary Public.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

Recorded in the office for recording deeds, &c., in and for said county, in deed book No. 262, page 480. Witness my hand and official seal, at Wilkesbarre, this fifteenth day of February, 1887.

[SEAL.] (Signed) JOSEPH J. MCGINTY, *Recorder.*
Per TERRY, *Dept.*

166 LACKAWANNA COUNTY, *ss:*

Recorded in the office for recording of deeds, &c., in and for said county, in deed book No. 43, page 339, &c. Witness my hand and seal of office this twenty-fourth day of March, A. D. 1887.

[SEAL.] (Signed) ELIEZER D. JENKINS, *Recorder.*

171 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April session, 1908. No. 206.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey.

It is stipulated and agreed between counsel in the above cause that its submission on petition and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 206. April session, 1908. U. S. v. The Central Railroad Company of New Jersey. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

(NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.)

248 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. At Law. No. 206.

UNITED STATES OF AMERICA
vs.
CENTRAL RAILROAD OF NEW JERSEY.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon petition and answer, the petition is refused and judgment is entered in favor of defendant.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 206. U. S. vs. Central Railroad of New Jersey. Order directing judgment. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

249 No. 206. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey.

Now comes the plaintiff and, in connection with the petition for writ of error, assigns the following errors in the action and proceedings of the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled case, that is to say:

1. That the Circuit Court erred in denying the petition for writ of mandamus in this case.

2. That the Circuit Court erred in refusing to grant an order for the issuance of a peremptory writ of mandamus and for the relief prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States.

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities
250 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the so-called "Commodities clause."

5. That the Circuit Court erred in holding that the said so-called "Commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "Commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and as such exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, is discriminative in its provisions and therefore constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and as such is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law.

251 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "Commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said plaintiff and petitioner prays that the said judgment and order of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 206. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. The Central Railroad Company of New Jersey. Assignment of errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

252 No. 206. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey.

To the Honorable, the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

And now comes the United States of America, on relation of Charles J. Bonaparte, Attorney-General of the United States, plaintiff herein, and says: that, on the sixth day of October, in the year nineteen hundred and eight, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated, October 6th, 1908.

253 (Endorsed:) U. S. C. C., E. D. of Penna. No. 206. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. The Central Railroad

Company of New Jersey. Petition for writ of error. The clerk will please file within petition for writ of error, the assignment of errors herewith, and order of court allowing the writ when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

254 No. 206. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey.

Before DALLAS, C. J.

This sixth day of October, in the year nineteen hundred and eight, comes the plaintiff, by Charles J. Bonaparte, Attorney-General of the United States, and files herein and presents to the court a petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged; praying also that a transcript of the record, proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

In consideration whereof, the court does allow the writ of error as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 206. April session, 1908. At Law. The United States of America ex rel. the Attorney-General of the United States vs. The Central Railroad Company of New Jersey. Order allowing writ of error. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

255 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America ex rel. the Attorney-General of the United States v. The Central Railroad Company of New Jersey, No. 206, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

Indorsement on cover: File No. 21357. E. Pennsylvania. C. C. U. S. Term No. 561. The United States of America ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Central Railroad Company of New Jersey. Filed October 10th, 1908. File No. 21357.

O

4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 562.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21358)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 562.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Writ of error	2	1
Citation and service	3	2
Petition for writ of mandamus	4	3
Notice of application for alternative writ of mandamus	15	7
Order to issue alternative writ of mandamus	18	8
Appearance for defendant	20	9
Answer	25	10
Stipulation as to submission on petition and answer	57	25
Opinions	58	25
Gray, J	59	26
Dallas, J	113	61
Buffington, J	118	63
Judgment	134	72
Assignment of errors	135	73
Petition for writ of error	138	74
Order allowing writ of error	140	75
Clerk's certificate	141	76

61439—08——1

1a April session, 1908.

Charles J. Bonaparte, J. Whitaker Thompson. 208 Robert W. de Forest, John G. Johnson.	The United States of America ex rel. the Attorney-General of the United States *vs.* Delaware, Lackawanna and Western Railroad Company.	Mandamus.

1908, June 5. Petition for alternative mandamus filed.

1908, June 5. Copy of notice of application for writ of alternative mandamus and affidavit of service of notice filed.

1908, June 5. Order granting alternative writ of mandamus.

1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.

1908, June 9. Writ of alternative mandamus exit returnable the sixteenth day of June, 1908.

1908, June 12. Return to writ of alternative mandamus filed.

1908, June 16. Stipulation of counsel filed.

1908, June 26. Argued.

1908, September 10. Opinion denying petition for mandamus filed.

1908, October 6. Dissenting opinion by Buffington, J., filed.

Order for judgment filed.

Assignments of error filed.

Petition for writ of error filed.

Order of court allowing writ of error filed.

Writ of error allowed and copy thereof lodged in clerk's office for adverse party.

Citation allowed and issued.

Citation returned "service accepted" and filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the United States of America ex rel. the Attorney-General of the United States, plaintiff, and Delaware, Lackawanna and Western Railroad Company, defendant, a manifest error hath happened, to the great damage of the said United States of America ex rel. the Attorney-General of the United States, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of October, in the year of our Lord one thousand nine hundred and eight.

[L. S.] HENRY B. ROBB,
Clerk of the Circuit Court of the United States.

Before DALLAS, J.
Allowed by

THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Delaware, Lackawanna & Western Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein the United States of America ex rel. the Attorney-General of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the Circuit Court of the United States this day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Defendant in Error.

4 No. 208. April session, 1908. In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company.	On information for writ of mandamus.

Petition.

Filed June 5, 1908, Henry B. Robb, clerk. By L., deputy clerk.

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 208.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company.	

To the honorable, the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the United States of America.

Petitioner respectfully states that he is the Attorney-General of the United States, and that, as such, he has been requested by the Interstate Commerce Commission to institute this suit against the Delaware, Lackawanna and Western Railroad Company, a common carrier as hereinafter particularly set forth, and to make application for a writ of mandamus as hereinafter prayed.

7 Petitioner, therefore, states that the said "Delaware, Lackawanna and Western Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of Pennsylvania, having its principal office in the State of New York, at the city of New York, and also an office in the said State of Pennsylvania, at the city of Scranton, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight. That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May,

in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

8 Your petitioner further states, alleges, and charges against the defendant a failure, by the defendant, to comply with and a violation, by the defendant, of that provision of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," as said act was amended by an act of the Congress of the United States, approved June 29, 1906, to be found in the first section of said "Act to regulate commerce," as amended by said act of June 29, 1906, which said provision is as follows, that is to say: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," in this:

(1) That the defendant holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Lackawanna and Luzerne, in the said State of

9 Pennsylvania, and owns and has an interest in the anthracite coal therein or thereupon and mined and being mined therefrom; and said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the authority of the defendant.

(2) That, apart from the coal lands, coal mines and coal held and owned by the defendant as hereinbefore stated, the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lackawanna Valley Coal Company and of the Glen Alden Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Lackawanna and Luzerne; but said coal lands and coal mines are, as they

have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been
10 for a long time past, the vice-president of the defendant, and certain of the directors of each of said coal companies being officers of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies in the mining of anthracite coal have been, and are now being, carried on by and under the authority of the defendant.

(3) That, moreover, apart from the coal lands, coal mines, and coal hereinbefore mentioned and described, the defendant is at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania, which said coal lands and coal mines are being operated, as they have been continuously since long
11 before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors, one of whom is president of the defendant and another of whom is a director of the defendant, as they have been, respectively, for a long time past. That, by virtue of such stock ownership, the defendant owns in part and has an interest in said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal company by a board of directors, some of whom are officers of the defendant, as hereinbefore stated, the operations of said last-mentioned coal company in the mining of anthracite coal are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(4) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at or near the mines and lands from which said coal has been and is being mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in inter-

state commerce, a large quantity, the number of tons whereof being to your petitioner unknown; that such large quantity of coal,
12 when so loaded as aforesaid, has been and is being carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not and is not necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(5) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, that provision of said "Act to regulate commerce," hereinbefore quoted.

(6) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of
13 the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, thus persisting in, and continuing, its failure to comply with, and its violation of, the provision of said "Act to regulate commerce," hereinbefore referred to and quoted.

(7) And so your petitioner alleges and says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the authracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier;" and your petitioner respectfully repeats and alleges
14 that such transportation, and such continuing transportation is, and will be, a failure by the defendant to comply with, and a violation by the defendant of, that provision of the law hereinbefore quoted.

Petitioner therefore prays that your honors grant an order for the issuance of an alternative writ of mandamus commanding and directing the defendant, the Delaware, Lackawanna and Western Railroad Company, to forthwith and hereafter comply with the provision of the law hereinbefore quoted by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, as is hereinbefore alleged, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, or to appear before this court on some day to be named in said writ, and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring the defendant, the said Delaware, Lackawanna and Western Railroad Company, to forthwith and hereafter comply with said provision of the "Act to regulate commerce;" that said alternative writ of mandamus be issued and directed to the defendant, the said Delaware, Lackawanna and Western Railroad Company; and he further prays for such other and general relief as he may be entitled to in the premises.

CHARLES J. BONAPARTE,
Attorney-General.

15 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Aylett T. Robinson, a notary public in, for, and of the District of Columbia aforesaid, Charles J. Bonaparte, Attorney-General of the United States, and made oath, in due form of law, that he is the Attorney-General of the United States, that he is acquainted with the facts alleged in the foregoing petition, and that the same are true to the best of his knowledge, information, and belief.

CHARLES J. BONAPARTE.

Subscribed and sworn to before me this 4th day of June, in the year nineteen hundred and eight.

[Notary's seal.] AYLETT T. ROBINSON,
Notary Public, D. C.

To "Delaware, Lackawanna and Western Railroad Company:"

You are hereby notified that I shall, on the fifth day of June, in the year nineteen hundred and eight, before the Honorable James B. Holland, one of the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, at his office in the city of Philadelphia, in said State of Pennsylvania, apply for alternative writ of mandamus, to be issued by the said circuit court against you, "Delaware, Lackawanna and Western Railroad Company," requiring you to forthwith and hereafter comply with that pro-

16 vision of the "Act to regulate commerce," as said act was amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than

timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the said State of Pennsylvania to the markets of any other State, any anthracite coal manufactured, mined, or produced by you, or under your authority, or which you may own in whole or in part, or in which you may have any interest, direct or indirect, except such of said anthracite coal as may be necessary and intended for your use in the conduct of your business as a common carrier.

Dated this fourth day of June, in the year nineteen hundred and eight.

CHARLES J. BONAPARTE,
Attorney-General of the United States.

17 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Personally appeared before me, C. K. Klink, a notary public, L. Allison Wilmer, special assistant to the Attorney-General, and made oath that he, on the fifth day of June, in the year nineteen hundred and eight, delivered a copy of the foregoing notice to Mr. Robert W. de Forest, of counsel for the said "Delaware, Lackawanna and Western Railroad Company."

L. ALLISON WILMER,
Special Assistant to the Attorney-General.

Sworn to and subscribed to before me this fifth day of June, in the year nineteen hundred and eight.

[Notary's seal.]

C. K. KLINK,
Notary Public.

(My commission expires April 18, 1911.)

18 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 208.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

Before HOLLAND, J.

On motion in behalf of Charles J. Bonaparte, Attorney-General of the United States, on petition this day filed praying for alternative

writ of mandamus to issue against "Delaware, Lackawanna and Western Railroad Company," requiring it to forthwith and hereafter comply with that provision of the "Act to regulate commerce," as amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity other than timber
19 and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the State of Pennsylvania to the markets of other States any anthracite coal manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such of said anthracite coal as may be necessary and intended for its use in the conduct of its business as a common carrier:

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition.

BY THE COURT.

Attest: GEORGE BRODBECK,
Deputy Clerk.

20–24 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA EX REL. Attorney-General *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. Co.	April session, 1908. No. 208.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for said Defendant.

TO CLERK OF SAID COURT.

(Indorsed:) U. S. C. C. E. D. of Penna. U. S. of America ex rel. Attorney-General v. Delaware, Lackawanna & W. R. R. Co. April session, 1908. No. 208. Order for appearance filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

25 208. Apr. sess., 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

Return of defendant, the Delaware, Lackawanna and Western Railroad Company, to the alternative writ of mandamus issued herein.

Filed June 13, 1908. Henry B. Robb, clerk. By L., deputy clerk.

JOHN L. SEAGER,
Solicitor.
W. S. JENNEY,
Of Counsel for Defendant.

26–27 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.
April sessions, 1908. No.

Return of defendant, the Delaware, Lackawanna and Western Railroad Company, to the alternative writ of mandamus issued herein.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The Delaware, Lackawanna and Western Railroad Company, to whom the said writ is directed, do herewith make return thereto to your honors, and assert and certify as follows:

I.

Defendant admits that petitioner herein is the Attorney-General of the United States, and that as such he has been requested by the Interstate Commerce Commission to institute this suit against the Delaware, Lackawanna and Western Railroad Company, and to make application for a writ of mandamus.

28 The defendant further admits that it is a corporation, duly organized and incorporated under and by virtue of the laws of

the State of Pennsylvania, having its principal office in the city of New York and an office in the city of Scranton, Pennsylvania. That it owns lines of railroad in the State of Pennsylvania extending from the center of the Delaware River at the boundary line of the State of New Jersey, in a northwesterly direction, across the State of Pennsylvania, to the bounary line between the State of Pennsylvania and the State of New York, with a branch line of railroad extending from Scranton, in the State of Pennsylvania, to Northumberland, in the State of Pennsylvania. That all the lines of railroad owned by it are wholly within the State of Pennsylvania.

Defendant also admits and alleges that as lessee it operates various lines of railroad in the States of New Jersey and New York, including the following: The New York, Lackawanna and Western Railway, extending from Binghamton to Buffalo, in the State of New York; the Cayuga and Susquehanna Railroad, extending from Owego, to Ithaca, in the State of New York; the Oswego and Syracuse Railroad, extending from Syracuse to Oswego, in the State of New York; the Greene Railroad and the Utica, Chenango and Susquehanna Valley Railway, which, together, extend from Chenango Forks to Utica and Richfield Springs, in the State of New York; the Valley Railroad, extending from the New York State line at the terminus of defendant's railroad to Binghamton, in the State of New York; the Morris and Essex Railroad, extending from Phillipsburg, in the State of New Jersey, to Hoboken, in the State of New Jersey; the Warren
29 Railroad, extending from the center of the Delaware River, at the southeasterly terminus of defendant's railroad, to Hampton Junction, in the State of New Jersey; together with other branch lines in the States of New York and New Jersey.

Defendant also admits and alleges that the Syracuse, Binghamton & New York Railroad Company is a corporation duly organized under and by virtue of the laws of the State of New York, and is engaged in the operation of a railroad from Binghamton, in the State of New York, to Syracuse, in the State of New York, connecting with other lines leased and operated by the defendant. Defendant also admits and alleges that with the assent of the Syracuse, Binghamton & New York Railroad Company, it operates its trains for the carriage of passengers and freight over said railroad.

Defendant admits that it is and has been since long prior to May 1, 1908, engaged as common carrier in the transportation of passengers and freight, in interstate commerce, over the railroads so owned, leased, and operated by it, to and from the city of New York, and to and from Hoboken, in the State of New Jersey, through the States of New Jersey, Pennsylvania, and New York, to and from Buffalo, Oswego, and Utica, in the State of New York, and intermediate points upon the lines of the railroads hereinbefore set forth.

Defendant also admits that for many years it has owned extensive tracts of coal lands in the State of Pennsylvania. That is has also leased large tracts of coal lands in the State of Pennsylvania, and that it is now engaged, and for many years last past has been engaged, in

mining coal from the lands so owned and leased by it. De-
30 fendant also admits that for many years last past, and particularly since May 1st, 1908, it has been and now is daily engaged in the interstate transportation of a commodity, to wit, anthracite coal, owned by it, and in which it has a direct interest, being the coal mined by it as aforesaid, which it transports over the lines of railroad owned, leased, and operated by it as aforesaid, and that it intends to continue such transportation in the future.

It further admits that the coal thus transported by it, and intended to be transported by it in the future, as aforesaid, is and will be an article or commodity other than timber and the manufactured products thereof, and except as hereinfater stated and alleged is not and will not be an article or commodity necessary and intended for its own use in the conduct of its business as a common carrier.

Defendant further admits that it is and has been since long prior to May 1, 1908, the owner of substantially all of the capital stock of the Lackawanna Valley Coal Company and the Glen Alden Coal Company, mentioned in the petition herein, and that it thus controls and has been controlling the election of directors of said companies, certain persons who are officers of defendant, being, as they have been for sometime past, directors of each of said coal companies. It denies that either of said coal companies hold, or have held since defendant acquired the stock thereof as aforesaid, by conveyances or leases or otherwise, any anthracite coal mines or anthracite coal lands, with the exception of about 1.74 acres owned by said Glen Alden Coal Company. It denies that since defendant acquired its stock in said companies coal has been mined or produced by either of them or
31 mined or produced from the land held by the Glen Alden Coal Company aforesaid. Defendant further admits that it is and has been since long before May 1, 1908, the owner of part of the capital stock of the Temple Iron Company mentioned in the said petition, which company holds by conveyances and leases made prior to May 1, 1908, anthracite coal lands and mines in Pennsylvania, which said coal lands and mines are being operated and have been continuously since long before May 1, 1908, in the mining of anthracite coal by and under the management of the board of directors, one of whom is an officer and the other a director of defendant, as they have been, respectively, for a long time past. That from time to time since the first day of May, 1908, and at the present time, of the anthracite coal so mined and being mined by the said Temple Iron Company, there has been and there is being loaded at the mines of said company and transported in interstate commerce large quantities of anthracite coal, over the lines of railroad owned and leased by this defendant. This defendant denies that it has managed the said Temple Iron Company, or that the operations of the said company in the mining of anthracite coal are or have been carried on, by and under the authority of the defendant.

Defendant denies that its ownership of capital stock of said coal company or its participation in the election of the board of directors

thereof constitutes an interest direct or indirect on its part in the anthracite coal mined by said company and transported over defendant's lines of railroad as aforesaid, or constitutes ownership on defendant's part in the coal mines or coal lands of said coal company, within the meaning of section I of the act of Congress of February 4, 1887, as amended.

32 II.

Further answering the defendant alleges that an act of the general assembly of the State of Pennsylvania was duly passed and approved by the governor April 7, 1832, providing for the incorporation of the Ligett's Gap Railroad Company, and authorizing said company, when incorporated, to construct a railroad from a point in Cobb's Gap, near Scranton, in the State of Pennsylvania, "to a point on the New York State line in Susquehanna County, passing through the coal region on the Lackawanna and Ligett's Gap." Defendant prays leave to refer to said act for greater certainty.

Pursuant to the provisions of such act, the Ligett's Gap Railroad Company was duly incorporated, and by its charter, duly issued under the seal of the Commonwealth of Pennsylvania March 19, 1849, it was created a corporation and vested with certain rights, powers, and privileges. Defendant prays leave to refer to said charter for greater certainty.

By a further act of the general assembly of the State of Pennsylvania, duly passed and approved by the governor April 14, 1851, certain additional rights, powers, and privileges were conferred upon said Ligett's Gap Railroad Company. Section 4 thereof provided:

"That it shall and may be lawful for the said company to purchase and hold a reasonable amount of coal lands: Provided, That the amount so held shall in no case exceed 1,000 acres."

By the same act the name of the Ligett's Gap Railroad
33 Company was changed to "The Lackawanna and Western Railroad Company." Section 5 thereof provided:

"* * * by and under which name, style, and title the said company shall use, exercise, and possess all the rights, privileges, powers, and franchises to which they are now by law entitled * * * the property and franchises of said company hereby merging and vesting by virtue of this act, in the name, designation, and style of 'The Lackawanna and Western Railroad Company.'"

Defendant alleges that an act of the general assembly of the State of Pennsylvania was duly passed and approved by the governor April 7, 1849, providing for the incorporation of The Delaware and Cobb's Gap Railroad Company, and authorizing such company, when incorporated, to construct a railroad beginning at the river Delaware at or near the Delaware Water Gap, and thence by a practicable route, terminating at or near Cobb's Gap, in the county of Luzerne or Wayne. Defendant prays leave to refer to said act for greater certainty. That said company was duly incorporated and its

charter issued under the seal of the Commonwealth December 4, 1850. By acts of the general assembly of the State of Pennsylvania, duly approved April 12, 1851, and April 23, 1852, said company was granted by the State of Pennsylvania certain additional rights, powers, and privileges. Defendant prays leave to refer to said charter and acts, and each and every of them, for greater certainty.

An act of the general assembly of the State of Pennsylvania was duly passed and approved by the governor March 11, 1853, providing for the consolidation of the aforesaid Lackawanna and Western Railroad Company and the Delaware and Cobb's Gap Railroad
34 Company. By section 1 of said act it was provided:

"That all and singular the property and corporate powers, rights, and privileges of both companies be consolidated and united under said merger, except so much of said powers, rights, and privileges as conflict, in which case the conflicting portions of the act incorporating the Delaware and Cobb's Gap Railroad Company, and its several supplements, are hereby repealed, and all provisions of law relative to the Lackawanna and Western Railroad Company not herein altered or supplied shall remain in full force, and so that by virtue of said merger of said companies and the provisions hereof said Lackawanna and Western Railroad Company may make and construct a continuous line of railroads from Great Bend to the Delaware River without necessity for transshipment."

By section 5 of said act the corporate name of the Lackawanna and Western Railroad Company was changed to the Delaware, Lackawanna and Western Railroad Company. Defendant prays leave to refer to said act for greater certainty.

Defendant alleges that pursuant to the terms of the aforesaid grants, and prior to the year 1855, it duly constructed its railroad as aforesaid from the Delaware River on the boundary line of the State of New Jersey, in a northwesterly direction, through the State of Pennsylvania to the boundary line of the State of New York near Great Bend, Pennsylvania, and that it has been engaged in the operation of said railroad continuously since its construction as aforesaid.

The Lackawanna and Bloomsburg Railroad Company was
35 duly incorporated under an act of the general assembly of the State of Pennsylvania, duly approved April 5, 1852, and was granted various rights, powers, and privileges by acts of the general assembly of the State of Pennsylvania, duly passed and approved February 19, 1849; March 3, 1853; and April 5, 1855. That under said acts said company was duly authorized to construct and operate a railroad from the city of Scranton to the city of Northumberland, in the State of Pennsylvania. That said railroad was duly constructed during the years 1852 to 1856, and pursuant to an act of the general assembly of the State of Pennsylvania, duly passed and approved by the governor May 16, 1861, entitled "An act relating to railroad companies," it was by a joint agreement dated June 16, 1873, consolidated and merged into the defendant, the Delaware, Lackawanna and Western Railroad Company. By virtue of the said act of the general as-

sembly, and the said merger, the defendant acquired all the rights, powers, privileges, franchises, and property conferred upon or vested in or which belonged to the Lackawanna and Bloomsburg Railroad Company aforesaid. Defendant prays leave to refer to said acts for greater certainty, and also to the agreement of merger and certificates of the merging companies filed in the office of the secretary of the commonwealth of Pennsylvania, June 17, 1873.

By an act of the general assembly of the State of Pennsylvania, duly passed and approved April 19, 1856, the Northwestern Coal and Iron Company was duly incorporated. By section 1 of said act said company was vested by the general assembly of the State of Pennsylvania with the power—

36 "to take and hold land and real estate on lease and in fee simple, in Butler County and in Armstrong County, and to mine, prepare for market, sell, and dispose of the cannel and bituminous coal, iron ores, fire-clay, and other minerals on their lands, and to manufacture iron * * * or other products of their minerals or lands, and to convey the said minerals or the products thereof to market, with power to grant leases of the said lands or any portion thereof: Provided, that the amount of land owned by said company shall not at any time in the aggregate exceed 3,000 acres."

By section 2 of said act said company was authorized "to construct such lateral or branch railroads, not exceeding twenty miles in length." Defendant prays leave to refer to said act for greater certainty.

By an act of the general assembly of the State of Pennsylvania, duly passed and approved April 19, 1856, the name of said Northwestern Coal and Iron Company was changed to the Buffalo Coal and Iron Company, which said company was, by an act of the general assembly of the State of Pennsylvania, duly passed and approved January 26, 1860, granted certain rights, powers, and privileges, including the right to acquire lands, as provided in the original act, in the county of Luzerne, State of Pennsylvania, and by said act the name of said company was changed to the Continental Coal Company.

By an act of the general assembly of the State of Pennsylvania, duly passed and approved March 13, 1865, the corporate name of the Continental Coal Company was changed to the Keyser Valley Railroad Company, and said Keyser Valley Railroad Company

37 was by said act duly granted certain powers, rights, and privileges, including the right to use, exercise, and possess all the property, rights, privileges, powers, and franchises theretofore granted to it, and granted by the general laws of the Commonwealth to railroad companies. Defendant prays leave to refer to said act for greater certainty. On November 9, 1865, the said Keyser Valley Railroad Company was, pursuant to the provisions of the act of May 16, 1861, hereinafter set forth, duly merged into the defendant, the Delaware, Lackawanna and Western Railroad Company, and the

defendant then became lawfully vested with all the rights, powers, and property of both companies. Defendant prays leave to refer to the original agreement of merger and certificates filed in the office of the secretary of the commonwealth, December 27, 1865, for greater certainty.

The Scranton Coal Company was incorporated in the State of Pennsylvania October 15, 1854, pursuant to the provisions of an act of the general assembly of said State, duly passed and approved April 7, 1849, entitled "An act to encourage manufacturing operations in this Commonwealth" and the supplements thereto. In its articles of incorporation it is certified "That the objects for which said company has been formed are the mining of coal and preparing for market the produce of their mines and vending the same." That pursuant to the provisions of the act of April 7, 1849, said company was duly authorized to purchase, hold, and convey any real or personal estate whatever, necessary or convenient to enable the said company to carry on the business or operations named in such certificate, not exceeding 2,000 acres.

38 By an act of the general assembly of the State of Pennsylvania duly passed and approved April 11, 1867, the said Scranton Coal Company was consolidated with the Steuben Coal Company, and said Steuben Coal Company was granted certain rights, powers, and privileges, including the right to hold, possess, use, and enjoy all the property of the said Scranton Coal Company, and the rights, privileges, and franchises granted to it. Defendant prays leave to refer to said act, and the certificates of ratification thereof filed with the secretary of the Commonwealth October 9, 1867, for greater certainty.

The said Steuben Coal Company was duly incorporated under an act of the general assembly of the State of Pennsylvania, duly approved May 18, 1865, by which it was granted certain rights, powers, and privileges, including the right, by section 4 thereof, to:

"Purchase, lease, and hold coal and other lands in the county of Luzerne, not exceeding at any one time 3,000 acres, with power to mortgage, sell, lease, or otherwise dispose of the same or any part thereof; and the capital of the said company may be employed in purchasing, mining, vending, and transporting to market coal and other minerals."

By section 7 of said act the said company was duly authorized to maintain an office for the sale of coal and the transaction of other business either in the city of Philadelphia, Pa., or in the city of New York, N. Y. Defendant prays leave to refer to said act for greater certainty.

The Granby Coal Company was duly incorporated under and by virtue of an act of the general assembly of the State of Penn-

39 sylvania, duly passed and approved April 15, 1867, by which it was granted certain rights, powers, and privileges, including the right to purchase, lease, and hold coal lands in the county of Luzerne, not exceeding at one time 5,000 acres, with power to sell

the same and to use the capital of said company in purchasing, mining, vending, and transporting to market coal and other minerals. By section 11 of said act it was authorized to construct, use, and operate a railroad or railroads not exceeding ten miles in length in said county of Luzerne.

The Nanticoke Coal and Iron Company was duly incorporated under and by virtue of an act of the general assembly of the State of Pennsylvania, duly passed and approved April 13, 1864, by which it was granted certain rights, powers, and privileges, including the right to purchase, lease, and hold coal land in the county of Luzerne, not exceeding at any one time 5,000 acres, with power to sell or lease the same and use the capital of said company in purchasing, mining, vending and transporting to market coal and other minerals. Defendant prays leave to refer to said acts of April 15, 1867, and April 13, 1864, for greater certainty.

By general acts of the general assembly of the State of Pennsylvania, duly passed and approved May 16, 1861, and April 13, 1868, respectively, entitled "An act relating to railroad companies" and "An act authorizing the merger and consolidation of coal companies," the aforesaid Steuben Coal Company and the aforesaid Granby Coal Company were, on June 1, 1868, duly merged and consolidated into the Nanticoke Coal and Iron Company, which was under and pursuant to the provisions of said acts duly vested with all the
40 rights, powers, privileges, and property of both the said companies, and of their constituent companies. The said general act of April 13, 1868, authorized coal companies having coal lands or mining privileges in the counties of Schuylkill and Luzerne, in the State of Pennsylvania, to merge and consolidate their corporate rights, powers, privileges, property, and franchises into any other company owning real estate in either of said counties, "being a coal or mining company, or a coal and iron company, or a company having mining privileges." Said act also provided that such merger "be made in accordance with the provisions of the act of May 16, 1861, above referred to, and when so made, all the property, rights, franchises, and privileges of the company so merged shall, by virtue of such merger, be thereby transferred to and vested in the company into which such merger shall be made." Under and by virtue of the provisions of the said acts, the said Nanticoke Coal and Iron Company was duly consolidated and merged into the defendant, the Delaware, Lackawanna and Western Railroad Company, on or about June 23, 1870. Defendant prays leave to refer to the certificate of the merging companies duly filed in the office of the Secretary of the Commonwealth of Pennsylvania, August 12, 1870, and August 17, 1870, for greater certainty.

By an act of the general assembly of the State of Pennsylvania, duly passed and approved March 22, 1855, certain powers, rights, and privileges were conferred upon the defendant by the State of Pennsylvania, and it was by section 4 of said act duly authorized to "increase the quantity of their coal lands to an amount not exceed-

ing (with those already acquired), 2,000 acres, and to hold
41 said coal lands, and to mine, purchase, transport, and vend coal." By section 5 of said act the defendant was duly authorized to "make agreements and contracts with corporations and individuals in the States of New York and New Jersey, expedient and necessary in the prosecuting of their business in transporting and vending anthracite coal."

By an act of the general assembly of the State of Pennsylvania, duly passed and approved April 4, 1854, the defendant was duly authorized to subscribe to the capital stock of the Warren Railroad Company, in the State of New Jersey, and lease said railroad, and to purchase and hold in the States of New York and New Jersey "lands necessary for depot purposes and the shipping of coal."

By an act of the general assembly of the State of Pennsylvania, duly passed and approved March 8, 1856, the defendant was authorized to borrow money, and to purchase anthracite coal mined from other lands than those owned by it, provided its charge for the transportation of anthracite coal upon its road shall not exceed two cents per ton per mile. The defendant was also by said act duly authorized to purchase and hold near Elizabethport, in the State of New Jersey, "such quantity of land as may be necessary for depot, wharfage, and coal yard accom'odations for its business, not exceeding fifty acres." It was also, by said act, authorized to lease the Warren Railroad. Defendant duly complied with the conditions of said act.

By an act of the legislature of the State of New Jersey, duly passed and approved March 5, 1857, the defendant was duly authorized and empowered by the State of New Jersey to purchase
42 and hold at or near Elizabethport, in the county of Essex, State of New Jersey, "such quantity of land as may be necessary for depot, wharfage and coal yard accommodations for their business, not exceeding fifty acres." It was also authorized to lease the Warren Railroad in the State of New Jersey.

By an act of the legislature of the State of New York, duly passed and approved April 5, 1864, the defendant was duly authorized by the State of New York to purchase and hold lands in said State "necessary for depot, wharfage and coal yard accommodations for their business, and for no other purpose, not exceeding ten acres in any one locality."

Defendant also alleges that under and pursuant to the provisions of various acts of the States of New York and New Jersey, it has been for many years last past, and now is, duly authorized, and empowered to hold lands in said States necessary for it to hold in connection with the transportation and sale of its anthracite coal in said States, and to transport, store and sell coal therein.

By an act of the general assembly of the State of Pennsylvania entitled, "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber and other material interests of this Commonwealth," approved April 15, 1869, this defendant

was authorized to aid corporations authorized by law to develop coal, iron, lumber and other material interests of this Commonwealth, by the purchase of their capital stock and bonds, or either of them. Defendant prays leave to refer to said acts for greated certainty, and alleges that it acquired the stock of the coal companies alleged in the complaint pursuant to the provisions of said act prior to the year 1899.

43 III.

Further answering, the defendant alleges, that at the time of the construction of its railroad from the State of New Jersey to the State of New York, through the State of Pennsylvania, prior to the year 1856, said portion of the State of Pennsylvania traversed by its said railroad, was an almost unbroken wilderness, mountainous and largely uninhabited, and its said railroad was constructed to enable it to carry to market and so vend its anthracite coal owned by it as aforesaid. Prior to the construction of any portion of said railroad this defendant, pursuant to legislative authority hereinbefore set forth, duly owned in fee coal lands to the amount of one thousand acres. Additional coal lands were then owned by other stockholders of the defendant. No railroads were then constructed from said coal lands to points where the coal to be mined therefrom could be advantageously sold, so that it became necessary to construct said railroad in order to enable the defendant and its stockholders to dispose of the coal from the lands so held by them. Subsequently, from time to time, the defendant acquired, pursuant to the authority of law hereinbefore cited, additional coal lands. At the time of the completion of its said railroad from the State of New Jersey to the State of New York as aforesaid, and prior to the year 1856, it had acquired coal lands to the extent of two thousand acres. The defendant in the year 1851 first engaged in the mining of coal, and thereafter, from year to year, expended large sums of money in the erection of collieries and breakers, and generally in connection with its business of extracting coal from its coal mines aforesaid and preparing the

45 larg amount of coal. Defendant alleges that all of the coal in the year 1851, during which year it transported 6,000 tons from its mines over that portion of its railroad then constructed. Thereafter, from year to year, it increased its mining operations. In the year 1855 it transported over its said railroad 131,000 tons of its coal. Thereafter, from time to time, various stockholders of the defendant, and others on its behalf, organized in the State of Pennsylvania the various coal companies hereinbefore named, which acquired coal lands subsequently transferred to the defendant. All such companies were organized pursuant to legislative authority hereinbefore set forth, and lawfully acquired coal lands to the amount hereinafter stated, all of which coal lands subsequently, pursuant to the legislative authority hereinbefore set forth, were lawfully acquired by the defendant. That all of said coal companies hereinbefore named, in-

cluding the Keyser Valley Railroad Company, the Scranton Coal Company, the Steuben Coal Company, the Granby Coal Company, and the Nanticoke Coal and Iron Company, acquired large holdings of coal lands, which upon their merger and consolidation with this defendant, were lawfully vested in it. That it thereby acquired, prior to the year 1871, in addition to the 2,000 acres of coal land lawfully theretofore held by it, approximately 15,000 additional acres of coal land, which it has since lawfully owned in fee. That said lands contained large deposits of anthracite coal of great value. That prior to said date, and pursuant to legislative authority hereinbefore cited, it had also acquired by lease several thousand acres of coal lands, which it has since held, and from which it has mined and sold yearly
45 large amounts of coal. Defendant alleges that all of the coal lands so acquired by it were contiguous to its lines of railroad in the State of Pennsylvania aforesaid, and upon being acquired by the defendant were connected by side tracks with its railroad.

IV.

Further answering the complaint, defendant alleges, that having so lawfully acquired large holdings of coal lands in the State of Pennsylvania as aforesaid, and for the purpose of obtaining lines of railroad by and over which it might transport such coal to market, it acquired by lease the various lines of railroad hereinbefore set forth, in the States of New Jersey and New York. In order to sell its coal in the city of New York it acquired lines of railroad in the State of New Jersey, connecting with its railroad at the Delaware River. In order to market its coal in Canada it acquired lines of railroad extending northerly through New York State to Lake Ontario. In order to sell its coal in the western markets it acquired a line of railroad extending to the city of Buffalo, connecting there with other railroads extending thence westerly and with boat lines on the Great Lakes.

The railroads so acquired by the defendant as aforesaid are the following:

The Cayuga & Susquehanna Railroad Company, which was incorporated under and pursuant to the laws of the State of New York, April 18, 1843, and authorized to construct and operate a railroad from Cayuga Lake, at the city of Ithaca, in the State of New York, to the Susquehanna River at or near the village of Owego. This railroad was duly leased to the defendant by an instrument in writ-
46 ing dated April 21, 1855, to the original of which the defendant hereby refers for greater certainty. By the special charter granted to this company by the State of New York, duly passed and approved April 8, 1851, the company was, by section 3 of said act—

"Authorized and empowered to make contracts with any corporations or individuals whereby a sufficient supply of coal may be secured for the use and benefit of said company or to be distributed by them; and it shall and may be lawful for said company to employ so much of its capital for the purpose of mining, transporting and vending

coal, and in the purchase of such real estate not exceeding 5,000 acres of coal land and personal property as they may deem necessary for the purpose aforesaid."

Pursuant to the authority thus conferred said company acquired 452 acres of coal lands in Pennsylvania, adjacent to defendant's railroad. That under and by virtue of the said lease and an agreement contemporaneous therewith, this defendant acquired the right to exercise, use, and enjoy all the charter rights, powers, and privileges of said company, including the right to mine and take coal from the lands acquired as aforesaid, and to transport and vend the same for defendant's use and benefit, and defendant has since mined, transported and sold coal therefrom. That by the terms of said lease this defendant obligated itself to pay to the stockholders of the said Cayuga & Susquehanna Railroad Company the sum of $70,000 per year, which was afterwards reduced to the sum of $54,600 per year, during the term of the corporate charter of the said company, and it also agreed to pay all taxes and obligations of the said
47 company, and to keep in repair and maintain and operate its railroad.

That said railroad was acquired to enable the defendant to ship its coal via said railroad in connection with boats on Cayuga Lake, to connect with the Erie Canal, by means of which its coal might be transported to various markets.

The railroad so next acquired by the defendant was that of the Warren Railroad Company, which was duly incorporated under and by virtue of an act of the State of New Jersey, duly passed and approved February 12, 1851, by virtue of which said company was authorized to construct a railroad from a point on the Delaware River connecting with the line of the defendant to a point to intersect with the railroad of the Central Railroad Company of New Jersey at or near New Hampton, in the county of Hunterdon, with a branch to Belvidere, in the country of Warren, New Jersey. By an act of the legislature of the State of Pennsylvania, duly passed and approved April 4, 1854, and an act of the legislature of the State of New Jersey, duly passed and approved March 5, 1857, the defendant company was duly authorized to lease the railroad of the aforesaid Warren Railroad Company. By virtue of such authority a lease in writing was duly made and executed by the said company to the defendant, dated October 1, 1857, whereby the defendant was authorized to operate the railroad of the Warren Railroad Company for and during the legal existence of said company, to the original of which said lease the defendant prays leave to refer for greater certainty. That by the terms of this lease the defendant duly obligated itself to pay perpetually dividends upon the capital stock of
48 the Warren Railroad Company, and interest upon its bonds, and to operate the railroad of said company in perpetuity, and to pay the taxes and other obligations of the said company, and to keep in repair and maintain its railroad. That the annual fixed charge of the defendant on account of the lease of said Warren Railroad Company is the sum of $174,790.

That thereafter, during the years 1868 to 1882, defendant duly acquired by lease the railroads hereinbefore named of the following companies, all of which were corporations duly incorporated pursuant to the laws of the State wherein their lines were constructed, viz: The Morris & Essex Railroad Company; the Valley Railroad Company; the Oswego & Syracuse Railroad Company; the Utica, Chenango and Susquehanna Valley Railway Company; the Greene Railroad Company, and the New York, Lackawanna and Western Railway Company.

That by the terms of the leases of all of said lines the defendant obligated itself in perpetuity to pay dividends upon the capital stock of said companies, all their taxes and outstanding obligations, including interest on their bonds, and to operate and maintain their railroads. That on account of the obligations so assumed defendant has yearly paid large sums of money, and its fixed charges for interest on stocks and bonds of said companies for the year 1907, including the Warren and Cayuga and Susquehanna aforesaid, was the sum of $5,155,697, and for taxes the sum of $1,163,916.95.

V.

That the contracts and leases aforesaid were all lawfully made by the defendant, and were made in good faith, and were made
49 to enable the defendant to transport over said railroads its anthracite coal as aforesaid, whereby it could obtain sufficient revenues to pay the obligations assumed by it under said contracts and leases aforesaid. Since the dates of said leases, up to the present time, the defendant has continuously operated all of said railroads, and has conformed in all respects to the terms of the contracts and leases hereinbefore set forth. It has expended yearly very large sums of money in equipment thereon and in betterments and improvements thereof. Over said lines the defendant has yearly transported many thousand tons of its coal. Out of a total of about 8,700,000 tons of coal produced by the D., L. & W. in the year 1907 from its lands owned in fee and leased, upward of 6,700,000 tons were transported over its lines of railroad in interstate commerce. In other years the amount of said coal thus transported was in a similar proportion to the total amount thus produced. From 40% to 60% of the annual transportation earnings of the defendant from the operation of said leased lines aforesaid have been derived from the carriage of its anthracite coal thereover.

VI.

Defendant further avers that for the purpose of facilitating the handling, transportation, and sale of its coal, and relying upon the charter powers hereinbefore set forth, it acquired, prior to June 29, 1906, at many points and at large cost, not only on the lines owned by it as aforesaid, but upon the lines leased and operated by it, extensive terminal facilities, storage yards, depots, docks, and wharfs. That for the said purpose it constructed prior to said date not only

50 on its own lines, but upon said leased and controlled lines, at many points and at large cost, coal trestles, coal pockets, transshipping plants, and other facilities.

That defendant has expended and laid out large sums of money in the construction, improvement, and betterment of the railroads so owned, leased, and controlled by it.

Defendant now owns in fee and by lease anthracite coal lands acquired by it pursuant to the legislative authority hereinbefore cited, containing many million tons of unmined coal, and prior to said date, at great cost, erected thereon and now owns collieries, breakers, buildings, machinery, appliances, and fixtures, and at great cost purchased and installed thereon, prior to said date, and now owns equipment to enable it to advantageously mine said coal, all of which is of great value. That relying upon its charter rights, as aforesaid, defendant prior to said date entered into contracts with various and sundry persons and corporations to sell them its coal, delivered at various points in various different States of the United States, which said contracts are still in force, and under the terms of which the defendant is obligated to sell its coal to such persons and corporations, delivered as aforesaid, for long terms of years.

That the ownership by the defendant of its coal and the revenues derived from the transportation of same to market has enabled it to expend millions of dollars in betterments and improvements of its railroads, so that the public is now in the enjoyment of the benefits of a modern railroad, with modern construction and equipment.

51 VII.

Defendant further alleges that it necessarily uses, itself, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal of the size of pea or smaller annually and will require more for such use in the future. That in the year 1907 defendant mined from the lands owned by it in fee approximately 5,600,000 tons of coal of all sizes, of which about 2,000,000 tons were of the size of pea or smaller. That coal of the size of pea or smaller is the most economical for the purposes aforesaid, and the larger sizes are not adapted to and can not be used for such purposes. That defendant's locomotives are nearly all anthracite-burning engines, and are so constructed as to require small sizes of coal in the economical operation of the same. That should defendant be forbidden to transport and market the sizes of coal larger than pea, which it does not require and can not use, in the preparation of which for market the smaller sizes are made, great waste would occur and an enormous loss would result to the defendant.

VIII.

Defendant therefore alleges that the portion of the first section of the act to regulate commerce, approved February 4, 1887, as amended by an act of Congress approved June 29, 1906, referred to in said

petition, and commonly called the "commodity clause," is invalid, in that if enforced it would deprive defendant of the use and enjoyment of property lawfully acquired without compensation and
52 without due process of law, in violation of the fifth amendment of the Constitution of the United States.

That defendant's rights to acquire its holdings of coal land, its rights to mine coal and to transport the same to market, and its leases of other railroads were acquired many years prior to the enactment of the so-called interstate commerce act and many years prior to the enactment of the amendment thereto known as the said commodity clause; that the investments aforesaid made in good faith in reliance upon such rights and in the expectation of the continuance thereof have resulted in vested rights which can not be impaired or taken away.

That said commodity clause is invalid in that the same constitutes a prohibition of and upon interstate commerce; that it is not a regulation thereof, and is not within the power of Congress under the commerce clause of the Constitution of the United States.

That said commodity clause is further invalid and in violation of the eighth amendment of the Constitution of the United States in that it imposes by section ten of the act excessive fines and punishment for its violation, and that such fines and punishment are so excessive as to ordinarily operate to deter railroads from testing the validity of the said clause. Defendant ships over its lines of railroad in interstate commerce about thirty trains of coal daily, composed of many cars contaning coal produced by it as aforesaid in which it has a direct interest, consigned to different destinations, which said coal was not and is not necessary and intended for the use of defendant in the conduct of its business as a common carrier. That the said
53 commodity clause is further invalid and violative of the fifth amendment of the Constitution of the United States in that it unlawfully discriminates between persons and common carriers, visiting upon corporations which are railroad companies its prohibition and penalties and exempting other persons and carriers therefrom. That said clause further unlawfully discriminates between common carriers of different classes of commodities in that it visits upon common carriers of coal, and all other commodities except timber, its prohibition and penalties and exempts common carriers of timber and the products thereof therefrom.

Wherefore the said Delaware, Lackawanna and Western Railroad Company prays that the said writ may be dismissed, and that it be relieved from obeying the command therein given.

Dated June 9", 1908.

DELAWARE, LACKAWANNA AND
WESTERN RAILROAD COMPANY,
[SEAL.] By A. D. CHAMBERS, *Secretary.*
JOHN L. SEAGER, *Solicitor.*
WILLIAM S. JENNEY,
Of Counsel for Defendant.

57 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April session, 1908. No. 208.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

It is stipulated and agreed between counsel in the above cause that its submission on petition and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 208. April session, 1908. U. S. *v.* Delaware, Lackawanna and Western Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

58 In the Circuit Court of the United States, for the Eastern District of Pennsylvania.

April sessions, 1908.

UNITED STATES OF AMERICA *v.* THE DELAWARE & HUDSON Company.	In Equity, No. 85. At Law, No. 202.
UNITED STATES OF AMERICA *v.* ERIE RAILROAD COMPANY.	In Equity, No. 87. At Law, No. 204.
UNITED STATES OF AMERICA *v.* THE CENTRAL RAILROAD OF New Jersey.	In Equity, No. 89. At Law, No. 206.
UNITED STATES OF AMERICA *v.* DELAWARE, LACKAWANNA and Western Railroad Company.	In Equity, No. 91. At Law, No. 208.

Filed Sept. 10, 1908. Henry B. Robb, clerk, per L., deputy clerk.

59 UNITED STATES OF AMERICA
v.
THE PENNSYLVANIA RAILROAD Company.
In Equity, No. 95. At Law, No. 212.

UNITED STATES OF AMERICA
v.
LEHIGH VALLEY RAILROAD Company.
In Equity, No. 97. At Law, No. 214.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge:

There have been filed in this court on behalf of the United States, by the Attorney-General thereof, six bills in equity against the railroad corporations, defendants respectively, as named in the cases set forth in the caption; the Delaware and Hudson Railroad Company and the Erie Railroad Company being corporations by and under the laws of the State of New York; the Central Railroad Company, a corporation by and under the laws of the State of New Jersey, and the Delaware, Lackawanna & Western Railroad Company, the Pennsylvania Railroad Company, and the Lehigh Valley Railroad Company, corporations by and under the laws of the State of Pennsylvania. There were also filed at the same time on behalf of the United States, at the relation of the said Attorney-General, under the authority of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, and of acts amendatory thereof, petitions for mandamus against the said defendants, respectively. Both the bills in equity and the petitions for mandamus are founded upon the same acts in alleged violation, or threatened violation, by the
60 defendants, respectively, of one of the provisions of section one of the said act to regulate commerce, approved February 4, 1887, as amended June 29, 1906, the said provision being as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

These charges of violations of this so-called "commodities clause" are, as we have said, the same in the bill in equity as in the petition for mandamus against each defendant. It is, in substance, charged in the bill and petition against each defendant that it operates, and has been operating, long prior to the said 8th day of May, 1906, a railroad or railroads in and through the anthracite coal fields of the State of Pennsylvania, and into New Jersey, New York, and other

States, and, as a common carrier through all said period, has been engaged in interstate transportation of the article or commodity known as anthracite coal, from the mines and mining lands in the State of Pennsylvania to the said other States; that as to some of said defendants, the coal so transported has been in large measure owned, in whole or in part, by them, either through purchase, or as being the product of their own mines and coal lands. It is also charged in each of said bills and petitions that the defendant has been engaged during the period aforesaid in the interstate transportation of coal, in which it had an interest, direct or indirect, by reason of its ownership of the stock of other companies owning or mining and producing the coal; and generally, that by continuing such interstate transportation of said coal, as aforesaid, each defendant has acted in violation of the said "commodities clause," by so transporting an article or commodity, other than timber and the manufactured products thereof, owned by said defendant in whole or in part, or in which it has or will have an interest, direct or indirect, or which has been mined or produced by it or under its authority, and which article or commodity is not necessary or intended, and will not be necessary and intended "for its use in the conduct of its business as a common carrier."

61

Each bill seeks to enjoin the defendant therein from further transporting in interstate commerce the anthracite coal, which it alleges it is the purpose of said defendant to transport, as thereinbefore stated, and each petition for mandamus prays for the issuance of an alternative writ, commanding and directing the defendant therein to forthwith and hereafter comply with the provisions of the law hereinbefore quoted, by forthwith and thereafter ceasing and refraining from transporting in interstate commerce, as therein alleged, the anthracite coal which, as is alleged, it is the purpose of the defendant to transport, or to appear and show cause, etc.

To these several bills and petitions, answers have been filed by the defendants therein, respectively. In these answers, it is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interest possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

62

(1) The Delaware and Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the State of New York, April 23,

1823, and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the State of Pennsylvania, between the years 1823 and 1871, and that these acts of the State of Pennsylvania resulted from the desire and policy of said State to create and foster the industry of mining such coal and developing the transportation thereof; that under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware River to the Hudson River; that later, under statutes of both States, it invested additional capital in the construction of railroads in the State of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the State of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands but for railroads acquired for the purpose of transporting coal; that there are three coal
63 companies whose shares are practically all owned by it, viz, The Northern Coal & Iron Co., The Jackson Coal Co., and The Hudson Coal Co.; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company, and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware and Hudson Company, that this said "commodities clause"

does not apply to it, because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated) "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal.

64 (2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the State of New York in 1832; that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of ever 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838, its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857, 1864, 1867, and 1868; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the State of Pennsylvania in 1869 for the purposes and with powers similar to those of the Pennsylvania

65 Coal Company. Under authority of acts of the legislature of Pennsylvania, the said Erie Railroad Company, long prior to the passage of the said amendment to the interstate-commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small

minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect, therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate-commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the State of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the State of Pennsylvania, one of which, approved April 15th, 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth;" that pursuant to the authority of these several acts, it had,

66 long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkes-Barre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkes-Barre Coal Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands, and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849; that all the lines

of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending from Scranton, in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the legislatures of the States of Pennsyl-
67 vania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1st, 1908, has operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned, in fee, extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal land in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom has been and continues to be under and by virtue of the authority of the laws of the State of Pennsylvania.

That in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State of Pennsylvania, have been merged into said defendant corporation; that by an act of the general assembly of the State of Pennsylvania, approved April 15th, 1869, entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the
68 year 1907 from its land owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or

smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other States as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate commerce act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the State of Pennsylvania April 13th, 1846; that as early as 1871, under authority of two general statutes of the State of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one-third of the shares of the Mineral Railroad Mining Company, corporations of the State of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the State of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein
69 within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon, or so contiguous to the system of railroads operated by said defendant, as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the State of Pennsylvania. Under the authority of various acts of assembly of the said State, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that by means of its own and of said leased lines of railroad it conducts, and for many years has conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania; also the entire capital stock of Coxe Bros. & Company, a corporation of said State; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority

interest in the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the State of Pennsylvania, organized for the purpose of mining coal, some of them more than half a century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a
70 trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Inc., owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1st, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the State of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal year, or $15,110,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that if said defendant were deprived of the earnings derived from the transportation of
71 the coal of said coal companies its business could not be continued, except at a net loss of many millions of dollars per annum.

These cases have all been submitted to the court upon the bills and answers in the cases in equity and the petitions and answers in the mandamus proceedings; the statements of fact, therefore, contained

in these answers must be taken to be true. There is no disagreement, however, as to any of the material facts, whether stated in the bills and petitions or in the answers, or as to those general facts of economic and industrial history of which judicial notice can be taken. The questions of law arising out of these facts in each of the cases are of such a character that they were heard and will now be considered together.

Some of the questions raised and stated in the answers are in a measure special and peculiar to individual cases, and arise out of the extent and character of the ownership, or of the interest, direct or indirect, existing as to the coal, which of course is the commodity here in question transported in interstate commerce.

The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration is whether the so-called "commodities clause," amendatory of the act to regulate commerce, passed January 29th, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole and in relation to the concrete facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants the facts set forth in their individual answers as above briefly summarized and the relevant industrial conditions, which, being matters of common knowledge, may be judicially noticed.

The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources,
72 especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to markets in Pennsylvania and in other States. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other States. It is not questioned that pursuant to this general policy investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other States and Canada,

and of this four-fifths, from 70 to 75 per cent, was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

It also appears from the answers filed that enormous sums of money have been expended by these defendants, to enable them to mine and prepare their coal and to transport it to any point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to the enjoyment of the same has never been doubted
73 or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both. To this situation, the complainant contends the fifth paragraph of the first section of the act to regulate commerce, as amended by the act of June 29, 1906, applies, and strikes with illegality the conduct by the defendants of this enormous business, as above described, a business harmless in itself, and of immense importance to the consumers of coal. We again quote this so-called "commodities clause:"

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The legislative will could hardly be expressed more unequivocally. There is no room for doubt as to the meaning and practical effect of the clause in question. By it each of the defendants is forbidden to transport in interstate commerce any of the coal

(a) "mined or produced" by it;

(b) "mined or produced under its authority;" or

(c) "which it may own in whole or in part;" or

(d) "in which it may have any interest, direct or indirect; except such as is necessary or intended for its own use in the conduct of its own business."

It results, therefore, that the coal described in the foregoing
74 categories, is outlawed in interstate commerce, and must remain so, unless the defendants can divest themselves of all title or interest in the coal, coal lands, or coal companies, from which the markets in other States have been so largely supplied. The enforcement of the act must, of necessity, result, either in the defendants holding their coal properties and refraining from transporting coal to other States, and confining themselves to the mining of such coal

as may be used in the State of Pennsylvania, or in their divesting themselves of all title or interest, direct or indirect, in said properties, by sale or surrender thereof, as they may be able to accomplish the same. The population of the region outside of Pennsylvania, absolutely dependent upon the use of anthracite coal for domestic or industrial purposes, is very large, and has been, no doubt moderately, estimated at from twelve to fifteen millions. The adoption of the former alternative, therefore, would entail, while it continued, an amount of suffering and deprivation that it is hard to forecast or appreciate, while the forced resort to the other would necessarily inflict upon the defendants and their stockholders a most disastrous sacrifice and pecuniary loss.

That the enforcement of a law should result in loss and inconvenience to individuals, few or many, does not, of course, impugn the legislative authority to enact such law, but it may well serve to challenge the serious consideration not only of the legislative body which enacts it, but of courts who are required to pass upon the question, whether indeed it be a valid law or not.

Congress, of course, is vested only with such legislative powers as are specifically enumerated in the Constitution, together with such as are necessary and proper to carry the same into execution, and it is admitted that, if constitutional sanction exists for the passage of the law in question, it must be found in that clause of the eighth section of article one of the Constitution, declaring that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

75 Upon several grounds, counsel for defendants contend that the said "commodities clause" of the act of June 29, 1906, was not a valid exercise of the power conferred upon Congress by this clause of the Constitution. No other part of the Constitution has been the subject of more judicial consideration and discussion, and no other grant of power has been more frequently invoked to sustain legislation by Congress upon subjects affecting the conduct and business of the citizens of a State, and which theretofore had been left exclusively to State control. Much of this legislation has not only passed the scrutiny of the Supreme Court, but has been admittedly beneficial in its results. The importance and influence of the commerce clause of the Constitution has not only been felt in the direct legislation by Congress which it has authorized, but also in the restraint that it has placed upon State legislation, which has tended to affect or control interstate or foreign commerce.

It is not surprising, therefore, that with the growth of population and the increasing importance of the interstate business of the country, there should be an increasing frequency in the exercise by Congress of the power thus conferred, and the legislative records of Congress show a still greater frequency in the proposals for such enactments, which have failed to receive legislative sanction. These considerations serve to emphasize the importance of the duty devolved upon the courts, as well as upon Congress, to carefully compare every

such enactment with the scope and intent of the constitutional power invoked therefor.

Fully appreciating the serious responsibility that is imposed upon the court in these cases, and recognizing fully the presumption of validity accorded to legislative acts, we turn to the question raised by defendants, as already stated, viz, whether the so-called "commodities clause," amendatory of the act to regulate commerce, passed January 29, 1906, is, so far as its scope applies by the universality of its language to the cases here presented, a constitutional and valid enactment—one within the legislative authority granted to Congress by the Constitution.

76 Ample as is the scope of legislative power granted by the language of the commerce clause, and far as the Supreme Court has undoubtedly gone in sustaining the validity of legislation under it, we think it may be safely said that no assertion of this power hitherto by Congress has been so far-reaching or affected in so serious a degree the individual liberty and property rights enjoyed under the Constitution and laws of a State as the enactment we are here considering. It is not to be denied that the right to carry in interstate commerce coal which they own in whole or in part, or which is mined or produced by them or under their authority, or by coal companies in which they are stockholders, was, until the passage of the act in question a lawful right of these defendants; that it was a common right of property, neither denied nor disputed by the common or statute law of Pennsylvania; that it was a most important property right, the enjoyment and exercise of which was neither criminal nor immoral, and subject only to any restraints imposed upon its possessors by the common or statute law of the State, or by the then existing statutes of the United States, so far as they were engaged in interstate commerce. If in any manner and to any extent whatever, they have actually violated the latter, surely they could be restrained, or otherwise made amenable to the legal penalties in such behalf, without crippling or destroying a business in which they are profitably and usefully engaged. We must, however, assume for the purposes of this discussion, in the absence of any assertion to the contrary, that these defendants have regularly complied with and conformed themselves to all the legal requirements of the interstate commerce law, touching the business in which they are engaged.

To these defendants, thus innocently and lawfully engaged in transporting coal which they own, or are interested in to the extent and under the circumstances hereinbefore set forth, comes this act of Congress, and declares that this whole business is unlawful, and that the future exercise of a vested right of ownership, which they have

77 heretofore and for long periods of years enjoyed, under the belief that it was an ordinary right of property enjoyed innocently by all citizens of the State alike, and inviolable as such, is a crime, and punishable as such. That this legislation is drastic and harsh does not, of course, dispose of the question of power on the part of Congress to enact it. Many laws, clearly within the legislative

power to enact, may result incidentally in loss or inconvenience to individuals and to particular interests. The first inquiry to be made, therefore, is as to whether this legislation is a regulation of commerce, within the true meaning of the commerce clause of the Constitution. It is contended that the power to regulate commerce assumes the continued existence of the thing to be regulated, and does not include the power to destroy or inhibit it, at least if the commerce inhibited is not criminal, immoral, or injurous to public health, morals, or safety. If we pass for the present this contention, the question remains, whether this power is an absolute one, and without any limitation upon its exercise, other than the will of the legislative branch of the Government.

It is impossible to consider this question without recurring again to the often-quoted language of Chief Justice Marshall, in Gibbons v. Ogden, that "this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." Further on the Chief Justice, in speaking of the plenary character of the specific powers granted to Congress, said: "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess in elections, are the sole restraints on which they have relied to secure them from their abuse." This language is repeatedly quoted in the arguments and briefs on behalf of the Government, in support of the contention that this power to regulate, etc., is in effect an unlimited and absolute one. But surely it would be unreasonable to suppose that the Chief Justice had in mind, as subject to abuse, any unlimited or absolute power, but
78 only such power as it existed under the grant of the Constitution, carrying with it such limitations as might be inherent in its nature or be prescribed in the Constitution itself. "Plenary power" may exist within such limitations, and though clearly liable to abuse within its permitted bounds, such abuse can only be corrected through the control possessed by the people at the elections. To deduce from the language quoted, authority for this contention of the Government is to attribute to the great Chief Justice opinions contrary to his expressed understanding of our dual scheme of government, and constitute him a champion of an absolutism abhorrent to the genius and character of our institutions. The contention also ignores the qualifying language contained in the definition of the power to regulate commerce, above referred to, where it says that "it acknowledges no limitation other than are prescribed in the Constitution." This extreme contention must also ignore the like qualifying language when it quotes, as it does with great emphasis, from the same opinion, the statement that "the power over commerce * * * among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." We have italicized these concluding words, because they express a clear recognition by Chief Justice Marshall of

the fact that the Constitution itself places limitations on the power to regulate commerce, granted by it to the Congress. But, recognizing, as he does, that these limitations exist, he says in this connection, that they do not affect the questions then before the court, and for that reason they were not further considered, the sole question for consideration in that case being, whether the power given to Congress to regulate commerce was exclusive or concurrent with a like power in the State of New York, by which it assumed to deprive citizens of other States of the right to navigate the navigable waters within the jurisdiction of said state.

79 We may assume, therefore, that the commerce clause of the Constitution is no exception to the general doctrine; that unlimited power has no place in American governmental institutions; and that there are rights of liberty and property that are secure against hostile legislative action. As has been well said, "In a constitutional government limitation is the abiding principle, exhibited in its highest form in the Constitution, as the deliberative judgment of the people, moderating every claim of right or use of power." (Prentice on Police Power.)

No one can read the history of the formation of the Constitution, and of the conditions from which it sprang, without being impressed with the fact that the desire to preserve the individual right of the citizens of each State to enjoy, untrammeled, that right of property which consisted in the ability to transport it into other States, free from the inhibitions and harassments that might theretofore have been imposed by the regulations of such other States, was one of the most important, if not the principal, of the impelling causes that brought about the convention of 1787. In contemplating this history the thought can not be avoided that, in conferring upon Congress and in denying to the States this power of interstate regulation, it was meant to preserve, and not to destroy or impair this important right of property, so essential to its full enjoyment and to the individual liberty of which it is a part.

These reflections are pertinent as a preparation for the inquiry: Does the Constitution prescribe any limitation on the power of Congress, as asserted by the enactment in question, of which these defendants can lawfully avail themselves?

The first ten amendments to the Constitution were admittedly intended to prevent abuse of the powers granted to the General Government, and of these, the fifth, among other things, provides: "Nor shall any person * * * be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." These inhibitions serve as a limitation upon the exercise of federal power, whether legis-

80 lative, executive or judicial, and it is not surprising that they should be invoked as a protection against any action of the Federal Government, supposed to be injurious or destructive of the rights thus protected. No more serious and responsible duty can be imposed upon this or any court, than of determining whether, as to

any given assertion of its legislative will, Congress has or has not transcended the limitations of the Constitution.

In the opinion of this court, the enactment in question is not a regulation of commerce, within the proper meaning of those words, as used in the commerce clause of the Constitution, and therefore not within the power granted by that clause. It never has been decided that the power conferred upon Congress to regulate interstate commerce, may be so expanded by construction as to warrant the prohibition of such commerce under all circumstances; and to us it does not seem to be reasonably possible that it should be. Moreover, this power, whatever its scope, certainly is subject to the limitations contained in the Constitution, and this can be said with especial emphasis as to those limitations found in amendments adopted after the ratification of the Constitution. Carroll v. Greenwich Ins. Co., 199 U. S., 401–410.

It seems perfectly plain, then, that Congress can not, in the exercise or pretended exercise of any legislative power conferred upon it, deprive any person within its jurisdiction of his liberty or property, without due process of law, nor can it be questioned that, with the possible exception of the war power, this is true, no matter under color of what power such deprivation is sought to be accomplished. No argument should be necessary, therefore, to show that this can not be accomplished by an enactment in assertion of power under the commerce clause of the Constitution. Counsel for the Government, however, contend that any enactment of Congress which purports to regulate interstate commerce, and which actually does control, restrain, or prohibit the same, or some part thereof, is such an exercise of power under the commerce clause of the Constitu-
81 tion as is subject to no limitation whatever, and can not be challenged by any person, on the ground that it is violative of the inhibitions contained in the fifth amendment. In other words, if it be on its face a regulation of commerce, no right of personal liberty or property can stand in the way of its enforcement, but, on the contrary, every such right is only held and enjoyed, subject to the will of Congress in the exercise of its power to regulate interstate commerce.

This is a startling proposition, but is, as we think will appear, a necessary premise to the conclusion contended for by the Government. It is admitted by counsel for the Government, that it has never yet been directly asserted in any decision of the Supreme Court, but they contend that it is deducible from certain judgments of that court, and is necessary to that fullness and completeness of control over commerce, which, begging the question, they say it was the intention of the Constitution to grant.

It may avail nothing to say that it has never heretofore been imagined that a power so formidable as this lay dormant in the Constitution, ready to be aroused and exercised at the arbitrary will or caprice of Congress, because it is true that, in the development of our modern life, clearly existing powers that have lain dormant, or have

only been partially exercised, have been made applicable to conditions unforseen by those who framed the Constitution, but in these cases the powers invoked have clearly existed, and were not predicated upon the supposed exigencies for their exercise. The consequences of establishing such a proposition as one of constitutional law, may well be considered, if they be of such a character as to throw light on the intention of those who framed the Constitution, or to render it improbable that they ever meant to grant in the premises the absolute and unlimited power contended for.

It may be safely said, and we have before remarked, that the legitimate exercise of no legislative power granted by the Constitution, is capable of touching at so many points, and in such a variety of ways, the every day life and business of the citizen. It is easy to see,
82 therefore, that if it be subject to none of the limitations of the Constitution, and especially if the constitutional guaranty of life, liberty, and property are of no avail to the citizen, rights which we have considered as most sacred and most secure may be overthrown and destroyed wantonly or arbitrarily by the will of Congress, provided that will is manifested by a regulation of commerce. It is small comfort to those who hate arbitrary or despotic power, to say that when Congress, by an enactment, has deprived the citizen of liberty or property without due process of law, it was but expressing the will of their constituents. We have, since the foundation of the Government, rested secure in the belief that there are rights which the people themselves have placed beyond the power of governmental agencies, or of the majorities for the time being behind them, to impinge upon or destroy. The provision in the fifth amendment, declaring that no person shall be deprived of life, liberty, or property without due process of law, would be a mere "rhapsody of words," without force or meaning, if so far reaching and important a legislative power as the one we are discussing can be exercised without regard to its inhibition.

It does not detract from the force of these observations to recognize that in the consideration and enforcement of these limitations and of those on the States in the fourteenth amendment the Supreme Court, as we shall presently see, has given to them that wise and common-sense application to concrete cases as they arose as makes them consistent with and not destructive of, the practical efficiency of the powers granted by the Constitution or reserved to the States.

The Constitution of the United States was intended for the common understanding of the people. The plain and obvious meaning of the words employed are to be accepted, unless plain reason to the contrary appears in the text of the Constitution itself. Life, liberty, and property are ranked together under the protection of the fifth amendment, and by the exigence of its command a person can no
83 more be deprived of his property than he can be deprived of his life or his liberty without due process of law. But if the contention of the Government be sustained that in regulating interstate commerce all the consequences, direct as well as indirect and incidental,

that injuriously affect the property of a citizen may be disregarded without respect to their character, the same must be true as to those consequences that affect his liberty. Indeed, the property rights of the citizen are a part of his personal liberty. So that a regulation of interstate commerce, not merely affecting the mode or manner of transportation, but excluding from interstate transportation altogether certain classes of persons or imposing conditions on such transportation as would wantonly and arbitrarily affect personal liberty, would have to be sustained, and even life itself might be put in peril without redress. Here again it is not enough to say, as does the counsel for the Government, either that it is an impossibility that Congress would proceed to such an extreme or that those who so legislated would be thereafter rejected at popular elections. The amendment we are considering makes it impossible for either Congress or their constituents to do any of these things, and the deprivation of life, liberty, or property without due process of law is placed by the Constitution beyond the reach of majorities, as well as beyond the power of governmental agencies.

It is not denied that corporations are persons within the provisions of the fifth, as well as of the fourteenth, amendment (165 U. S., 150, 154), and in the cases before us it is claimed that the enforcement of the provision of the so-called "commodities clause" will violate this inhibition of the fifth amendment as to these defendants and that its enactment is therefore invalid. The facts set forth in the several answers become pertinent and necessary to the proper consideration of this claim, and to them we must again refer.

We need not dwell upon the enormous aggregate of the property to be affected by this amendment. Each individual defendant is
84 either the direct owner or interested directly or indirectly, in coal or coal lands to a very large extent, and it has owned these lands and possessed these interests, as we have seen, for long periods of years prior to the enactment of the clause in question. We need not repeat what we have already said in regard to the harmless character of this ownership and these interests, but we can refer to the fact that some, if not all, of these defendants were invited and encouraged by the legislature of the State of Pennsylvania to invest their funds in the coal land through which their respective railroads ran and in the coal companies who owned and operated mines contiguous to such railroads, and that two of the corporations defendant were brought into existence by the legislature of Pennsylvania—one of them three-quarters of a century ago and the other half a century ago—for the express purpose of developing the coal lands of the State so that coal might be transported to the people of Pennsylvania and of other States. It is the interstate transportation of the property thus acquired and owned that the enforcement of this act in the present proceeding seeks to enjoin and prevent.

The facts set forth in the several answers of these defendants abundantly show that no right of property of these defendants, in or to the coal owned by them, is so valuable or important as the right

to transport it over their own roads. Every incident of this ownership and of this interest, as set out in the answers of the defendants, tends to enhance the value of this right. It must be accepted as a fact that the coal from the mines thus owned or controlled, or in which these defendants have an interest, direct or indirect, is so situated as not to be capable of transportation, without enormous loss, by any other roads than those of the defendant owning it or interested therein. As we have before said, the exigence of the act will compel the defendants to cease mining and transporting such coal, while still retaining their ownership or interest therein, to the incalculable injury of the great populations depending upon the marketing of such coal, or they will be compelled to surrender and divest themselves of
85 title thereto by a compulsory sale of these coal lands and stock in coal companies. When we consider the magnitude of the sacrifice that must certainly attend such a sale, from throwing upon the market at once these properties, whose enormous aggregate value we have already referred to, it will be manifest that either alternative means a deprivation of property of enormous value by the mere command of the statute, without process of law or just compensation therefor. No refinement of argument or legal casuistry, if it were permissible in such a case, can conceal the loss directly inflicted by the enforcement of this statute, or make it anything else than a practical and substantive violation of the letter and spirit of the fifth amendment. To forbid the right to transport this commodity under the circumstances set forth in these cases is to deprive the larger part of the property owned or controlled by these defendants of a market, and therefore of its chief value. In such a situation it boots little to say that the owner is not deprived of his mere title to the coal when it has been stripped of its chief value in his hands.

Further argument is hardly needed to establish the conclusion that the necessary result of enforcing the "commodities clause" of the interstate commerce act will be to deprive the defendants of property, and likewise of their liberty as to transportation and disposition of a useful and harmless article of property—a liberty which they have always enjoyed in common with all the citizens of Pennsylvania, and under the protection of that Commonwealth, and in accordance with the usages of its people and its public policies.

The gravamen of the argument on behalf of the Government, as we apprehend it, may be stated as follows: Inasmuch as the same inhibition, as to depriving any person of life, liberty, or property without due process of law, as is applicable by the fifth amendment to the Federal Government, is made applicable also to the States by the adoption of the recent fourteenth amendment, it follows that the decisions of the Supreme Court, which have exempted in certain cases
86 the exercise of their police powers by the States from the inhibition of the fourteenth amendment, as being outside of the scope thereof, are in point, as showing that a like exemption from limitation should be accorded to the power of Congress to regulate interstate commerce. It is further argued that this power of Con-

gress is the equivalent of the police power, as exercised by the States with reference to subjects within their jurisdiction.

The power to regulate commerce is a distinct and substantive power granted to Congress by the Constitution, subject, as we have seen, to the limitations thereof. "It is complete in itself," like the other granted powers, while the police powers comprise that indefinite mass of powers reserved to the States, and which inhere in all civil societies for the protection of the lives, health, morals, and public interests of their members. They have their origin in the law of necessity. There is no equivalency between them and the power to regulate commerce which does not pertain to the other granted powers. The police powers reserved to the State must always remain indefinite in character and incapable of classification or definition, from the very variety and multiplicity of the matters with which they are concerned. As said by Mr. Justice Grier in the license cases, 5 How., 632:

"As subjects of legislation they are, from their very nature, of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience, or luxury, to recede, when they come in conflict or collision. * * * The exigencies of the social compact require that such laws be executed before and above all others. It can not be supposed that the States intended by adopting that amendment (the fourteenth) to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community."

See also Mugler v. Kansas, 123 U. S., 666.

87 When lawfully and properly enacted, their practical efficiency will not be interfered with, because they incidentally affect private property or interests. Their legitimate exercise can not be brought within the purview of the life, liberty, and property guaranties, either State or national. To do so would tend to destroy the very foundations upon which the security of those inestimable rights of the citizen must rest.

Of necessity, therefore, the courts have from the beginning been compelled in each case as it arose to determine what was or was not a legitimate exercise of its police power by a State, and in doing so, to consider whether it was enacted in good faith and was calculated reasonably to accomplish any one or more of the objects within the purview of that power.

Of necessity, too, the courts must, in determining the challenged validity of any given exercise of its police powers by a State, consider the reasonableness of such exercise, in the light of the essential character of those powers, as above described, and determine whether they have "appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens." (Patterson v. Kentucky, 97 U. S., 501, 506.) If not in direct collision with constitutional restraints, State or Federal, courts will not allow indirect and incidental consequences of such exercise of the police power to personal or property rights to affect adversely the validity of the

enactments. If, on the contrary, they are in such direct collision, or constitute a "palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

If this be so, it is apparent that the argument for the unlimited character of the power conferred upon Congress to regulate commerce is not advanced by comparing it to the police powers reserved to the States. It would still be the duty of the courts to determine whether any challenged restriction of commerce by Congress was a reasonable exercise of the power to regulate it, or constituted "a palpable
88 invasion of rights secured by the fundamental law." The cases in the Supreme Court, involving such a consideration of the police powers reserved to the States, have been frequent, and some of those cited by counsel for the Government require a brief consideration at our hands.

It is hardly necessary to do more than refer to the full discussion of the principles to which we have above alluded, contained in the elaborate opinion delivered by Mr. Justice Harlan, for the Supreme Court, in the comparatively recent case of Mugler v. Kansas, 123 U. S., 623; because the court in that case went as far as it has ever gone, in recognizing the rights of the States in the exercise of their police powers, by recognizing the right of Kansas to entirely prohibit the sale or manufacture of intoxicating liquors, and thereby, as was alleged, to destroy the value of the brewery of the plaintiff in error, notwithstanding the due process provision of the fourteenth amendment. But, in order to uphold the validity of the law of Kansas in this behalf, the court deemed it necessary to show that it did not invade the rights secured by the fourteenth amendment, because it was a reasonable exercise of the police powers of the State. In demonstrating its reasonableness in this respect, this language of Mr. Justice Grier, in the license cases, is quoted with approval: "The true question presented by these cases, and one which I am not disposed to evade, is whether the States have a right to prohibit the sale and consumption of an article of commerce, which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime." After stating at some length the well-known facts in regard to the pernicious character of the traffic in intoxicating drinks, Mr. Justice Harlan says: "There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we can not shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact established
89 by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil;" and it can not be supposed, he says, that the States intended by the fourteenth amendment to impose restraints upon the exercise of their powers for the extirpation of such evils. While it belongs to the legislative department of the States to

determine primarily what are appropriate or needful exercises of their police powers, it belongs to the courts to finally determine on the reasonableness of such exercise. Though the Kansas law in question was properly found by the court, for the reasons stated, to be a valid exercise of its police powers, Mr. Justice Harlan says that the following principles must be kept in view, "as governing the relations of the judicial and legislative departments of government with each other:"

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation can not rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund cases, 99 U. S., 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in Marbury v. Madison, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed, are under a solemn duty—to look at the sub-
90 stance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

There can hardly be a fuller recognition of the necessity of establishing the reasonableness of a given exercise of the police power than is exhibited in this case, and of the authority of the courts, when properly invoked, to determine the same. So in Barbier v. Connolly, 113 U. S., 27, a municipal ordinance prohibiting washing and ironing in public laundries and washhouses from ten o'clock at night to six in the morning was decided to be within the scope of the police powers conferred upon the board of governors of San Francisco by the legislature of the State, and that the fourteenth amendment did not interfere with the exercise of the same. Here again the court was at pains to consider the particular facts of the case presented as bearing upon the reasonableness of this exercise of police power.

The power and duty of the court to determine the reasonableness of an exercise of the police power by a State, and the constitutional limitations which may be applicable thereto, is, on the other hand, affirmatively shown in the case of Yick Wo v. Hopkins, 118 U. S.,

356. In that case a municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality was decided not to be a legitimate exercise of the police power of the State, because it conferred upon the municipal authorities arbitrary power to give or withhold consent as to persons or places for the carrying on of the business, and thus was inimicable to the letter and spirit of the fourteenth amendment. In this case clearly the consti-
91 tutional provision, as to the deprivation of personal liberty or property, was applied by the court because, in its judgment, the regulation in question was not a reasonable, and therefore not a legitimate, exercise of the police power.

Anything like a general review of the cases in which the Supreme Court has dealt with the limitations upon the exercise of the police power of the States, by the provisions of the fourteenth amendment, or by the exclusive character of the power conferred upon Congress by the commerce clause itself, would unduly prolong this opinion. We will not refrain, however, from quoting the admirable statement made on this subject, contained in the opinion delivered for the court by Mr. Justice Day, in Dobbins v. Los Angeles. That was a case in which a municipal ordinance had fixed the limits within which gas works might be erected. A subsequent ordinance was adopted, amending the former one, by which latter the territory in which the works were in course of erection was excluded. This ordinance was held to be void as an arbitrary and discriminatory exercise of the police power of the State, which amounted to an impairment of property rights protected by the fourteenth amendment. Recognizing the doctrine that every intendment is to be made in favor of the lawfulness of the exercise of the police powers of a State, Mr. Justice Day proceeds as follows:

"But notwithstanding this general rule of law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. In
92 Lawton teele, 152 U. S., 133, 137, Mr. Justice Brown, speaking for the court, said upon this subject:

"'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful oc-

cupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.'

"And again, in Holden v. Hardy, 169 U. S., 366, 398, the same justice, again speaking for the court, said:

"'The question in each case is, whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination or the oppression or spoliation of a particular class.'"

The learned justice then quotes with approval from the opinion of the Supreme Court of California, in the case In re Smith, decided May 31st, 1904, the following language:

"But, running current with this principle" (that the courts will not interfere with state laws within the scope of their legislative power), "and to be read with it, is one of equal importance, namely, that when the police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what
93 is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business, or vocation, which in itself is recognized as innocent and useful to the community. It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the courts to declare such regulation invalid will be exercised with the utmost caution, and only where it is clear that the ordinance or law declared void passes the limits of the police powers and infringes upon rights guaranteed by the Constitution."

These cases, in regard to the police power of the States and the restraints imposed thereon by the fourteenth amendment, are exceedingly pertinent, as that power is at least as broad as the power of Congress to regulate commerce.

The cases cited by the Government, from Gibbons v. Ogden down to the present time, which recognize the doctrine of that case, that the power granted by the commerce clause of the Constitution is exclusive of any like power remaining in the States, have manifestly no bearing upon the question we are now considering, viz, whether the power of Congress under the commerce clause is unlimited, as contended for by counsel for the Government, or is subject to those "restrictions on the exercise of the power" which Chief Justice Marshall says "are found in the Constitution of the United States." No further reference need be made to them, except to point out that, by the recognition of the exclusiveness of this power, a further and distinct limitation is placed upon the exercise by the States of their police powers.

But it is further said in the argument for the Government that the unlimited power of Congress over interstate commerce is illustrated in the embargo cases, and the question whether Congress could prohibit all commercial intercourse between the States, and thus destroy what it was only empowered to regulate, is answered by saying that

the question supposes an impossibility, and the authority of
94 Chief Justice Marshall is again invoked for the proposition which they formulate, as follows: "That the policy of Congress in the enactment of a law is not within the judicial cognizance; that though all power granted to any department was liable to be abused, the remedy must be found at the ballot box." We have already quoted Chief Justice Marshall's precise language in this respect, and have shown that he was speaking of the abuse of the power, as it existed under the grant of the Constitution, subject to those limitations inherent in its nature, or prescribed by the Constitution itself, and that if abused within its permitted bounds, such abuse could only be corrected by the people at the polls.

We need not enlarge upon the argument derived from the acquiescence in the embargo and nonintercourse acts. It is true that both the power conferred to regulate commerce with foreign nations and with the Indian tribes and the power to regulate the same among the States are conferred in the same clause and by the same terms, and while the one is as complete as the other, each is complete with reference to the peculiar nature of its own subject-matter. The power to prohibit foreign commerce, in part or in whole, may in one aspect of it be part of the war power, and in another result from the inherent and necessary power recognized by international law in an independent nation to control its intercourse with foreign nations to any extent, by treaty or otherwise, even to the extent of prohibiting all intercourse therewith. We hazard nothing in saying that the power to regulate commerce among the States could not be exercised to this extreme limit. The fundamental principles lying at the foundat on of the union of States and the purposes for which such union was formed, as well as the whole scheme of our constitutional government, insure the perpetuity of the freedom of commercial intercourse between the States, subject only to the legitimate control of Congress under the power to regulate the same. No case yet decided by the Supreme Court asserts the unlimited power of Congress under the commerce clause that is here contended for. On the con-
95 trary, the court has frequently asserted in varying language that the power to regulate commerce is subject to all the limitations imposed by the Constitution, and among them that of the fifth amendment. The language of the court in Monongahela Nav. Co. v. U. S., 148 U. S. 336, expresses the position assumed in all the cases touching this matter. It is as follows: "Like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the fifth amendment we have heretofore quoted."

All the argumentation of counsel for the Government in support of the validity of this legislation would be equally applicable to any assertion of the power of Congress to regulate commerce, however arbitrary it might be, or to whatever extent, by prohibition or otherwise, it might affect the liberty or property of the citizen. If, as the

Attorney-General contends, the power of Congress to prohibit interstate commerce is as absolute as that exercised over foreign commerce in the embargo and nonintercourse acts, Congress may, for any reason or no reason, prohibit, in whole or in part, the interstate transportation of necessary and harmless commodities and restrain the liberty of the citizens of the several States or of certain classes of them from engaging in interstate commerce therein. If the propositions laid down by the Attorney-General are sound, it is hard to conceive upon what ground legislation could be challenged which arbitrarily prohibited farmers from carrying their own corn by their own teams to market across the boundary line between their own and another State. Such a power would be a mockery of the purposes for which the Constitution was formed and destroy that freedom of interstate trade which it was intended to secure.

Counsel cite the so-called "lottery case," 188 U. S., 321, in support of their extreme contention, but even a cursory reading will show how far short of answering this purpose was the judgment in that case. The court decided that though the power to regulate lotteries and to permit or prohibit the sale of lottery tickets was exclu-
96 sively within the jurisdiction of the police power reserved to the States, yet lottery tickets, in view of their essential character as written certificates, were articles of value in the hands of the holder thereof, were the subjects of traffic, and therefore commerce, and the regulation of the carriage of such tickets from State to State was a legitimate regulation of commerce among the States. The court, then, in addressing itself to the question whether Congress, under the power of regulation, could prohibit the carriage of such articles entirely from State to State, in the exhaustive and erudite opinion written by Mr. Justice Harlan, said (the italics being ours):

"In determining whether regulation may not under *some* circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress can not be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phalen* v. *Virginia*, 8 *How.*, 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: 'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.' In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; *this, for the reason that no State may bargain away its power to protect the public morals*, nor excuse its failure to per-

form a public duty by saying that it had agreed, by legislative
97 enactment, not to do so. *Stone* v. *Mississippi*, 101 *U. S.*, 814; *Douglas* v. *Kentucky*, 168 *U. S.*, 488.

"If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We can not think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State, except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; 'to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper.' *Allgeyer* v. *Louisiana*, 165 *U. S.*, 578, 589. But surely will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

* * * * * * *

98 "As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, *for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries'* and to protect the commerce which concerns all the States, may prohibit the carying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce."

Here, as in the cases in relation to the exercise by the States of their police powers, in view of the "due process" provision of the fourteenth amendment, the Supreme Court has felt itself compelled to

consider the reasonableness of this particular exercise of the power of Congress to regulate interstate commerce, in view of the nature of that power and of the "due process" clause of the fifth amendment. If this power of regulation is as absolute as contended for by the Government, and acknowledges none of the limitations prescribed by the Constitution, of which Chief Justice Marshall speaks in defining that power, the elaborate and convincing argument of the opinion in the Lottery case, to show that interstate commerce should not be made available for the promotion of a pestilential form of gambling, destructive alike of the morals and material interests of the people, was wholly unnecessary. It would have been sufficient to say that the power was absolute and free from any limitation except the will of Congress, and that the reasonableness of its exercise was not a matter for judicial discussion or determination.

This harmful character of lotteries was judicially rec-
99 ognized as far back as 1833, by the Court of Errors and Appeals of Delaware (1 Harr. 65), in a case from which the following language is quoted and approved by the Supreme Court, in Patterson v. Kentucky, 97 U. S. 508. The Delaware court said:

"At the time Yates and McIntyre made contracts for the lottery privileges set forth in the bill, we had in force an act of assembly prohibiting lotteries, the preamble of which declares that they are pernicious and destructive to frugality and industry, and introductive of idleness and immorality, and against the common good and general welfare. It therefore can not be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State, merely because they have a patent for it under the United States. A person might, with as much propriety, claim a right to commit murder with an instrument, because he held a patent for it as a new and useful invention."

That this was the particular ground upon which the decision in the Lottery case was based, is emphasized by the reference made in the opinion of the court to the act of Congress of May 29th, 1884, prohibiting railroad companies or steam or sailing vessels from receiving, for interstate transportation, any live stock affected with contagious or infectious diseases, and especially the disease known as pleuro-pneumonia. This act was referred to in the case of Reid v. The State of Colorado, 187 U. S. 137, in which it was decided that the act of that State, forbidding the introduction of cattle with infectious or contagious diseases, was constitutional, the court saying in its opinion: "It is said that the defendant has a right under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given, by that instrument, the right to introduce into a State, against its will, live stock affected by a contagious, infectious, or communicable disease."

100 It should not escape observation and comment that the traffic in lottery tickets, as prohibited by Congress, was regarded as malum in se. It was pernicious and immoral in those who

received those tickets in interstate transportation, as well as in those who issued and consigned them. The extirpation of such a traffic was, as said by Mr. Justice Harlan, a legitimate exercise, both of the police power of the State and of the like power of Congress in aid thereof under the commerce clause. Nothing like this is true of the case before us. The traffic sought to be here prohibited was admittedly, up to the time of the enactment in question, lawful, moral, and innocent at both ends thereof. The one who bought the coal from the owner who delivered the same over his own road was innocently enjoying a liberty of buying where he could buy to his own advantage, a liberty characteristic of healthy business activities everywhere. No reproach attaches or has ever attached to such conduct; indeed, the commodities clause itself refrains from denouncing it as a crime. It will be seen from the case just cited that the reasonableness of a regulation of commerce which amounts to a prohibition of any of the commodities which may form the subject-matter of interstate commerce must be inquired into by the courts when the validity thereof is challenged, and it is also seen upon what grounds such validity can be sustained.

The practical wisdom of such an exercise of the judicial function is vindicated by its necessity. In no other way can the exercise of this vast and complete power conferred on Congress by the Constitution be kept within the limitations imposed by that instrument itself or its salutary efficiency be maintained.

The case of the United States v. 43 Gallons of Whiskey, 93 U. S., 188, cited by the Government, might have been placed upon the same ground. But the court thought it necessary to place it upon the peculiar situation of the Indians, as quasi wards of the Government, and upon the treaty-making power which was exercised by a stipulation in a treaty with an Indian tribe, that, within the territory
101 thereby ceded, the laws of the United States, then or thereafter enacted, prohibiting the introduction of spirituous liquors in the Indian country, shall be in full force and effect.

We do not think the cases referred to under the antitrust act, such as United States v. Joint Traffic Association, 171 U. S., 571, and Addystone Pipe Co. v. United States, 175 U. S., 211, and United States v. Trans-Missouri Freight Association, 166 U. S., 290, are at all applicable to the question here at issue. They deal with the illegality of contracts or combinations made in violation of the act of Congress, sometimes called the "Antitrust law," and it is decided that that act refers to all contracts of every description, whether reasonable or unreasonable, and that courts have no right to discriminate in that regard, but, under the express language of the act, any contract in restraint of trade was within its purview.

But it is well to refer for a moment to the grounds upon which the decisions in these cases are placed. In the United States v. Trans-Missouri Freight Association, supra, after deciding that the statute was intended to apply to common carriers by railroad, the court, through Mr. Justice Peckham, says:

"The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad? What is the meaning of the language as used in the statute, and that 'every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal?' It is confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include, what the language of the act plainly and in terms covers, all contracts of that nature?"

In reply to the contention that the statute should be so construed as to interdict only those contracts which were in unreasonable restraint of trade, the court replied that its express language covered all contracts in restraint of trade, and that it was not permitted to the court to read into the statute a qualifying word which made it apply to less than all such contracts. The plain intention of the law was to protect the freedom of trade, and it thus carried out what must be admitted to be the underlying purpose of the commerce clause of the Constitution. No question was raised as to the right of Congress to thus declare unlawful all contracts in restraint of trade. In a certain sense the statute is declaratory of the common law by which for centuries such contracts have been denounced as illegal.

The United States v. Joint Traffic Association and the Addystone Pipe Co. v. United States (supra) were decided upon the authority of the case just quoted from. They concern the enforcement of the same provisions of the antitrust law and declare that private agreements between persons or corporations, tending directly and not indirectly or incidentally, to restrain trade among the States were unlawful. It is no longer contended that the interdiction of such contracts is not a valid exercise of the power to regulate interstate commerce. The decisions in these cases and others of the same class plainly have no bearing upon the questions we have here to consider.

It is unnecessary to discuss in detail the numerous decisions of the Supreme Court which recognize, directly or impliedly, the duty of the court to inquire into and determine the reasonableness of legislation purporting to be a regulation of commerce under the commerce clause of the Constitution as to its being properly such or as to whether it contravenes the inhibition of the fifth amendment by depriving any person of life, liberty, or property without due process of law. Among the cases relied upon by the Attorney-General in support of the "commodities clause" is the case of New Haven Railroad Co. v. Interstate Commerce Commission (200 U. S., 361). A brief review of the facts in that case and its ratio decidendi we think will show that, far from supporting the contention made by the learned Attorney-General, it distinctly fails to do so. The charge was that the Chesapeake & Ohio Railroad was engaged in the carriage of coal as interstate traffic between a district of West Virginia and Newport News, Virginia, for delivery thence to the New

Haven, in Connecticut, and that the traffic was being moved at less than the published rates and in such a way as to produce a discrimination in favor of the New Haven road as against others, in violation of the act to regulate commerce and the amendments thereto. The Chesapeake & Ohio had made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at $2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was charged that in order to comply with this contract the Chesapeake & Ohio bought the coal at the mines and that the price paid and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake & Ohio only about twenty-eight cents a ton for carrying the coal to Newport News, whereas the published tariff for like carriage from the same district was $1.45 per ton. The petition alleged that the C. & O. asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates and was not a discrimination for two reasons: First, because if such difference existed it was a loss suffered by the C. & O., not from taking less than its published rates, but because it had received less as a purchaser than the coal had cost; second, that even if it had not the lawful right thus to impute the payment of the price of the coal, the C. & O. had, in fact, received much more for the coal than the price in money agreed on, because at the time of the verbal agreement to sell the New Haven had a claim of $100,000 against the C. & O., which was
to be extinguished by the completion of the delivery of the coal,
104 and in this way caused the price thereof largely to exceed the
cost of the coal to the C. & O., including its published rates.
With his usual perspicuity, Mr. Justice White brushed aside the sophistry of the contention that by purchasing the coal at the mines the C. & O. could avoid the requirement of the act that it should not carry coal for less than its published rates, and held that where the difference between the price paid for the coal at the mines and that for which it was sold was not sufficient to cover the published freight rates for carrying the same, the charging of the full rates for the freight and entering up in their books the difference between those rates and the prices at which the coal was to be delivered in New Haven as the price actually received was a mere device in fraud of the law and was a palpable violation thereof. Accordingly, it was decreed that the contracts made by the C. & O. with the New Haven were contrary to public policy and void because in conflict with the prohibitions of the act to regulate commerce, and the C. & O. was perpetually enjoined from taking less than the rates fixed in its published tariff by means of dealing in the purchase and sale of coal.

The question, as put by the learned justice, is this: "Has a carrier engaged in interstate commerce the power to contract to sell, and

transport in completion of the contract, the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates?" Further on it is said: "Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character?"

The opinion is a most interesting one, and completely demonstrates the futility of any attempt to avoid the inhibitions of the act against discriminations in freight rates by one who deals in or owns the coal to be transported, if such attempt, like any other violation of
105 the law, is prosecuted in the courts having jurisdiction of the same. It is true that in the opinion the duality of ownership and transportation of commodities is animadverted upon as presenting a temptation to avoid thereby the requirements of the act. But conditions or situations may not be destroyed by the mere fiat of an act of Congress, because they may create temptations for violating the law. It was one thing to say, as was said by Mr. Justice White in this case, that it did not matter, so far as it affected the power to enforce the requirements of the interstate commerce act in the case before the court, that its enforcement might make it difficult or impossible for a railroad company to transport its own coal in interstate commerce, but quite a different thing for Congress to say, in the first instance, that such coal could not be so carried at all. In one case the regrettable inconvenience to the public and injury to a private property right merely incidental to the enforcement of a valid regulation of commerce were not allowed to obstruct the same, while on the other hand—the case we are now considering—these regrettable results are sought to be brought about directly by legislative enactment, independently of any other asserted regulation of commerce. It is perfectly clear that in the application of this well-settled doctrine as to the incidental loss or injury that may result from the enforcement of valid laws, Mr. Justice White is not to be taken as, even by way of obiter dictum, sanctioning the validity of the act here in question. When he speaks of "proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the Haddock and Coxe cases (before the Interstate Commerce Commission), as not being confiscatory," the meaning is evident that, in the business of carrying its own coal by a railroad carrier, there should be a "segregation" of the same into such departments as would make plain in any case whether a fraud upon the law against discrimination was being practiced. The course so pointed out would have fully regulated commerce in anthracite coal without at all restraining it or depriving the
106 carriers in question of the full enjoyment of their corporate powers and of the properties lawfully and innocently acquired thereunder. With this remedy for the supposed evil in the hands of Congress, the unreasonableness of the statute under consideration as

a regulation of commerce becomes still more apparent. It extirpates and destroys an entirely lawful business, in order to stamp out the evils which may be practiced in its conduct.

Applying the philosophy of this case to those before us, it is obvious that, instead of a competent and efficient regulation of commerce, directly dealing with the evil of the situation, by explicitly forbidding and penalizing all such discriminations in freight rates as were possible of commission under guise of the ownership of the commodity carried, the enactment in question has excluded from interstate commerce all commodities owned by the carrier, whether their transportation be carried on in conformity with the legal requirements against discrimination or not. Such an exclusion can only be justified by the assumption that a carrier who transports his own coal, as well as that of others, must discriminate. It could hardly be more unreasonable to forbid the burning of coal on the locomotives, and compel a resort to wood for fuel, because the carriage and distribution of such coal might furnish the opportunity for the attempt to discriminate in freight rates as to the coal necessarily remaining after the preparation of coal for their own steam purposes.

It has long been settled that, because the products of domestic enterprises in agriculture, manufactures, or the arts may ultimately become the subjects of interstate or foreign commerce the control of the means or the encouragements by which they are fostered and protected are not on that account within the regulative power of Congress. (Veazie v. Moor, 14 How., 573; Kidd v. Pearson, 128 U. S., 1.) A fortiori, that power can not be extended, in the guise of regulation, to the destruction of property interests which only indirectly affect interstate commerce, and this, we think, is true independently of any consideration of the effect of such a regulation as an arbitrary spoliation of property rights, within the protection of the fifth amendment.

107 Counsel for the Government have dwelt much upon the case of Union Bridge Co. v. United States, 204 U. S., 364, to show the unlimited character of the power to regulate commerce. The complete control of Congress under this power over the navigable waters of the United States, as highways of interstate or foreign commerce, for the purpose of keeping them clear and unobstructed for navigation has long been recognized. Any physical obstruction to or interference with their free navigation may undoubtedly be dealt with as such by Congress. These waters are public highways of the nation, and no one can be so permitted to encroach upon them as to deprive Congress of the right and power to abate the public nuisance thereby created. No one can acquire rights as to such navigable waters in derogation of the public right to navigate the same.

This was the doctrine of the Union Bridge Co. case. Its bridge, though permitted to be built at a time when it did not interfere with the navigation of the Allegheny River, afterwards, owing to the development of commerce, became an obstruction to such navigation, and as such was properly required to be so altered in height as to pre-

vent its being an obstruction. The pecuniary loss resulting thereby to the owners was not in any proper sense a taking of private property for public use without compensation, or a deprivation thereof without due process of law under the fifth amendment.

Arguments from analogy are always to be guardedly used, as they are often misleading. The argument is seriously made that as Congress may remove a physical obstruction to navigation, like a rock or a bridge, it may call anything it chooses an obstruction, not to navigation but to commerce generally, and require its removal. It hardly needs to be pointed out that the analogy is unsound and fanciful. It would have us conclude that, because Congress can declare a rock or a bridge an obstruction to navigation, and require its removal, it may also declare the otherwise lawful carriage of their owner's harmless commodities by the boats navigating the river to be an obstruc-
108 tion to commerce, and so forbid it. If, indeed, the latter may be done there is no logical nexus between the two.

The bridge may be removed as a patent physical obstruction to navigation, and so, pro tanto, an obstruction to commerce, but it could hardly be contended that Congress could, by declaring a house situated a mile back from a river an "obstruction" to its navigation, escape the inhibitions of the fifth amendment. Such an assertion of power would clearly come within the scope of the judgment in the case of Monongahela Navigation Co. v. U. S. (supra). A fortiori, Congress can not, by merely calling a theretofore lawful and harmless social or business situation an obstruction to interstate commerce, escape the inhibitions of the said amendment, in decreeing its destruction.

It is clearly a judicial question not to be avoided, whether this enactment, known as the "commodities clause," in view of the character of the discriminations made by it, as between owners of property, and of the inhibitions of the fifth amendment to the Constitution, is a reasonable exercise of the power conferred upon Congress to regulate interstate commerce. Passing its discriminatory features, we confine ourselves to the consideration whether the enactment in question is violative of any right of the defendants within the protection of the fifth amendment. The facts appearing in these several cases, in regard to the history of the character and extent of the ownership and interests in coal and coal lands of these defendants that will be injuriously affected by the enforcement of this law, render it impossible to say that there has not been a deprivation, as to each of them, of its liberty and its property, within the meaning of that clause of the fifth amendment which forbids that any person shall be deprived of life, liberty, or property without due process of law.

It is to be observed in the first place, that the act is in a certain sense retroactive. It applies to or affects property lawfully acquired long prior to the date of its enactment and lawfully and innocently enjoyed under the sanction of the laws of Pennsylvania during
109 long periods of years prior thereto, and is not confined to the dual ownership of transportation and property acquired after

the passage of the act. In forbidding the defendants to transport in interstate commerce the products of the mines owned by them, or in which they are directly or indirectly interested, it can not be doubted, from the facts stated in the records before us, that a most important, if not the most important, property right attaching thereto is stripped from these defendants. As we have before said, it is to no purpose to assert that they are not, by force of this enactment, deprived of the legal title to these various properties. Courts "are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority." It is perfectly clear, from the conditions as stated under which these coal lands, mines, and interests in coal companies are held by these defendants, that the deprivation of the right to carry their products in interstate commerce is a deprivation of the most valuable property right attaching thereto. It is urged by the Government, however, that the defendants may divest themselves of these properties by selling the same. Such a suggestion seems only to emphasize the arbitrary and despotic character of the legislative act. The thing commanded bears no relation to that which is within the power of Congress to prescribe.

The regulation must be within the restrictions of the Constitution, reasonably construed in application thereto. In determining this question of reasonableness, the carefully considered expert opinion of the Interstate Commerce Commission is entitled to great weight. In distinguishing the case of Grain Rates of Chicago Great Western Ry. Co., 7 Inters. Com. Rep., 33, from those of Haddock v. D. L. & W. R. R. Co., 3 Id., 302, and Coxe Bros. & Co. v. Lehigh Valley R. R. Co., 3 Id., 460, the learned commission said:

"Those cases are in no respect similar to this. In both, the common carrier was also the owner of extensive coal fields, and
110 indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property, and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to enquire whether the rate charged the complainant was a reasonable one."

Even if wrong in their conclusion, as intimated by Mr. Justice White, that an enforcement of the prohibition against discrimination in rates, under proper rules and regulations for the separation of the business of producing, selling, and transporting into appropriate departments, would have amounted to an interdiction on the carrier as to carrying his own coal, and have been, therefore, confiscatory in its results, this does not detract from the force of the judgment expressed by the commission, that if the operation of the act were such as to interdict the interstate carrying of coal by the railroad carriers owning or interested in the same, it would be practically a

confiscation of its property. Yet this is just what the "commodities clause," not indirectly, but directly, does.

As said by one of the counsel who argued these cases at the bar, "to prevent favoritism and discrimination, it is not necessary to deprive the carrier of its right to transport its own commodities; to render useless hundreds of millions of dollars of its improvements; or practically to destroy the value of property by forbidding its transportation." The provision that no person shall be deprived of liberty or property without due process of law, would, indeed, be shorn of its vitality if the contention of the Government in the premises can be sustained. If, without regard to the exigence of the fifth amendment, we merely compare the consequences of this so-called regulation of commerce to the property and property rights of these defend-
111 ants, with what we are told is the end to be achieved by this so-called regulation of interstate commerce, the utter unreasonableness of the said regulation will still more clearly appear. A property right of almost incalculable value, which these defendants have hitherto innocently enjoyed in common with the citizens of Pennsylvania and of all the other States, is stricken down for the alleged purpose of preventing discrimination by common carriers, as owners and carriers of such property, as against others who may lawfully require their services. It hardly needs pointing out how enormous the disparity between the value and importance of the end accomplished and the cost of the means employed for the accomplishment; and this, too, when any such discrimination, if it exists, can be remedied by regulations bearing a direct relation thereto. But to further make the disparity between the means and the end to be accomplished more apparent, it is not because such discriminations are practiced, but because they possibly may be practiced.

From every point of view from which we have been able to approach the question, the unreasonableness and consequent invalidity of this so-called "commodities clause" is apparent. It invades the rights of the State by striking down the liberty hitherto innocently enjoyed by its citizens under the laws and usages of the Commonwealth, to engage in interstate commerce to the fullest extent, as to all harmless articles, whether owned or not owned by the carrier, and deprives of their property these defendants contrary to the letter and spirit of the fifth amendment to the Constitution. If the enactment in question be warranted by the commerce clause of the Constitution, it is hard to see what bounds may be set to the exercise of that power. It will indeed be an open door, through which the forces of a centralization hitherto unknown may enter at will, to the overthrow of that just balance between federal and state power, for which the makers of the Constitution so wisely provided as an essential to the preservation of our dual form of government.

112 We confine ourselves to the concrete facts presented by the pleadings in these cases, and intimate no opinion either way, as to cases where property has been acquired by the carriers subsequent to the passage of the act. For the reasons stated, therefore,

these bills in equity are dismissed, and the petitions for writs of mandamus on the law side of this court are denied.

113 DALLAS, Circuit Judge, concurring.

I fully concur in the foregoing opinion, and the little now to be added is intended merely to accentuate my acceptance of it.

It was held in the Lottery case (188 U. S., 321) that the power of Congress to regulate commerce among the States is plenary, and is subject only to such limitations as the Constitution imposes upon its exercise; but it was not held that the power committed to Congress to prescribe the rules by which interstate commerce is to be governed, authorizes the interdiction of its pursuit by any person or persons, natural or artificial, without regard to the character of the traffic sought to be proscribed. It was decided, it is true, that the prohibition of the carriage of lottery tickets is an "appropriate mode for the regulation of that particular kind of commerce;" but it was not decided that prohibition, apart and distinct from regulation, may be ordained, or that as a mode for regulation it would universally, or even generally, be appropriate. On the contrary, it was said that, "in determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic * * * can not be overlooked." Where it is "a kind of traffic which no one can be entitled to pursue as of right," its pursuit by anyone may be prevented: this the Lottery case has established; but that a common carrier may be forbidden to transport from one State to another any article or commodity, however useful and inoffensive, which Congress may choose, no matter with what motive, to exclude from such transportation, neither the Lottery case nor any other has determined.

The prohibitory intent of the piece of legislation under consideration is too plain for disavowal, and the suggestion that what it prohibits is not interstate commerce, but interstate transportation by a railroad company of commodities which it has produced, etc., is delusive. The question is not whether the carriage from State to

114 State of coal produced by the carrier is interstate commerce, for of course it is; but whether, being a kind of commerce which is not inimical to safety, health, or morals, and which, therefore, anyone is entitled to pursue "as of right," Congress may restrict a railroad company's interstate transportation of coal to coal not mined or owned by it and in which it has no interest. Any such restriction, whatever it may be called, in its nature and effect is discriminative prohibition; and that the restrictive provision now in question was enacted, not actually for the regulation of interstate commerce, but really to coerce the conformity of intrastate business with a "policy" approved by Congress, seems practically to be admitted, and could not, with candor, be denied.

"While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the Constitution rather than the law-making department of government," and they have been charged with no duty more exalted or imperative than that of reso-

lutely resisting the assumption by that department of any power not delegated to it by the Constitution, let the pretext or ostensible object be what it may. No court has authority, under the guise of interpretation, to change the Constitution for the purpose of meeting a supposed requirement of present conditions, and the covert tendency of any usurpation of such authority would inevitably be to transform the government of enumerated powers which the Constitution established into a government with all power vested in its legislative and executive branches. But there are rights not derived from the Constitution, though they may be secured by it, which in any free government must be conceded to be beyond invasion by any of its departments (Loan Association v. Topeka, 87 U. S., 662), and the inherent right of the States to unrestricted innoxious commercial intercourse never has been relinquished nor made dependent upon the sufferance of the body to which its regulation was confided, not for its suppression in whole or in part, but to foster its benefits and preclude its obstruction. The right itself was "retained by the
115 people," and by no subterfuge can any of the people, whether incorporate or not, be deprived of it. Moreover, the States, subject only to the powers delegated to the United States by the Constitution, or prohibited by it to the States, have severally the right, within their respective geographical limits, to the administration of their own law for the maintenance and defence of life, liberty, and property, and consequently Congress, unless in aid of the unfeigned exercise of a power possessed by it, has no authority whatever to divest, limit, or impair any property right which competent State law recognizes and protects. Yet we are confronted in these cases with an attempt to subvert by congressional edict the right to use and enjoy property of the utmost value, which was acquired and has long been held under state law of unquestionable validity, and to withhold from the people of many of the States a commodity which has aptly been characterized as "a prime necessity of life and an essential of civilization." Such legislation is incompatible with free government (Loan Ass. v. Topeka, supra), and, in my opinion, it is simply impossible to find support for it in a grant of power to regulate commerce, coupled with a mandate that private property shall not be taken for public use without just compensation, and that no person shall be deprived of liberty or property without due process of law. The inclination sometimes manifested to centralize power in the General Government results in great measure, no doubt, from the apparent expediency of committing to it the correction of ills which it is supposed that the States can not so readily repress; but the achievement of no presently desired end, however salutary, can justify the infraction of our fundamental law, or warrant its perversion by insidious construction. The Constitution of the United States is a written instrument, not a progressive development, and the often quoted epigram that "Constitutions are not made, but grow" should not apply to it.

BUFFINGTON, Circuit Judge, dissents.

118 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908.

UNITED STATES OF AMERICA v. DELAWARE & HUDSON COMPANY.	In equity, No. 85. At law, No. 202.
UNITED STATES OF AMERICA v. ERIE RAILROAD COMPANY.	In equity, No. 87. At law, No. 204.
UNITED STATES OF AMERICA v. CENTRAL RAILROAD OF NEW JERSEY.	In equity, No. 89. At law, No. 206.
UNITED STATES OF AMERICA v. DELAWARE LACKAWANNA AND WESTERN RAILROAD Company.	In equity, No. 91. At law, No. 208.
119 UNITED STATES OF AMERICA v. PENNSYLVANIA RAILROAD COMPANY.	In equity, No. 95. At law, No. 212.
UNITED STATES OF AMERICA v. LEHIGH VALLEY RAILROAD COMPANY.	In equity, No. 97. At law, No. 214.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.
Dissenting opinion, by BUFFINGTON, C. J.

BUFFINGTON, C. J.

These cases involve the constitutionality of the fifth paragraph of the first section of an act of Congress, approved June 29, 1906, which provides: "From and after May 1, 1908, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

In Brown v. Walker, 70 Fed. Rep., 46, where the constitutionality of the immunity clause of the interstate commerce act, already held

unconstitutional in another jurisdiction (60 Fed. Rep., 257),
120 came before Judge Acheson and myself, we said: "When a statute has been passed by the legislative branch of the Government, the judicial branch will act with great caution in declaring it unconstitutional, and will do so 'only,' as Chief Justice Black said in Sharpless v. Mayor, etc., of Philadelphia, 21 Pa. St., 164, 'when it violates the Constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds.' For, as Chief Justice Marshall said in Fletcher v. Peck, 6 Cranch, 126: 'The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.'" This extract states my attitude toward the act now before this court.

That act is an alleged exercise of power under the eighth section of article 1 of the Federal Constitution, which conferred on Congress power "to regulate commerce * * * among the several States." Its subject-matter is, "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced" by an interstate railroad, or "which it may own in whole or in part, or in which it may have any interest, direct or indirect." That it affects such articles only when they have reached a commercial stage, viz, are "manufactured, mined, or produced," and become subjects of interstate commerce, viz, by carriage, "from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country," the act provides. And that such commodities are articles of commerce is clear:
Gibbons versus Ogden, 9 Wheat., 1. These commodities,
121 the act says, it shall be unlawful for any railroad to transport between the States when "manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." It does not forbid a railroad to own or operate mines or manufactories. It does not preclude sale of its product or debar carriage thereof from the State. It simply puts the carrier-owner on the basis of all other owners and shippers of commodities, viz, transportation of its and their product by a disinterested carrier. Its manifest purpose is to prevent, in shipments, favor to any, and secure fairness to all.

At this point we note that the prior action of any State authorizing such carrier to own manufactories or mines could in no way detract from the power of Congress to thereafter regulate interstate commerce. Manifestly, such purchases under State authority created no

obligation or contract on the part of Congress that it never would, in pursuance of its power to regulate commerce between the States, enact laws which might restrict carriers from the interstate carriage of their own products. Mere inaction, mere omission to exercise a constitutional power, can not estop that body, for such a doctrine of congressional estoppel would compel it to forestall the laws of every State and seriously impair the exercise of the power to regulate commerce. In effect it would place in each State a veto on the power to regulate conferred on the United States. The contention for congressional estoppel is best answered by Mr. Justice Harlan in Union Bridge Company v. United States (204 U. S., 400), where he says: "There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the Government that it can not exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation as then
122 carried on, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States at the time to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, can not have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We can not give our assent to that principle."

But in the present cases we have a different situation. The purpose of this federal statute of 1906, to divorce, in interstate commerce, the dual relation of carrier and producer, was anticipated by intrastate legislation thirty-odd years before by the State of Penn-

sylvania. In its constitution of 1874 (sec. 5, art. 17), that State provided that "No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage
123 in mining or manufacturing articles for transportation over its works, nor shall such company, directly or indirectly, engage in any other business than that of a common carrier, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the product of its mines and manufactories on its railroad or canal not exceeding fifty miles in length." The effect of this constitutional provision upon the legality of the purchase of lands by carriers has never been passed upon by the supreme court of that State. Assuming it was not self-operative in the sense that it required legislation to enable the State to forfeit title to lands acquired in the face of it, for this alone was decided in Commonwealth v. New York, Lake Erie & Western Railroad Company, 132 Pa. St. 591, yet certain it is it strips every purchase in Pennsylvania since 1874 of mining properties by common carriers of the status of innocent purchases, and the answers do not allege that the purchases of these respondents were all prior thereto and whether or not they had elected to accept the provisions of the Constitution. Now the object of this federal statute is clear. It seeks, in the sphere of interstate commerce, and, be it observed, in it alone, to enforce proper service by carriers of such commerce, by divorcing their public duty as common carriers from their private interest in carrying their own products. It forbids them to become competitors of their own customers. Such carriers are created and vested with public rights to enable them to serve as common carriers. "The question," say the Supreme Court in Cherokee Nation v. South Kansas Railroad Company, 135 United States, 657, "is no longer an open one as to whether a railroad is a public highway, established primarily for the convenience of the people and to subserve public ends." So far as this dominant, public purpose is concerned, their lawful ownership of private property is an incident to enable them to fulfill, certainly not to thwart, this public duty. "Though the corporation, in respect to its capital, is private, yet it was created
124 to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out:" Western Union Telegraph Company versus Pennsylvania Railroad Company, 120 Fed. Rep. 367, quoting Railroad v. Colwell, 39 Pa. St. 339. Now, rightly or wrongly, Congress determined that the interstate carriage of the commodities produced from carriers' property injuriously affected their public duty and enacted that the full enjoyment of the secondary and private right of private carriage must yield to the primary and higher requirement of public duty. Of the wisdom of that body in adopting the particular course of the statute, the courts can not inquire. "The question is for us one of power only, and not of policy:" United States v. Joint Traffic Association, 171 United States, 505, for, as said of the inter-

state commerce act by Mr. Justice White in the New Haven Railroad Company v. United States, 200 United States, 399. "If the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted." That the regulation of interstate commerce was the object of this law is clear. When it was under consideration the mover of the amendment said it was intended "to divorce transportation from production on the part of the railroads engaged in transporting coal they mined and sold in competition with other shippers, which was a great abuse. This abuse grew into a grievous wrong to independent shippers. I sought to correct this abuse by an amendment confining railroads to their legitimate business of transporting freight and passengers and prohibiting them from engaging in the transportation of any commodity which they might own, except for their own use." Indeed, the dual and conflicting relation of public carrier and private producer was a matter of com-
125 mon observation. We have seen how it had been constitutionally forbidden in Pennsylvania in 1874. In the case of the Attorney-General of Great Britain v. The Great Northern Railway Company, 29 Law Journal (N. S. Equity), 794, decided in 1860, the question was whether dealing in coal by a railroad was illegal because incompatible with its duty as a public carrier and calculated to injure the public. It was there held that the act of Parliament granting the charter to operate the railroad implied a prohibition against the company engaging in any other business, the court saying: "These large companies, joint stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money—large amounts of property—and if they were to apply that money or that property to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways. * * * Here we find this company, having the traffic from the north of England, where the great coal fields are (at least some of the principal coal fields), supplying the country with coal, or capable of supplying it. This company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic—that is, the dealing—in all the coal in the large districts supplying coal to the country. They have to a considerable extent done so, and there is no reason why it should not go on progressing. I observe that in the six years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to

794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. * * * There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal."
126 Accordingly an injunction was granted, and no case to the contrary being cited, it would seem that its principles now are, and since 1860 have been, the law of England on the dual relation of common carriers. Moreover, this dual relation of public carrier and private producer was involved in the case of New Haven Railroad Company v. United States, supra, and in discussing its effect on the requirement of the interstate commerce act that the carrier adhere to published rates, Mr. Justice White said: "The existence of such a power in its essence would enable a carrier, if it choose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over very other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier."

In the light of these views, it must be presumed, for every presumption of the integrity of purpose of the lawmaking power must be made, that Congress in passing this act sought not to confiscate private property, but rather to avert by due regulation the evils the carrrier had itself brought about by allowing private interest
127 to injuriously affect public duty. And while, as we have said, the wisdom or otherwise of Congress in the measures it adopts is not a subject of judicial scrutiny, for "in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed:" Lottery case, 188 U. S., 353, yet the recognition by courts of an evil to be remedied and the avowed purpose of Congress to stop such evil may throw some light on that which, after all said, is a question of fact rather than law, namely, whether this act

is a real regulation of commerce, or under the guise of regulation, a prohibition of holding property. And as bearing on the conditions in view of Congress, the facts set forth in the answer of one of the defendants are highly suggestive, viz: "This defendant, further answering, says that anthracite coal is an article of prime necessity, and is universally used for domestic purposes throughout New England and the Middle Atlantic States, and to a great extent throughout other sections of the country. The source of the entire supply, save a few small deposits of inferior quality, is located within the State of Pennsylvania, and the deposits extend over an area of only about 484 square miles, divided for trade purposes into three 'regions,' the Wyoming (sometimes called the Lackawanna) region, the Lehigh region, and the Schuylkill region. Ninety per cent, approximately, of the entire unmined area of anthracite coal is owned or controlled by the following-named companies or by 'subsidiary coal companies,' so called, that is, companies in which they have an entire or controlling stock interest, viz, the Reading Company, the Pennsylvania Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Lehigh Valley Railroad Company, the Central Railroad of New Jersey, the Delaware & Hudson Company, the Erie Railroad Company, and the New York, Ontario & Western Railroad Company, and from 70 to 75 per cent of the annual supply of anthracite coal in the United States is, and for many years past has
128 been, produced either directly by said companies, as in the case of the Delaware, Lackawanna & Western Railroad and Delaware & Hudson companies, or through the agency of the said 'subsidiary' coal companies."

Such facts may have been ground in the mind of Congress to justify restricting transportation regulations, when it saw that these private acquisitions by public carriers, up to 90 per cent of the entire anthracite supply, had resulted from the mere inaction of Congress to restrict carriers in their interstate relations to their public and primary service of transportation. The facts set forth in this answer disclose a greater and more significant absorption than that in the English case, of which the Supreme Court, in New Haven Railroad Company v. Interstate Commerce Commission, supra, said: "Here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of the Attorney-General v. the Great Northern Railway Company, 29 Law Journal (N. S. Equity), 794."

But apart from authoritative statements, it must be clear to thoughtful men that the conduct of a carrier is the most vital and

essential requirement to fair enjoyment of the benefits of commerce. Such being the case, it is equally clear that to be effective the power to regulate commerce must include ability to regulate the carrier, for to exclude it strips the power to regulate of all remedial strength. Regulation of the carrier, then, being essential to the power to regulate commerce, and the regulation of commerce between all States being delegated by the Constitution to the United States, it follows that any control or regulation of a carrier by a State which
129 affects the performance of the carrier's interstate service is unconstitutional. "In a large proportion of the cases in respect to interstate commerce brought to this court," say the Supreme Court in in re Debs, 158 U. S., 564, "the question presented was of the validity of State legislation in its bearings on interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce." It is clear, therefore, that if the act now before us, which makes it "unlawful for any railroad company to transport from any State * * * to any other State * * * any article or commodity * * * manufactured, mined, or produced by it," etc., had been passed, for example, by the State of Pennsylvania, it would be unconstitutional, because by circumscribing the carrier's power and regulating its duty in the interstate carriage of commerce, that State exercised power to regulate commerce between States which the Constitution committed to the United States. We are not, therefore, embarrassed in this case by any question of trenching on the right of a State. Such being the case, one of two results must follow—either the right to regulate the interstate carrier's efficient performance of duty rests in Congress and its regulation must prevail, or no power to regulate interstate carriers exists, and the carriers "are a law unto themselves." Unfortunate as this would be, yet the nonexistence of a power affords no ground for vesting such power in Congress. But there is neither warrant or necessity for such fallacious reasoning. The federal power rests on the sound and sufficient warrant of the Constitution itself, which gave the United States the power to regulate commerce between all the States. There is no mistaking the Constitution's plain words. The power to regulate means sufficient power to effectually regulate, for, as said by Chief Justice Marshall in McCulloch v. Maryland, 17 U. S., 411: "The Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the Government to general reasoning.
130 To its enumeration of powers is added that of making 'all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department thereof.'" Now, it would seem idle for practical men to discuss the question whether regulation of the carrier to ensure performance of its duty is not vital to the regulation of commerce. In

the very nature of things the right of the people of one State to market their products in another, and the corresponding right of the people of the latter to enjoy the products of the former can not be mutually enjoyed unless there be some regulating power over the carrier who performs the interstate service. Seeing, as said by Mr. Justice Peckham in United States v. Joint Traffic Association, supra, "the business of a railroad carrier is of a public nature and in performing it the carrier is also performing to a certain extent a function of government, which requires them to perform the service upon equal terms to all," by whim shall the requirement be made unless by Congress, and on whom except upon the carrier? And clearly the general power to forbid a public carrier from doing what hinders its performance of a public duty could not before the Constitution be denied to a sovereign State, for "the States were unquestionably supreme," says Mr. Justice Johnson in Gibbons v. Ogden, supra, "and each possessed that power over commerce which is acknowledged to reside in every sovereign State." When, then, all the States and the people thereof granted to the United States the broad power to regulate commerce between the States, did the incident to such power, namely, control of the carriers of such commerce cease to exist or did it pass to the nation as an incident to the general power? If the sale of a ship vests in the new owner the right to thereafter control engine and rudder without mention of such power in the bill of sale, there can be no doubt that the grant of the general power to regulate commerce carried with it the right to regulate the carriers thereof as agencies of commerce. It is no answer to this to say that
131 sufficient power to regulate and control exists in Congress in forbidding rebates and enforcing uniform rates. To concede to Congress power to regulate carriers by such means is to concede it power to regulate by other means. For whether regulation is best exercised by punishing past or by removing incentives to future unfairness is a question that concerns the exercise but not the existence of the power. Power to regulate commerce was held in the safety appliance cases, Johnson v. Southern Pacific Company, 196 U. S., 1, to justify regulations for safety devices upon carriers' cars, and if the power to regulate cars is an incident to the general power to regulate commerce, the power to make the carriers themselves efficient agencies of commerce can not be gainsaid. Regulation of interstate carriers in the manner provided by this act invokes no new principle and subjects them to no other condition than that impliedly assumed by everyone who enters upon a public duty, viz, that so far as private right interferes therewith it must be foregone. The right to contract belongs to every citizen, but when a citizen becomes a member of Congress, all right to contract with his Government is by R. S., sec. 3739, denied him. The profession of law has been held a right of which one may not be deprived by legislation, but only by decree of court: Ex parte Garland, 71 U. S., 333, but when a lawyer becomes a federal judge, the law by R. S., sec. 713, forbids him the right to

use his property and practice his profession. Such prohibitions are not restrictions of liberty or deprivations of property. They are the law's aids to public service. They make the public servant have an eye single to the public duty, voluntarily assumed, and in forbidding legislators, judges, and public carriers alike to act in a dual capacity the law but throws around them the time-proved safeguard of faithful service, that "no man can serve two masters."

It remains to notice the objection that timber was excepted from the interdicted commodities. Reflection will show that, so far as the evils sought by this law to be cured are concerned, timber differed greatly from coal. Apart from the grants of timber lands to
132 pioneer transcontinental roads along their rights of way, our attention has been called to no public carrier dealing in and transporting timber. Nature has prevented this. Forests make streams, and water, from its nearness, and timber, from its capacity to float, make water transportation timber's natural outlet. It is impossible, therefore, for any land carrier to become such a private carrier of its own timber as to affect its duty as a public carrier, and a railroad so quickly exhausts the forests tributary to it that it could not long remain a distinctive timber road.

Satisfied, then, of the three propositions, namely, first, that under the Constitution the power to regulate commerce between the States is vested in Congress; secondly, that such power includes the power to regulate carriers thereof, and, thirdly, that the divorce of the dual relation of public carrier and private transporter is a regulation of commerce, I hold this law is constitutional, and from the opinion of the majority to the contrary I record my dissent.

134 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. Co.	April sessions, 1908. At Law, No. 208.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon petition and answer, the petition is refused and judgment is entered in favor of defendant.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 208. U. S. v. Delaware, Lackawanna & Western Railroad Company. Order directing judgment. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

135 No. 208. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States

vs

DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

Now comes the plaintiff and, in connection with the petition for writ of error, assigns the following errors in the action and proceedings of the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled case, that is to say:

1. That the Circuit Court erred in denying the petition for writ of mandamus in this case.

2. That the Circuit Court erred in refusing to grant an order for the issuance of a peremptory writ of mandamus and for the relief prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities
136 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the so-called "Commodities clause.'

5. That the Circuit Court erred in holding that the said so-called "Commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "Commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, is discriminative in its provisions and therefore constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, constittues an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty without due process of law.

137 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "Commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said plaintiff and petitioner prays that the said judgment and order of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 208. April session, 1908. At Law. The United States of America ex rel. the Attorney-General of the United States *v.* Delaware, Lackawanna and Western Railroad Company. Assignment of errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

138 No. 208. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

And now comes the United States of America, on relation of Charles J. Bonaparte, Attorney-General of the United States, plaintiff herein, and says: That on the sixth day of October, in the year nineteen hundred and eight, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more

in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated October 6, 1908.

139 (Endorsed:) U. S. C. C., E. D. of Penna. No. 208. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. Delaware, Lackawanna and Western Railroad Company. Petition for writ of error. The clerk will please file within petition for writ of error the assignment of errors herewith and order of court allowing the writ when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

140 No. 208. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

Before DALLAS, *C. J.*

This sixth day of October, in the year nineteen hundred and eight, comes the plaintiff, by Charles J. Bonaparte, Attorney-General of the United States, and files herein and presents to the court a petition praying for the allowance of a writ of error and an assignment of errors intended to be urged; praying also that a transcript of the record, proceedings, and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

In consideration whereof the court does allow the writ of error as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 208. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States v. Delaware, Lackawanna and Western Railroad Company. Order allowing writ of error. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

141 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America ex rel. the Attorney-General of the United States v. Delaware, Lackawanna and Western Railroad Company, No. 208, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] HENRY B. ROBB, *Clerk of C. C.*

(Indorsement on cover:) File No. 21358. E. Pennsylvania C. C. U. S. Term No. 562. The United States of America ex rel. the Attorney-General of the United States, plaintiff in error, vs. Delaware, Lackawanna & Western Railroad Company. Filed October 10th, 1908. File No. 21358.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 563.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 16, 1908.

(21359)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 563.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Writ of error	2	1
Citation and service	3	2
Petition for mandamus	4	3
Notice of application for alternative writ of mandamus	14	7
Order to issue alternative writ of mandamus	17	8
Appearance for defendant	24	9
Answer	25	9
Stipulation as to submission on petition and answer	41	16
Opinions (omitted in printing)	42	
Gray, J. (omitted in printing)	43	
Dallas, J. (omitted in printing)	97	
Buffington, J. (omitted in printing)	102	
Judgment	118	16
Assignment of errors	119	17
Petition for writ of error	122	18
Order allowing writ of error	124	19
Clerk's certificate	125	20

1 APRIL SESSION, 1908.

Charles J. Bonaparte, J. Whitaker Thompson.	The United States of America ex rel. The Attorney-General of the United States	Mandamus.
212	*vs.*	
Robert W. de Forest. John G. Johnson.	The Pennsylvania Railroad Company.	

1908, June 5. Petition for alternative mandamus filed.

1908, June 5. Copy of notice of application for writ of alternative mandamus and affidavit of service of notice filed.

1908, June 5. Order granting alternative writ of mandamus.

1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant filed.

1908, June 8. Alternative writ of mandamus exit returnable the sixteenth day of June, 1908.

1908, June 10. Answer and return by the Pennsylvania Railroad Company to petition and alternative writ of mandamus, respectively, filed.

1908, June 16. Stipulation of counsel filed.

1908, June 26. Argued.

1908, September 10. Opinion denying petition for mandamus filed.

1908, October 6. Dissenting opinion by Buffington, J., filed.

Order for judgment fied.

Assignments of error fled.

Petition for writ of error filed.

Order of court allowing writ of error filed.

Writ of error allowed and copy thereof lodged in clerk's office for adverse party.

Citation allowed and issued.

Citation returned "service accepted" and filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the Unted States to the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the United States of America ex rel. the Attorney-General of the United States, plaintiff, and the Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said United States of America ex rel. the Atorney-General of the United States as by his complaint appears. We being willing that error, if any hath been, should be duly cor-

rected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of October, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY B. ROBB,
Clerk of the Circuit Court of the United States.

Before DALLAS, C. J.
Allowed by THE COURT.
Attest:
HENRY B. ROBB, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein the United States of America ex rel. the Attorney-General of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, Judge of the Circuit Court of the United States, this 6th day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*
Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Defendant in Error.

4 No. 212. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

The United States of America ex rel. the Attorney-General of the United States *vs.* The Pennsylvania Railroad Company.	On information for writ of mandamus.

Petition.

Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 212.

The United States of America ex rel. the Attorney-General of the United States *vs.* The Pennsylvania Railroad Company.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the United States of America.

Petitioner respectfully states that he is the Attorney-General of the United States, and that, as such, he has been requested by the Interstate Commerce Commission to institute this suit against the Pennsylvania Railroad Company, a common carrier, as hereinafter particularly set forth, and to make application for a writ of mandamus as hereinafter prayed.

7 Petitioner therefore states that the said "The Pennsylvania Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of Pennsylvania, having its principal office in that State, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight. That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce,"

and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

Your petitioner further states, alleges, and charges against the defendant a failure, by the defendant, to comply with and a
8 violation, by the defendant, of that provision of an act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," as said act was amended by an act of the Congress of the United States approved June 29, 1906, to be found in the first section of said "Act to regulate commerce," as amended by said act of June 29, 1906, which said provision is as follows, that is to say: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," in this:

(1) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Summit Branch Mining Company and of the Susquehanna Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers
9 of said coal companies; that said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Luzerne, Northumberland, Dauphin, and Schuylkill, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, nearly all of whom are, in the case of each of said coal companies, as they have been for some time past, officers of the defendant; that by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the

mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(2) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of
10 the capital stock of the Mineral Railroad and Mining Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Luzerne, Northumberland, Dauphin, and Schuylkill, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors, nearly all of whom are, as they have been for some time past, officers of the defendant; that, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last mentioned coal company by officers of the defendant, as hereinbefore stated, the operations of said last mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant.

(3) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands
11 from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your petitioner unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(4) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being

transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlaw-
12 ful, being a failure to comply with, and a violation of, that provision of said "Act to regulate commerce" hereinbefore quoted.

(5) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, thus persisting in and continuing its failure to comply with, and its violation of, the provision of said "Act to regulate commerce" hereinbefore referred to and quoted.

(6) And so your petitioner alleges and says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is and will be "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and also such "article or commodity" owned by it, "in whole or in part," and is likewise "an article or commodity other than timber and the manufactured products thereof," in which it has and will have an "interest direct or indirect," and is not "an article or
13 commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier;" and your petitioner respectfully repeats and alleges that such transportation, and such continuing transportation, is and will be a failure by the defendant to comply with, and a violation by the defendant, of that provision of the law hereinbefore quoted.

Petitioner therefore prays that your honors grant an order for the issuance of an alternative writ of mandamus commanding and directing the defendant, "The Pennsylvania Railroad Company," to forthwith and hereafter comply with the provision of the law hereinbefore quoted by forthwith and hereafter ceasing and refraining from transporting in interstate commerce, as is hereinbefore alleged, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, or to appear before this court on some day to be named in said writ and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring the defendant, the said "The Pennsylvania Railroad Company," to forthwith and hereafter comply with said provision of the "Act to regulate commerce;" that said alternative writ of mandamus be issued and directed to the defendant, the said "The Pennsylvania Railroad Company;" and he further

prays for such other and general relief as he may be entitled to in the premises.

CHARLES J. BONAPARTE.
Attorney-General.

14 DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Aylett T. Robinson, a notary public in, for, and of the District of Columbia aforesaid, Charles J. Bonaparte, Attorney-General of the United States, and made oath, in due form of law, that he is the Attorney-General of the United States, that he is acquainted with the facts alleged in the foregoing petition, and that the same are true to the best of his knowledge, information, and belief.

CHARLES J. BONAPARTE.

Subscribed and sworn to before me this 4th day of June, in the year nineteen hundred and eight.

[NOTARY'S SEAL.] AYLETT T. ROBINSON,
Notary Public, D. C.

To "The Pennsylvania Railroad Company:"

You are hereby notified that I shall, on the fifth day of June, in the year nineteen hundred and eight, before the Honorable James B. Holland, one of the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, at his office in the city of Philadelphia, in said State of Pennsylvania, apply for alternative writ of mandamus, to be issued by the said Circuit Court against you, "The Pennsylvania Railroad Company," requiring you to forthwith and hereafter comply with that provision of the "Act to regulate commerce" as said act was amended by an act of the Congress of the United States approved June 29, 1906, which prescribes

15 "from and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the said State of Pennsylvania to the markets of any other State, any anthracite coal manufactured, mined, or produced by you, or under your authority, or which you may own in whole or in part, or in which you may have any interest direct or indirect, except such of said anthracite coal as may be necessary and intended for your use in the conduct of your business as a common carrier.

Dated this fourth day of June, in the year nineteen hundred and eight.

CHARLES J. BONAPARTE,
Attorney-General of the United States.

16 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Personally appeared before me, C. K. Klink, a notary public, L. Allison Wilmer, special assistant to the Attorney-General, and made oath that he, on the fifth day of June, in the year nineteen hundred and eight, delivered a copy of the foregoing notice to Mr. Robert W. de Forest, of counsel for the said "The Pennsylvania Railroad Company."

L. ALLISON WILMER,
Special Assistant to the Attorney-General.

Sworn to and subscribed before me, this fifth day of June, in the year nineteen hundred and eight.

[NOTARY'S SEAL.] C. K. KLINK,
Notary Public.

My commission expires April 18, 1911.

17 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 212.

THE UNITED STATES OF AMERICA EX REL. The Attorney-General of the United States
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Before HOLLAND, J.

On motion in behalf of Charles J. Bonaparte, Attorney-General of the United States, on petition this day filed praying for alternative writ of mandamus to issue against "The Pennsylvania Railroad Company" requiring it to forthwith and hereafter comply with that provision of the "Act to regulate commerce" as amended by an act of the Congress of the United States approved June 29, 1906, which prescribes "from and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured
18 products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the State of Pennsylvania, to the markets of other States any anthracite coal manufactured,

mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such of said anthracite coal as may be necessary and intended for its use in the conduct of its business as a common carrier:

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition.

BY THE COURT.

Attest:

GEORGE BRODBECK, *Deputy Clerk.*

24 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA EX REL. Attorney-General, *vs.* P. R. R. Co.	April session, 1908. No. 212.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for said Defendant.

To Clerk of said Court.

(Endorsed:) U. S. C. C., E. D. of Penna. U. S. of America ex rel. Attorney-General, v. P. R. R. Co. April session, 1908. No. 212. Order for appearance. Filed Jun-5, 1908. Henry B. Robb, clerk, by L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

25 No. 212. April sessions, 1908.

In the Circuit Court of the United States, Eastern District of Pennsylvania.

Proceeding for mandamus by petition, alternative writ awarded.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-General of the United States, *vs.* THE PENNSYLVANIA RAILROAD COMPANY.	

Answer and return by the Pennsylvania Railroad Company to the petition and alternative writ of mandamus, respectively.

FRANCIS I. GOWEN,
GEORGE V. MASSEY,
Attorneys for the Pennsylvania Railroad Company, the Defendant.

Filed Jun. 10, 1908. Henry B. Robb, clerk. By L., deputy clerk.

27 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States *vs.* THE PENNSYLVANIA RAILROAD COMPANY.	April sessions, 1908. No. 212.

Answer of the Pennsylvania Railroad Company.

The Pennsylvania Railroad Company, the defendant in the above-entitled action, answering the allegations and averments of the petition upon which the alternative writ of mandamus issued, says:

1. It admits that it is a corporation created, organized, and existing under the laws of the State of Pennsylvania and that its principal office is located in the city of Philadelphia, in that State. It avers that it was incorporated by and duly organized under an act of the said State of Pennsylvania entitled "An act to incorporate the Pennsylvania Railroad Company," approved April 13, 1846, and that it is duly possessed of and may lawfully exercise all and every the corporate rights, powers, privileges, and franchises mentioned in and conferred by the said act, and by divers other acts supplementary to and amendatory thereof, subsequently from time to time enacted,

28 and also an act entitled "An act for the sale of the main line of public works," approved May 16, 1857, to all of which it prays leave to refer with the same force and effect as if the same were herein set out at length.

In addition to the powers conferred in and by the said aforementioned acts this defendant avers that it has been, and still is, possessed of all the powers, privileges, and rights conferred by two general statutes of the said State, entitled, respectively, "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities, and fixing the time for holding elections for directors," approved March 31, 1868, and "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth," approved April 15, 1869, to each of which acts it prays leave to refer at the hearing of this cause as fully to all intents and purposes as if the same were herein set forth at length.

2. It admits that it is now, and has been for many years past, engaged in operating lines of railroad in the States of Pennsylvania and New Jersey, and also a line of railroad in the State of New York, and that prior to the first day of May, 1908, it was engaged as a common carrier, within the meaning of the act to regulate commerce, in interstate transportation, and in such transportation has, inter alia, for a long time past transported on and over its lines of railroad anthracite coal from mines within the State of Pennsylvania to markets in other States, and that it is still engaged in such transportation.

3. It admits that it is the owner of the entire capital stock—consisting of twenty-one thousand three hundred and sixty-eight (21,368) shares, of the par value of one hundred dollars ($100), and aggregating at such par value two million one hundred and thirty-six thousand eight hundred dollars ($2,136,800)—of the Susquehanna Coal Company, a corporation of the State of Pennsylvania, created
29 and organized under a special statute of said State, entitled "An act to incorporate the Pittston Railroad and Coal Company," approved April 11th, 1867, and by virtue of said act and two additional acts approved, respectively, February 24th, 1869, and June 14th, 1873, authorized to acquire, own, and operate coal lands in the county of Luzerne, in said State; that this defendant, on the thirty-first day of December, 1873, acquired ten thousand (10,000) shares of the said coal company's stock—the whole whereof then issued and outstanding was fifteen thousand (15,000) shares—and at divers times subsequently, and until and inclusive of the fifth day of January, 1886, from time to time made purchases and acquisition of the additional shares.

This defendant also admits that it is the owner of the whole capital stock—consisting of five hundred (500) shares, of the par value of fifty dollars ($50) each, and aggregating at such par value twenty-five thousand dollars ($25,000)—of the Summit Branch Mining Company, a coal mining corporation duly constituted under the laws of the State of Pennsylvania by the purchasers at judicial sale of the corporate property and franchises of the Summit Branch Coal Company, which latter was likewise a corporation duly constituted under the laws of the State of Pennsylvania by the purchasers at judicial sale of the corporate property and franchises of the Summit Branch Railroad Company, and the said Summit Branch Railroad Company was duly constituted under and by virtue of "An act to incorporate the Summit Branch Railroad Company in Dauphin and Schuylkill counties," approved March 20th, 1846, and several supplements thereto, approved, respectively, February 12th, 1850, March 30th, 1853, and March 23rd, 1860, and was possessed of the corporate rights, privileges, and franchises conferred by said several acts, as well as by an act entitled "An act relating to the Summit Branch and Millersburg and Rousch Gap Railroad companies," approved March 1st, 1866. This defendant became the owner, in 1871, of shares of the capital stock of said Summit Branch Railroad Company aggre-
30 gating at their par value one million two hundred and fifty-two thousand four hundred dollars ($1,252,400), and subsequently and until and inclusive of the year 1899 from time to time made purchases of additional shares thereof. That the said last-mentioned coal company is authorized to acquire, by purchase or lease, coal lands in the counties of Dauphin and Schuylkill, in the said State of Pennsylvania, and has acquired such lands, which are principally situated and operated in the said county of Dauphin.

This defendant further admits that it is the owner of one thousand six hundred and sixty-seven (1,667) shares, out of a total of five

thousand and one (5,001) shares issued and outstanding, of the capital stock of the Mineral Railroad and Mining Company, also a corporation of the State of Pennsylvania, created by and under two special statutes of said State, to wit, "An act to incorporate the Mineral Railroad and Mining Company" (Public Laws, 1865, page 959) and "An act to authorize the Mineral Railroad and Mining Company to lease certain coal lands," approved April 1st, 1872; and that said last-mentioned company is authorized to acquire, own, and operate coal lands in the county of Northumberland, in said State.

This defendant further states and avers that it became the lawful owner of the shares of each of the said three coal companies, as hereinabove stated, many years prior to the enactment of the act of Congress entitled "An act to amend an act to regulate commerce,, approved February 1st, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906.

4. This defendant further admits that each of the above-mentioned coal companies holds, under conveyances and leases made long prior to the said first day of May, 1908, anthracite coal lands situate in what is known as the "anthracite coal regions" of Pennsylvania, and located in the counties, respectively, as hereinabove stated, and that said companies have been, from a date long prior to the
31 said first day of May, 1908, engaged in mining anthracite coal thereon and therefrom, such mining operations being carried on under the immediate and direct control of the executive officers of the respective companies, these, in their turn, being subject to the supervisory power and control vested in the boards of directors of the said companies by their respective charters.

The actual operations of the said coal companies, in so far as these relate to or have to do with the mining, shipping, selling, and marketing of the coal mined by the said companies, respectively, are, as this defendant is informed and believes and so avers, directed and controlled by the president and vice-president of said companies, and the officers and agents subordinate to and appointed by them, and this defendant avers that neither at the present time nor for many years past have either the said president or vice-president of said coal companies, or any of the subordinate officers or agents appointed by them, been an officer or agent of this company, or in any wise subject to the orders or directions of this defendant.

And this defendant admits that at the present time, and for many years past, a majority of the board of directors of each of the said coal companies have been either officers or directors of this defendant.

This defendant denies that because or by virtue of its ownership of the aforesaid shares of stock of the said several coal companies it has become the owner of the coal lands and coal mines, title to which is in the said companies respectively, or of the coal therein or mined therefrom, or that it has any interest in said lands, mines, or coal; or that by virtue of its ownership of the shares of stocks of the

said several coal companies and the voting power incident thereto in the election of the managers or directors of each of said companies, and such other officers (if any) as, under the charter of each company, are elected by the stockholders, the operations of said coal companies, or any of them, in the mining of anthracite coal, are being carried on by and under the authority of this defendant.

32 5. This defendant admits that from time to time since the first day of May, 1908, and at the present time anthracite coals produced from mines of the several coal companies heretofore mentioned—a portion whereof is sold before and a portion after the transportation thereof begins—have been transported and are still being transported at lawfully established schedule rates on and over its lines of railroad, and that a considerable portion—approximately sixty-five per centum (65%) of the coal so mined—is carried to different destinations outside the State of Pennsylvania, and that the transportation of such portion thereof by this defendant constitutes commerce between different States, and it also admits that the coal thus transported was not, and is not, necessary nor intended for the use of the defendant in the conduct of its business as a common carrier.

6. This defendant denies the correctness of the conclusions of law stated in paragraph 6 of the bill. Under advice of counsel, it denies that it results from its ownership of the shares of stock of the aforesaid coal companies that the anthracite coals mined or produced from the mines of said coal companies have been or are being mined or produced by it or under its authority, or that it has any interest, direct or indirect, therein, within the purview, meaning, and intent of the clause of the act of Congress approved June 29, 1906, which is referred to and set out in the said petition, but, on the contrary, it states and avers that it has, and can have, no interest or benefit in the operation of said companies other than that of receiving such portion of the clear profits of each as may be by the board of directors of each of said companies from time to time declared as dividends, and allotted to this defendant according to its ownership of the capital stock of each thereof.

7. This defendant admits that it is now engaged in the interstate transportation of anthracite coal mined by the aforesaid coal

33 companies, and that it is its purpose to continue such transportation unless it should be required to desist from the same by the order of this honorable court, but it denies that in so doing it is acting in violation of law.

8. This defendant admits that anthracite coal is an article or commodity other than timber and the manufactured products thereof, as averred in said petition, but it denies, under the advice of counsel, that any coal which it transports other than that which may be intended for its use in the conduct of its business as a common carrier, is either owned by it in whole or in part, or that it has any interest, direct or indirect, therein.

And this defendant, further answering, says that the mining and production of anthracite coal is confined to the State of Pennsylvania, as no deposits of this coal have as yet been found outside of the limits of that State, which at the present time are being worked. That the said coal is almost the exclusive domestic fuel for large portions of the States of New York, New Jersey, Delaware, Maryland, and for many of the New England States, and that the transportation of such coal into these States has been carried on for many years past.

That in the year 1907 more than sixty-eight million gross tons of anthracite coal were mined in the State of Pennsylvania, and that approximately forty-five million tons were transported to and consumed at points outside of the State of Pennsylvania. The anthracite coal has thus become a very considerable increment in interstate commerce, exceedingly important, and highly essential to the public welfare; and that any interference with or interruption of the movement of such coal to points of consumption outside the State would be a serious inconvenience and detriment to a large portion of the inhabitants of the States to which anthracite coal is now transported.

That a very large proportion of the anthracite coals produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined mar-
34 kets over the railroads of this defendant, and that many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic and transportation uses, both without and within the State of Pennsylvania.

9. This defendant, while insisting that the interstate transportation of coal by it, which has been mined or produced by the aforesaid coal companies, is not prohibited by the act of Congress approved June 29, 1906, further states and shows to the court that the clause of said act which it is averred it has violated because of the interstate transportation of such coal is violative of and repugnant to the Constitution of the United States in the following particulars:

(a) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the several coal companies hereinbefore mentioned: but, on the contrary, undertakes to absolutely prohibit transportation thereof, and therefore is not a "regulation" of interstate commerce, but a "prohibition" of such commerce; and consequently is not within the scope of the commerce clause of the Constitution.

(b) That the effect of the said clause will constitute a taking of the defendant's property, corporate rights, and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.

(c) That said clause is "class legislation," unduly and unjustly discriminative in its results in that it expressly permits railroad companies to transport in interstate commerce timber and the
35 manufactured products thereof, which may be manufactured or produced by any such company, or under its authority; or which it may own in whole or in part, or in which it may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "class legislation," in that it arbitrarily denies to one class of common carriers under the act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities, but imposes no such restriction or prohibition on other common carriers under said act and its amendments.

(*d*) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate, as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to such carriers to constitute a denial of the equal protection of the law.

And this defendant having fully answered all material allegations and averments contained in said petition and the alternative writ of mandamus awarded thereon prays that it may be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

THE PENNSYLVANIA RAILROAD COMPANY.

[SEAL.] By JAMES MCCREA, *President.*

Attest:

LEWIS NEILSON, *Secretary.*

FRANCIS I. GOWEN,
GEO. V. MASSEY,
Attorneys for the Pennsylvania Railroad Company, the Defendant.

36 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this ninth day of June, A. D. 1908, personally appeared before me, the undersigned, a notary public of the State of Pennsylvania, in the said county of Philadelphia, James McCrea, who having been by me duly sworn according to law, deposes and says that he is the president of The Pennsylvania Railroad Company, and that the facts set forth in the foregoing answer of said company are correctly and truly stated according to the best of his knowledge, information, and belief.

JAMES MCCREA.

Sworn to and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.

[SEAL.] A. J. COUNTY,
Notary Public.

Commission expires January 21st, 1909.

41 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April session, 1908. No. 212.

THE UNITED STATES OF AMERICA EX REL. The Attorney-General of the United States
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

It is stipulated and agreed between counsel in the above cause that its submission on petition and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purpose thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 212. April session, 1908. U. S. v. The Pennsylvania Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.

118 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. At law. No. 212.

UNITED STATES OF AMERICA
vs.
PENNSYLVANIA RAILROAD COMPANY.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon petition and

answer, the petition is refused and judgment is entered in favor of defendant.

By the Court.

Attest:
Henry B. Robb, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 212. U. S. v. Pennsylvania Railroad Company. Order directing judgment Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

119 No. 212. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

The United States of America ex rel. the Attorney-General of the United States
vs.
The Pennsylvania Railroad Company.

Now comes the plaintiff and, in connection with the petition for writ of error, assigns the following errors in the action and proceedings of the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled case, that is to say:

1. That the Circuit Court erred in denying the petition for writ of mandamus in this case.

2. That the Circuit Court erred in refusing to grant an order for the issuance of a peremptory writ of mandamus and for the relief prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States.

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
120 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the so-called "commodities clause."

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and as such exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions and therefore constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and as such is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law.

121 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said plaintiff and petitioner prays that the said judgment and order of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 212. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States v. The Pennsylvania Railroad Company. Assignment of errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

122 No. 212. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

And now comes the United States of America, on relation of Charles J. Bonaparte, Attorney-General of the United States, plaintiff herein, and says that on the sixth day of October, in the year

nineteen hundred and eight, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated October sixth, 1908.

123 (Endorsed:) U. S. C. C. E. D. of Penna. No. 212. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States *vs.* The Pennsylvania Railroad Company. Petition for writ of error. The clerk will please file within petition for writ of error, the assignment of errors herewith, and order of court allowing the writ when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

124 No. 212. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States
vs.
THE PENNSYLVANIA RAILROAD COMPANY.

Before DALLAS, C. J.

This sixth day of October, in the year nineteen hundred and eight, comes the plaintiff, by Charles J. Bonaparte, Attorney-General of the United States, and files herein and presents to the court a petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged; praying also that a transcript of the record, proceedings, and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

In consideration whereof the court does allow the writ of error as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 212. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States *v.* The Pennsylvania Railroad Company. Order allowing writ of error. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

125 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of The United States of America ex rel. the Attorney-General of the United States *v.* The Pennsylvania Railroad Company, No. 212, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

(Indorsement on cover:) File No. 21359. E. Pennsylvania C. C. U. S. Term No. 563. The United States of America ex rel. the Attorney-General of the United States, plaintiff in error, *vs.* The Pennsylvania Railroad Company. Filed October 10th, 1908. File No. 21359.

O

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 564.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

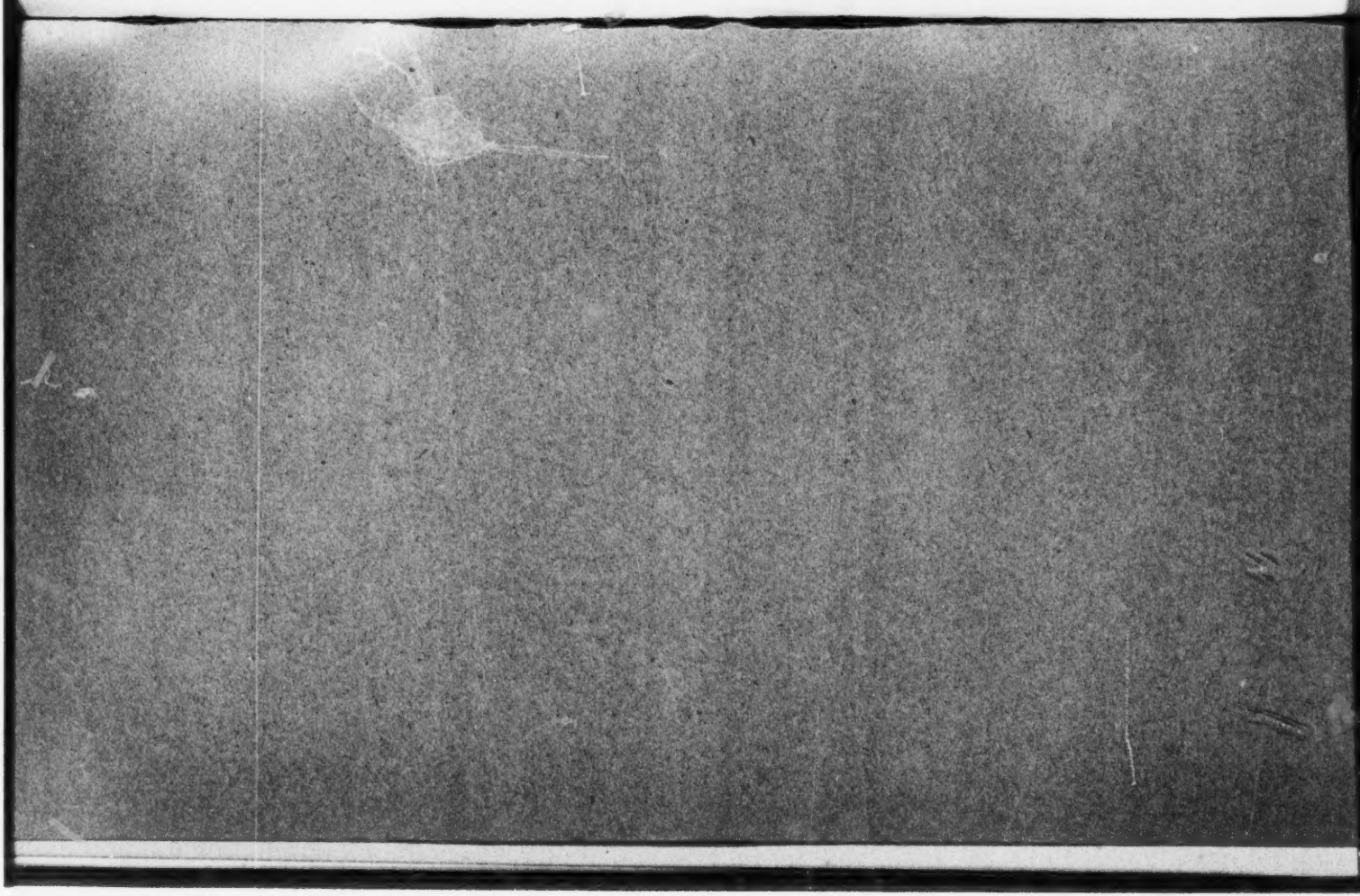
vs.

LEHIGH VALLEY RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21360)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 564.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Writ of error	2	1
Citation and service	3	2
Petition for mandamus	4	3
Notice of application for alternative writ of mandamus	16	8
Order to issue alternative writ of mandamus	19	9
Appearance for defendant	24	10
Answer	25	10
Exhibit A.—General consolidated mortgage, Lehigh Valley Railroad Company to Girard Trust Company, September 30, 1903	49	23
B.—Collateral trust agreement, Lehigh Valley Railroad Company with Girard Trust Company, November 1, 1905	143	83
Stipulation as to submission on petition and answer	160	91
Opinions: (omitted in printing)	161	....
Gray, J. (omitted in printing)	162	....
Dallas, J. (omitted in printing)	216	....
Buffington, J. (omitted in printing)	221	....
Judgment	237	92
Assignment of errors	238	92
Petition for writ of error	241	94
Order allowing writ of error	243	95
Clerk's certificate	244	95

61438—08——1

1 APRIL SESSION, 1908.

Charles J. Bonaparte, J. Whitaker Thompson.	THE UNITED STATES OF America ex rel. the Attorney-General of the United States	Mandamus.
214	*vs.*	
Robert W. de Forest, John G. Johnson.	LEHIGH VALLEY RAILROAD Company.	

1908, June 5. Petition for alternative mandamus filed.

1908, June 5. Copy of notice of application for writ of alternative mandamus and affidavit of service of notice filed.

1908, June 5. Order granting alternative writ of mandamus.

1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.

1908, June 9. Writ of alternative mandamus exit returnable the sixteenth day of June, 1908.

1908, June 13. Answer filed.

1908, June 16. Stipulation of counsel filed.

1908, June 26. Argued.

1908, September 10. Opinion denying petition for mandamus filed.

1908, October 6. Dissenting opinion by Buffington, J., filed.

Order for judgment filed.

Assignments of error filed.

Petition for writ of error filed.

Order of court allowing writ of error filed.

Writ of error allowed and copy thereof lodged in clerk's office for adverse party.

Citation allowed and issued.

Citation returned "service accepted" and filed.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you or some of you, between The United States of America ex rel. the Attorney-General of the United States, plaintiff, and Lehigh Valley Railroad Company, defendant, a manifest error hath happened, to the great damage of the said The United States of America ex rel. the Attorney-General of the United States as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid

in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United Sates should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the sixth day of October, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY B. ROBB,
Clerk of the Circuit Court of the United States.

Before Dallas, C. J.
Allowed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lehigh Valley Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein The United States of America ex rel. the Attorney-General of the United States is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge, of the Circuit Court of the United States, this 6 day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted:

JOHN G. JOHNSON,
Per J. H. BAYARD,
Attorney for Defendant in Error.

4 No. 214. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES

vs.

LEHIGH VALLEY RAILROAD COMPANY.

ON INFORMATION FOR WRIT OF MANDAMUS.

Petition.

Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

6 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
LEHIGH VALLEY RAILROAD COMPANY.
April sessions, 1908. No. 214.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The petition of Charles J. Bonaparte, Attorney-General of the United States, for and in behalf of the United States of America.

Petitioner respectfully states that he is the Attorney-General of the United States, and that, as such, he has been requested by the Interstate Commerce Commission to institute this suit against the Lehigh Valley Railroad Company, a common carrier as hereinafter particularly set forth, and to make application for a writ of mandamus as hereinafter prayed.

7 Petitioner, therefore, states that the said "Lehigh Valley Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of Pennsylvania, having its principal office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight. That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and

eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

Your petitioner further states, alleges, and charges against the defendant the failure, by the defendant, to comply with and a
8 violation, by the defendant, of that provision of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," as said act was amended by an act of the Congress of the United States, approved June 29, 1906, to be found in the first section of said "Act to regulate commerce," as amended by said act of June 29, 1906, which said provision is as follows, that is to say: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," in this:

(1) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lehigh Valley Coal Company and of Coxe Brothers & Co., Incorporated, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or
9 managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and a majority of the directors of each of said coal companies being officers or directors of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines,

and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

10 (2) That, apart from the coal lands, coal mines, and coal hereinbefore mentioned and described, the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of a large majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company and of the Locust Mountain Coal and Iron Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and all of the directors of each of said coal companies being officers, directors, or servants of the defendant, as they have been for a long time past. That, by virtue of the ownership of a majority

11 of the capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant practically owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and is, also, owner thereof in part, and, likewise, has an interest therein; and that, by virtue of the management of said coal companies by certain officers, directors, and servants of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(3) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Highland Coal Company, of the Packer Coal Company, and of the Temple Iron Company, corporations of the said State of Pennsylvania, which hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day

of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, the defendant being represented
12 on each and every of said boards of directors by one or more persons who is, or are, in each and every such case, an officer or director, or officers or directors, of the defendant, as they have been, respectively, for a long time past. That, by virtue of such stock ownership in each and every of said last-mentioned coal companies, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines of the three said last-mentioned coal companies and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal companies by directors one or more of whom is, or are, in each case, an officer, or officers, of the defendant, as hereinbefore stated, the operations of said last-mentioned coal companies, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(4) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your petitioner unknown; that such large quantity of
13 coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(5) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is unlawful, being a failure to comply with, and a violation of, that provision of said "Act to regulate commerce" hereinbefore quoted.

(6) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars

of the defendant for transportation in interstate commerce, as
14 hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, thus persisting in, and continuing, its failure to comply with, and its violation of, the provision of said "Act to regulate commerce" hereinbefore referred to and quoted.

(7) And so your petitioner alleges and says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier;" and your petitioner respectively repeats and alleges that such transportation, and such continuing transportation, is, and will be, a failure, by the defendant, to comply with,
15 and a violation, by the defendant, of that provision of the law hereinbefore quoted.

Petitioner therefore prays that your honors grant an order for the issuance of an alternative writ of mandamus commanding and directing the defendant, "Lehigh Valley Railroad Company," to forthwith and hereafter comply with the provision of the law hereinbefore quoted by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, as is hereinbefore alleged, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, or to appear before this court on some day to be named in said writ, and show cause, if any there be, why a peremptory writ of mandamus should not issue requiring the defendant, the said "Lehigh Valley Railroad Company," to forthwith and hereafter comply with said provisions of the "Act to regulate commerce;" that said alternative writ of mandamus be issued and directed to the defendant, the said "Lehigh Valley Railroad Company;" and he further prays for such other and general relief as he may be entitled to in the premises.

CHARLES J. BONAPARTE,
Attorney-General.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, Aylett T. Robinson, a notary public in, for, and of the District of Columbia aforesaid, Charles J. Bonaparte, Attorney-General of the United States, and made oath,

16 in due form of law, that he is the Attorney-General of the United States, that he is acquainted with the facts alleged in the foregoing petition, and that the same are true to the best of his knowledge, information, and belief.

CHARLES J. BONAPARTE.

Subscribed and sworn to before me this 4th day of June, in the year nineteen hundred and eight.

AYLETT T. ROBINSON,
Notary Public, D. C.

[NOTARY'S SEAL.]

To Lehigh Valley Railroad Company:

You are hereby notified that I shall, on the fifth day of June, in the year nineteen hundred and eight, before the Honorable James B. Holland, one of the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, at his office in the city of Philadelphia, in said State of Pennsylvania, apply for alternative writ of mandamus, to be issued by the said Circuit Court against you, Lehigh Valley Railroad Company, requiring you to forthwith and hereafter comply with that provision of the act to regulate commerce, as said act was amended by an act of the Congress of the United States approved June 29, 1906, which prescribes: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or
17 the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the said State of Pennsylvania to the markets of any other State, any anthracite coal manufactured, mined, or produced by you, or under your authority, or which you may own in whole or in part, or in which you may have any interest, direct or indirect, except such of said anthracite coal as may be necessary and intended for your use in the conduct of your business as a common carrier.

Dated this fourth day of June, in the year nineteen hundred and eight.

CHARLES J. BONAPARTE,
Attorney-General of the United States.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Personally appeared before me, C. K. Klink, a notary public, L. Allison Wilmer, special assistant to the Attorney-General, and made oath that he, on the fifth day of June, in the year nine-
18 teen hundred and eight, delivered a copy of the foregoing notice to Mr. Robert W. de Forest, of counsel for the said Lehigh Valley Railroad Company.

L. ALLISON WILMER,
Special Assistant to the Attorney-General.

Sworn to and subscribed before me this fifth day of June, in the year nineteen hundred and eight.

C. K. KLINK,
Notary Public.

[NOTARY'S SEAL.]

My commission expires April 18, 1911.

19 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, EX REL. The Attorney-General of the United States *vs.* LEHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. No. 214.

Before HOLLAND, J.

On motion in behalf of Charles J. Bonaparte, Attorney-General of the United States, on petition this day filed praying for alternative writ of mandamus to issue against "Lehigh Valley Railroad Company," requiring it to forthwith and hereafter comply with that provision of the "Act to regulate commerce," as amended by an act of the Congress of the United States approved June 29, 1906, which prescribes: "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other
20 State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," by forthwith and hereafter ceasing and refraining from transporting, in interstate commerce, from the mines and mining lands in the State of Pennsylvania to the markets of other States, any anthracite coal manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct, or indirect, except such of said anthracite coal as may

be necessary and intended for its use in the conduct of its business as a common carrier:

It is ordered that the clerk of this court issue the alternative mandamus according to the prayer of said petition.

BY THE COURT.

Attest:
GEORGE BRODBECK, *Deputy Clerk.*

24 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA EX REL. Attorney-General *vs.* LEHIGH VALLEY R. R. Co. } April session, 1908. No. 214.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FOREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Said Defendant.

TO CLERK OF SAID COURT.

(Endorsed:) U. S. C. C., E. D. of Penna. U. S. of America ex rel. Attorney-General v. Lehigh Valley Railroad Company. April session, 1908. No. 214. Order for appearance. Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forest, John G. Johnson, attorneys for defendant.

25 214. April sess., 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA EX REL. THE Attorney-General of the United States *vs.* LEHIGH VALLEY RAILROAD COMPANY. Mandamus proceeding. April sessions, 1908.

Answer of Lehigh Valley Railroad Company.

J. F. SCHAPERKOTTER.
Solicitor for Defendant,
143 Liberty street, New York City, N. Y.

FRANK H. PLATT,
Of Counsel.

Filed Jun' 13, 1908. Henry B. Robb, clerk. By L., deputy clerk.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

United States of America ex rel. the Attorney-General of the United States *vs.* Lehigh Valley Railroad Company.	Mandamus proceeding. April sessions, 1908. No. 214.

The defendant, Lehigh Valley Railroad Company, for answer and return to the petition and alternative writ of mandamus herein, or to so much thereof as this defendant is advised it is material or necessary for it to answer, respectfully shows:

1. This defendant admits that it is a railroad corporation organized and existing under certain laws of the Commonwealth of Pennsylvania, hereinafter specified, having its principal office at the city of Philadelphia, in said Commonwealth, and that it now is, and since long before May 1, 1908, has been, a common carrier by railroad of passengers and property, and engaged in interstate commerce, including the transportation in interstate commerce of anthracite coal from the mines and mining lands in the State of Pennsylvania to the markets of other States.

2. Said defendant was incorporated by the name of Delaware, Lehigh, Schuykiil & Susquehanna Railroad Company on September 20, 1847, under a statute of the Commonwealth of Pennsylvania enacted April 21, 1846 (P. L., 422), entitled "An act to authorize the governor to incorporate the Delaware, Lehigh, Schuylkill and Susquehanna Railroad Company," and by a supplement to the statute aforesaid enacted January 7, 1853 (P. L., 1), the name of this defendant was changed to "Lehigh Valley Railroad Company."

3. Said statute of April 21, 1846, authorized this defendant to construct and maintain a railroad in the Commonwealth of Pennsylvania by certain routes and locations therein specified, and conferred upon the defendant certain powers, privileges, and franchises therein enumerated and expressed. The routes and location of said railroad and the corporate powers, privileges, and franchises of the defendant were thereafter extended and amended by statutes of the Commonwealth of Pennsylvania, supplementary to said act of incorporation, enacted, respectively, March 20, 1849 (P. L., 203); April 18, 1855 (P. L., 253); March 8, 1856 (P. L., 96); April 16, 1857 (P. L., 209); April 3, 1866 (P. L., 419), and April 2, 1872 (P. L., 739), and this defendant now possesses all the powers, privileges, and franchises conferred by said statutes.

4. On July 8, 1864, under the laws of the Commonwealth of Pennsylvania in such case made and provided the Beaver Meadow Railroad and Coal Company was duly consolidated with and merged into this defendant, and this defendant thereupon acquired all the property, rights, and franchises of said Beaver Meadow Railroad and Coal Company, including the right to mine, transport, and vend coal referred to in the next succeeding paragraph hereof.

29 5. The Beaver Meadow Railroad and Coal Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under and pursuant to the statute of said Commonwealth enacted April 7, 1830 (P. L., 392), entitled "An act to incorporate the Beaver Meadow Railroad and Coal Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad and the carrying on of the business of mining, transporting, and vending coal. The routes and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter amended and extended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted, respectively, April 4, 1831 (P. L., 494); January 29, 1833 (P. L., 18); April 15, 1835 (P. L., 336); December 22, 1836 (P. L. [1837], 5); February 18, 1848 (P. L., 62); March 20, 1849 (P. L., 185); March 15, 1853 (P. L., 186), and April 15, 1857 (P. L., 189).

6. On August 5, 1864, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Penn Haven and White Haven Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

7. The Penn Haven and White Haven Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under a statute of said Commonwelath enacted May 4, 1857 (P. L., [1859], 786), entitled "An act to incorporate the Penn Haven and White Haven Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad; and the routes and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter extended and amended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted, respectively, on April 11, 1859 (P. L., 474); April 2, 1860 (P. L., 751), and February 16, 1863 (P. L., 47).

30 8. On June 20, 1866, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Lehigh and Mahanoy Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

9. The Lehigh and Mahanoy Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, organized on November 11, 1862, under a statute of said Commonwealth enacted April 8, 1861 (P. L., 259); and upon the organization of said corporation the franchises of the Quakake Railroad Company were transferred and conveyed to it. Said Quakake Railroad Company was a corporation of the Commonwealth of Pennsylvania, organized under a statute of said Commonwealth enacted April 25, 1857 (P. L., 324), entitled "An act to incorporate the Quakake Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad; and the routes and location of said railroad were thereafter extended and amended by a statute of

said Commonwealth supplementary to said act of incorporation enacted March 22, 1859 (P. L., 200).

10. On May 25th, 1868, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Hazleton Railroad Company was consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation, including the right to mine, transport, and vend coal referred to in the next succeeding paragraph hereof.

11. The Hazleton Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, originally incorporated under the name of the Hazleton Coal Company, under a statute of said Commonwealth enacted March 18, 1836 (P. L., 129), entitled "An act to incorporate the Hazleton Coal Company," with certain
31 powers, privileges, and franchises therein specified for the purposes of the mining of coal and the transacting of the usual business of companies engaged in the mining, transporting to market, and selling of coal and other products of coal mines, and constructing a railroad from any point on its lands near the headwaters of Cranberry and Hazel Creeks to intersect the Beaver Meadow Railroad. The routes and location of the said railroad and the powers, privileges, and franchises of said corporation were thereafter amended and extended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted, respectively, March 8, 1839 (P. L., 49); April 5, 1849 (P. L., 403); March 18, 1851 (P. L., 190; January 12, 1856 (P. L., 2); March 19, 1863); P. L., 170); March 9, 1865 (P. L., 299), and March 29, 1867 (P. L., 626). Pursuant to a statute of said Commonwealth enacted March 9, 1865 (P. L., 299), the name of said corporation was duly changed to the Hazleton Railroad Company."

12. On June 16, 1868, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Lehigh Luzerne Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

13. The Lehigh Luzerne Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under the name of Jeddo and Carbon County Railroad Company under a statute of said Commonwealth enacted March 23, 1854 (P. L. [1856], 605), entitled "An act to incorporate the Jeddo and Carbon County Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad, and the route and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter extended and amended by statutes of the Commonwealth of
32 Pennsylvania, supplementary to said act of incorporation, enacted, respectively, March 16, 1855 (P. L., 545); February 12, 1856 (P. L., 41), and April 8, 1857 (P. L., 184); and by and pursuant to said supplementary statutes the name of said corporation was changed to "Lehigh Luzerne Railroad Company."

14. Under and pursuant to the statutory authority hereinbefore set forth, various lines of railway were constructed by defendant and its constituent companies aforesaid, and this defendant now owns absolutely and operates, and for many years has held in absolute ownership and operated, lines of railway in the Commonwealth of Pennsylvania, either constructed by itself or acquired from its constituent companies by virtue of the consolidations and mergers hereinbefore specified, to wit, from Phillipsburg, New Jersey, up the valleys of the Lehigh and Susquehanna to Wilkes-Barre, Pennsylvania, with various branches and divisions traversing the counties of Northhampton, Lehigh, Carbon, Luzerne, Schuylkill, Columbia, and Northumberland of said Commonwealth.

15. This defendant has also at various times acquired ownership of the entire capital stock of certain other railroad corporations which are now and long have been operated by the defendant as a part of its railroad system, to wit: (1) Lehigh Valley Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, and owning a line of railway from Phillipsburg, New Jersey, to Jersey City, New Jersey, with various branches therefrom; (2) Pennsylvania & New York Canal & Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Wilkes-Barre, Pennsylvania, up the valley of the Susquehanna to the boundary line between the State of New York and the Commonwealth of Pennsylvania, with various branches therefrom; (3) Lehigh Valley Rail Way Company, a corporation organized
33 and existing under the laws of the State of New York, and owning a line of railway connecting with the line of the Pennsylvania & New York Canal & Railroad Company as aforesaid at the boundary line between the State of New York and the Commonwealth of Pennsylvania and running thence to Buffalo, New York, with branches and divisions traversing all the territory of the central portion of the State of New York; (4) Montrose Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Tunkhannock, Pennsylvania, to Montrose, Pennsylvania; (5) Schuylkill & Lehigh Valley Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Lizard Creek Junction, Pennsylvania, to Blackwood, Pennsylvania; (6) Delaware, Susquehanna & Schuylkill Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning lines of railway from Drifton to Sheppton and from Oneida to Derringer, Pennsylvania; (7) Easton & Northern Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and owning lines of railway from Easton to Belfast, Pennsylvania, and Bushkill Station to Thirteenth Street Junction, Easton, Pennsylvania; (8) Loyalsock Railroad Company, a corporation organized and existing under the laws of the Commonwealth of

Pennsylvania and owning lines of railway from Port Bowkley to Bernice, Pennsylvania, and branches.

16. This defendant also leases and operates the lines of railway of (1) the State Line & Sullivan Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning lines of railway from Monroeton, Pennsylvania, to Bernice, Pennsylvania; and (2) the Lehigh and New York Railroad Company, a corporation organized and existing
34 under the laws of the State of New York, and owning lines of railway from the Pennsylvania State line, at or near Sayre, Pennsylvania, to North Fair Haven, New York.

17. The railway lines constituting the defendant's railway system as aforesaid aggregate 1,390.75 miles in length, and constitute and are operated as continuous transportation routes between the States of New Jersey, Pennsylvania and New York. Said lines of this defendant intersect and connect with lines of various other railroad companies and with steamship lines on the Great Lakes and other waterways, and in conjunction with such connecting carriers this defendant transports commodities consigned from and destined to points in many other States and Territories of the United States.

18. By a statute of the Commonwealth of Pennsylvania, duly enacted on March 31, 1868 (P. L., 50), entitled "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities," etc., it was provided that it should be lawful for any and all companies incorporated or organized under the laws of said Commonwealth, including those authorized thereby to transport merchandise or other property, to invest their surplus or other funds or earnings in any good stocks or securities, and to sell and transfer the same and to reinvest the proceeds of such sales in securities or stocks of like kind.

19. By a statute of the Commonwealth of Pennsylvania, duly enacted on the 15th day of April, 1869 (P. L., 31), entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber and other material interests of this Commonwealth," it was provided that it should be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of said Commonwealth by the purchase of their capital stock and bonds, or either of them, or by guarantee of or agreement to purchase the principal and interest or either of such bonds.

35 20. This defendant admits that it is now and has been for many years past the owner of shares of the capital stock of the coal companies named in the petition herein, and alleges in regard thereto as follows: This defendant now owns the entire capital stock of the Lehigh Valley Coal Company. Said Lehigh Valley Coal Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, formed by the consolidation and merger of the Luzerne Coal & Iron Company and the Green Land

Company, and acquired and now owns all the rights, privileges, and franchises of said Luzerne Coal & Iron Company and said Green Land Company. In or prior to 1872 this defendant had acquired the entire capital stock of said Luzerne Coal & Iron Company and of said Green Land Company, and owned the same at the time of said consolidation, and in said consolidation exchanged such holdings for the stock of the Lehigh Valley Coal Company. Thereafter the Mineral Spring Coal Company and the Delano Land Company were consolidated and merged into the Lehigh Valley Coal Company, and the said Lehigh Valley Coal Company acquired all the rights, privileges, and franchises of said companies. The Green Land Company aforesaid was duly organized and existed as a corporation under and pursuant to a statute of the Commonwealth of Pennsylvania, enacted on the 29th day of May, 1871 (P. L. [1872] 1351), entitled "An act to incorporate the Green Land Company," and a supplement thereto enacted on April 2, 1872 (P. L., 737). The Luzerne Coal & Iron Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted on April 11, 1868 (P. L., 828), entitled "An act to incorporate the Luzerne Coal and Iron Company." The Delano Land Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted on the 15th day of March,
36 1872 (P. L., 388), entitled "An act to incorporate the Delano Land Company," etc. The Mineral Spring Coal Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted April 3, 1866 (P. L. [1867] 1400), entitled "An act to incorporate the Mineral Spring Coal Company." This defendant now owns and since the year 1872 has owned the majority and control of the capital stock of the New York & Middle Coal Field Railroad & Coal Company. Said New York & Middle Coal Field Railroad & Coal Company is a corporation originally organized and existing under the laws of the Commonwealth of Pennsylvania, under the name of The Coal Run Improvement Company, under and pursuant to a statute of said Commonwealth, enacted on March 11, 1851 (P. L., 143), entitled "An act to incorporate The Coal Run Improvement Company," and supplements to said statute enacted, respectively, March 2, 1853 (P. L., 136); May 2, 1855 (P. L., 399); April 8, 1864 (P. L., 300); April 17, 1866 (P. L., 1000); February 15, 1872 (P. L., 111); March 7, 1872 (P. L., 250), and reincorporated and since existing under and pursuant to the laws of the Commonwealth. This defendant owns the entire capital stock of Coxe Brothers & Company (Incorporated). Said Coxe Brothers & Company (Incorporated), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. This defendant owns a minority interest in the capital stock of the Highland Coal Company. Said Highland Coal Company is a corporation organized and existing under a statute of the Commonwealth of Pennsylvania, enacted on the 18th day of July, 1863. This defendant now owns and since the year 1869 has owned a majority and control of the capi-

tal stock of the Locust Mountain Coal & Iron Company. Said Locust Mountain Coal & Iron Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania,
37 originally organized under a statute of said Commonwealth, enacted April 5, 1842 (P. L., 240), entitled "An act authorizing Jacob Sorrick and Michael Hettrick, trustees of the Lutheran Congregation of Clover Creek, Huntington County, to sell and convey certain real estate and for other purposes," and supplements to said statute enacted respectively March 31, 1853 (P. L., 265); May 3, 1864 (P. L., 710); and April 13, 1868 (P. L., 906). This defendant owns a minority interest in the capital stock of the Packer Coal Company. Said Packer Coal Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. This defendant owns a minority interest in the capital stock of the Temple Iron Company. Said Temple Iron Company is a corporation of the Commonwealth of Pennsylvania, organized in 1873, under a statute of said Commonwealth, enacted March 21, 1873 (P. L., 28), and acts supplementary thereto and amendatory thereof.

21. The shares of the capital stock of the aforesaid Lehigh Valley Coal Company; New York & Middle Coal Field Railroad & Coal Company; Coxe Brothers, Incorporated; Highland Coal Company; Locust Mountain Coal & Iron Company; Packer Coal Company; and Temple Iron Company, now owned by this defendant, were acquired and are owned and held by it under the authority therefor conferred by the various statutes of the Commonwealth of Pennsylvania hereinbefore mentioned.

22. The aforesaid Lehigh Valley Coal Company; New York & Middle Coal Field Railroad & Coal Company; Coxe Brothers & Company, Incorporated; Highland Coal Company; Locust Mountain Coal & Iron Company; Packer Coal Company; and Temple Iron Company, under the authority of their respective charters and the provisions of the several statutes under which they respectively exist, are empowered to mine, ship, and sell coal; and defendant admits that said companies, pursuant to the powers so conferred upon
38 them have acquired by purchase, lease, or otherwise, coal lands and coal mines and interests therein in the Commonwealth of Pennsylvania, and that said companies or their lessees are engaged in the mining, production and sale of anthracite coal within the Commonwealth of Pennsylvania, and shipping such coal by the lines of this defendant from various points within the Commonwealth of Pennsylvania to market in other States for sale therein.

23. This defendant admits that as the owner of the entire capital stock of said Lehigh Valley Coal Company and of said Coxe Brothers & Company, Incorporated, and as the owner of a majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company and of the Locust Mountain Coal & Iron Company, it controls and has been controlling the election of the directors or managers of said coal companies; that the coal lands and coal mines of said companies have been continuously since long before the 1st

day of May in the year 1908, and now are, operated in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies; that the person who has been and is the president of each of said coal companies is, and for a long time past has been, the president of the defendant; that the same persons who are and have been a majority of the directors of each of said coal companies are, and for a long time past have been, officers or directors of this defendant; that the coal lands and coal mines of the said Highland Coal Company, Packer Coal Company, and Temple Iron Company have been continuously since long before the 1st day of May in the year 1908, and now are, operated in the mining of anthracite coal under the direct management of their respective boards of directors; and that this defendant is, and for a long time past has been, represented upon the board of directors of said Highland Coal Company, Packer Coal Com-
39 pany, and Temple Iron Company by one or more persons who are also officers or directors of this defendant; and defendant further admits that at the present time, and continuously since the 1st day of May in the year 1908, some of the anthracite coal mined by the aforesaid coal companies, or by their lessees, has been and is being loaded at or near the mines and lands from which said coal is produced, upon the cars of this defendant for transportation in interstate commerce, and that a large quantity of such coal has been and is being carried and transported in the cars of this defendant over and upon the railroad of this defendant and its branches, connections, and lines operated as a part of its railway system, through and over the territory of the Commonwealth of Pennsylvania, by continuous carriage in interstate commerce across the boundary line of said Commonwealth to and into the States of New York, New Jersey, and other States, for sale and delivery at the markets thereof, and that a large quantity of such anthracite coal so transported as aforesaid was not and is not necessary and intended for the use of this defendant in the conduct of its business as a common carrier; and defendant further admits that it is the purpose of this defendant to continue the transportation of said coal as aforesaid.

24. This defendant denies that its ownership in whole or in part of the capital stock of the various coal companies as hereinbefore set forth constitutes the defendant the owner of the coal lands and coal mines and the anthracite coal therein or thereupon and mined or being mined therefrom, or constitutes any interest of this defendant, direct or indirect, therein within the meaning of the 5th paragraph of section 1 of "An act to regulate commerce," approved February 4, 1887, as amended by the act of Congress approved June 29, 1906; and this defendant further denies that the participation of certain persons who are also officers and directors of this defendant in the management of the said coal companies as aforesaid constitutes
40 the operations of said coal companies in the mining and delivering of anthracite coal a mining or production of such

anthracite coal by this defendant or under its authority within the meaning of the act of Congress aforesaid.

25. The capital stock of the Lehigh Valley Coal Company and of the New York & Middle Coal Field Railroad & Coal Company owned by this defendant as aforesaid was transferred and assigned to and is now held by the Girard Trust Company, as trustee, under the general consolidated mortgage executed by this defendant, dated September 30, 1903, for the purposes and upon the terms expressed in said mortgage, a copy of which is hereto annexed, marked Exhibit "A," and made a part of this answer. Bonds to the amount of $23,539,000 have been issued by this defendant under said mortgage and are now outstanding in the hands of the public.

26. The capital stock of Coxe Brothers & Company, Incorporated, owned by this defendant as aforesaid, was transferred and assigned to, and is now held by the Girard Trust Company, as trustee, under the collateral trust agreement, executed by this defendant, dated November 1, 1905, for the purposes and upon the terms expressed in said agreement, a copy of which is hereto annexed, marked Exhibit " B," and made a part of this answer. Bonds to the amount of $18,000,000 have been issued by this defendant under said agreement and are now outstanding in the hands of the public.

27. The anthracite coal fields of Pennsylvania contain the only large, extensively mined, and commercially valuable deposits of anthracite coal known in the world, and are divided geographically into three regions, commonly known respectively as the Wyoming, Lehigh, and Schuylkill regions, all located in the eastern portion of the said Commonwealth. The anthracite coal produced from these coal fields is a commodity of use and necessity as fuel for
41 domestic, manufacturing, and other purposes, the annual consumption of anthracite coal from the said Pennsylvania coal fields being estimated at 12,589,722 tons in the Commonwealth of Pennsylvania and 52,183,601 tons in other States.

28. The gross earnings of this defendant during its last fiscal year were $36,068,431, of which $15,110,899, or nearly 42% of such gross earnings, was derived from the freight rates for the transportation of coal, and $14,996,672 was derived from the freight rates for the transportation of other commodities. During the said period, the coal transported by this defendant represented over 51% of the entire tonnage of freight transported by this defendant. During the said period the net earnings of this defendant, after the payment of operating expenses, were $13,954,178, and its net income, after deducting the expenditures for interest on funded debt and other obligations, rentals, taxes, and improvements, was $6,024,953. Of the aforesaid amount of gross earnings derived from the transportation of coal, the greater part thereof was received by this defendant for the transportation of coal for the various coal companies whose stock is in whole or in part owned by defendant as aforesaid. This company transports annually in interstate commerce upwards of 7,600,000 tons of anthracite coal shipped by the said coal companies, whose stock is

owned by this defendant in whole or in part, and transports anually for said coal companies wholly within the State of Pennsylvania upwards of 1,500,000 tons. In addition to the portion of the defendant's earnings directly derived from the transportation of coal for said coal companies, a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies. If this defendant were deprived of the earnings derived from the transportation of the coal of said coal companies, its business could not be continued except at a net loss of many millions of dollars per annum.

42 29. The railroad lines of this defendant intersect the Wyoming coal region, reach all parts of the Lehigh coal region, and extend into the eastern portion of the Schuylkill coal region, and the mines and collieries of the aforesaid coal companies whose stock is owned by this defendant in whole or in part are all located in the portions of said coal fields tributary to the lines of railroad of this defendant. Many of the mines and collieries of the said coal companies are so situated that no means of transporting their product to market exists or can practically be made available, except the railroad lines of this defendant, and many other mines and collieries of said coal companies are so situated that the natural, direct, and more economical route, although not the exclusive route, for the transportation of their product to market is over the lines of the defendant. The value of the stocks of said companies is dependent upon the right and ability to transport the coal owned or produced by them to the markets in other States, and such stocks would be rendered of little or no value if this defendant should be prohibited from transporting the product of said coal companies in interstate commerce.

30. Throughout the corporate existence of this defendant the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. The railroad lines of this defendant have been from time to time extended, the control of other railroads acquired and its facilities and equipment increased at enormous expense in reliance upon the rights and franchises conferred by the statutes of Pennsylvania as aforesaid, and upon the prospective earnings from the transportation of anthracite coal, and to meet the increasing demands of the markets of the United States for said commodity. The prosperity and existence of this defendant have at all times been dependent upon the transportation of anthracite coal, and its prosperity has increased with the expansion and growth of the anthracite coal trade.

43 31. This defendant has expended large sums of money in extending its lines and constructing branches and sidings to the collieries of said coal companies whose stock is owned by it in whole or in part, and in providing other facilities in order to receive and transport the product of said collieries.

32. The defendant and other railroad corporations whose railroad lines are operated as a part of defendant's railroad system, as afore-

said, respectively own branch lines of railroad of great value, connecting with the main lines of said system and extending from the main lines to collieries owned by the Lehigh Valley Coal Company or others of said coal companies whose capital stock is owned in whole or in part by the defendant. Such branch lines were built only to reach said collieries and to provide the means of transporting the products of said collieries, respectively, and are and at all times have been used exclusively for that purpose. They have no other traffic except such coal traffic and the carriage of supplies to such collieries and small traffic incidental thereto. Substantially the entire amount of the anthracite coal so transported over said branch lines of railway is destined to markets in States other than the Commonwealth of Pennsylvania, and no accessible and available market within the Commonwealth of Pennsylvania exists therefor. The value of such branch lines of railway depends wholly upon their use in transporting the anthracite coal from the collieries tributary thereto, and there is no value to such branch lines except for that purpose. Defendant specifies the following branch lines as to which the foregoing allegations are true:

(1) The Blackwood Branch of the Schuylkill & Lehigh Valley Railroad Company, from Blackwood Junction, Pennsylvania, to the Blackwood colliery of the Lehigh Valley Coal Company, said branch line being 5.2 miles in length and having a reproduction value
44 of at least $100,000. Schuylkill Railroad Company, from Oneida Junction to Sheppton, Pennsylvania, on which are located the Harwood and Oneida collieries, controlled by Coxe Brothers & Company, Incorporated, said branch line being 9.7 miles in length and having a reproduction value of at least $125,000.

(3) Derringer Branch of the Delaware, Susquehanna & Schuylkill Railroad Company, from Oneida Junction to Derringer, Pennsylvania, on which is located the Derringer colliery of Coxe Brothers & Company, Incorporated, said branch line being 13.4 miles in length and having a reproduction value of at least $400,000.

(4) Primrose Branch of this defendant to the Primrose colliery of the Lehigh Valley Coal Company, said branch line being 3 miles in length and having a reproduction value of at least $90,000.

(5) There are many other branch lines of great value as to which the foregoing allegations of this paragraph are true.

33. The capital stock of this defendant issued and outstanding amounts to $40,441,100, consisting of 808,822 shares of the par value of $50 each, and said shares are distributed among and held by 5,370 stockholders, of whom 2,732 own less than 25 shares each.

34. The transportation of anthracite coal over the lines of this defendant in interstate commerce, which is charged in the petition to be unlawful, amounts to a daily average of at least 1,200 cars.

35. This defendant is informed and believes and therefore alleges that there are railroad corporations other than this defendant which transport from one State or Territory to another State or Territory timber and the manufactured products thereof produced or manu-

factured by such railroad corporations, or under their authority, or which such railroad corporations own or are interested in,
45 other than timber and the manufactured products thereof which are necessary and intended for the use of such railroad corporations in the conduct of their business as common carriers.

36. This defendant further states and avers that its only relation to the said anthracite coal produced from the mines of said several coal companies whose stock is owned by defendant in whole or in part and transported by this defendant (apart from its obligation and duty as a railroad common carrier in the transportation thereof) is incidental to and arises from its ownership to the extent hereinbefore stated of shares of the capital stock of said coal companies, and this defendant is advised by counsel and verily believes and so avers that its ownership of shares of the capital stock of said coal companies, which it had lawfully acquired and owned for a long period prior to the enactment of the said act of Congress approved June 29, 1906, and the participation of some persons who are also its officers in the management of said coal companies, do not constitute this defendant a miner or producer of the anthracite coal produced from the mines of said coal companies, or as authorizing such production; or invest this defendant with any ownership of or any interest, direct or indirect, in said coal within the purview, meaning, and intent of the fifth paragraph of section 1 of "An act to regulate commerce," approved Feb. 4, 1887, as amended by the act of Congress approved June 29, 1906.

37. Defendant avers that if the ownership of the stocks of the coal companies aforesaid could rightfully be held to create ownership of, or interest in, the anthracite coal transported by defendant for such corporations within the meaning of the act of Congress aforesaid, said statute would have the effect of destroying and rendering wholly valueless property lawfully acquired and owned by this defendant, and would amount to a taking of its property without due process of law and without compensation and
46 (2) Sheppton Branch of the Delaware, Susquehanna & to an arbitrary deprivation of the liberty of the defendant, in contravention of the fifth amendment to the Constitution of the United States.

38. Defendant further avers that the said act of Congress is in effect a prohibition of interstate commerce in a useful and necessary commodity and not a regulation of commerce, and that its enactment was not within the scope and power of Congress under the third clause of section 8, article 1, of the Constitution of the United States, and that such prohibition is not an appropriate means or a means consistent with the letter and spirit of the Constitution for the accomplishment of any purpose within the scope of said third clause of section 8, article 1, of the Constitution.

39. Defendant further avers that said act of Congress, if construed as prohibiting the transportation of anthracite coal owned by the Lehigh Valley Coal Company, the New York & Middle Coal Field

Railroad & Coal Company, and Coxe Brothers Company (Incorporated) would have the direct and necessary operation and effect of impairing the obligations of the contracts between this defendant and its bondholders expressed in its general consolidated mortgage and collateral trust agreement hereto annexed, in contravention of the Constitution of the United States.

40. Defendant further avers that the act of Congress aforesaid is in contravention of the provisions of the eighth amendment to the Constitution of the United States, in that it operates to impose and inflict excessive fines and cruel and unusual punishment within the meaning of said constitutional amendment.

Wherefore this defendant prays that the prayer of the petition be denied and that the alternative writ of mandamus heretofore issued herein be dismissed, and for such further and other
47–48 relief in the premises as to this honorable court may seem meet and in accordance with equity.

J. F. SCHAPERKOTTER,
General Solicitor for Lehigh Valley Railroad Company,
143 Liberty Street, New York City, N. Y.

FRANK H. PLATT,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Eben B. Thomas, being duly sworn, deposes and says that he is the president of the Lehigh Valley Railroad Company, the defendant herein; that he has read the foregoing answer of said defendant and that the same is true to the best of his knowledge, information, and belief.

E. B. THOMAS.

Sworn to before me this 11th day of June, 1908.

[SEAL.]

F. T. HARBACK,
Notary Public, New York County.

49 EXHIBIT A.

GENERAL CONSOLIDATED MORTGAGE.

This indenture, made the thirtieth day of September, in the year one thousand nine hundred and three, between

Lehigh Valley Railroad Company, a corporation created by and existing under the laws of the State of Pennsylvania (hereinafter called the "Railroad Company"), party of the first part, and Girard Trust Company, a corporation created by and existing under the laws of the State of Pennsylvania (hereinafter called the "Trustee"), party of the second part.

Whereas at a meeting of the board of directors of the Railroad Company, duly called and held at its office in the city of Philadelphia on the thirtieth day of September, in the year nineteen hundred and

three, the draft of a mortgage or deed of trust in the form of this indenture was submitted and read, and resolutions in the following words were duly and unanimously adopted, viz:

Resolved, That the president or vice-president and the secretary of the company be, and they are hereby, authorized and directed, in its behalf and under its corporate seal, and in form substantially that now submitted to this board, to execute and deliver a mortgage or deed of trust upon the property and franchises of the corporation, to be known as the "General consolidated mortgage," to Girard Trust Company, as trustee, to secure an issue of bonds for an aggregate principal sum not exceeding $150,000,000; the principal of such bonds to be payable in gold coin of the United States of the present
50 standards of weight and of fineness on the first day of May, in the year 2003, at the office or agency of the Railroad Company in the city of Philadelphia, or in the city of New York, as shall be determined by the board of directors from time to time as such bonds shall be issued, with interest thereon at such rate per annum, not exceeding five per cent, as shall from time to time be determined by the board of directors when such issues of such bonds shall be made; interest to be payable semiannually at said office or agency in like gold coin on the first days of May and November in each year; such bonds to be issued and disposed of on the conditions, for the purposes, and in the manner set forth in said form of mortgage.

And whereas the bonds to be secured by this indenture are to be executed in the name and on behalf of the said company and under its corporate seal by its president, or any vice-president, and its secretary, or assistant secretary, as and when called for by resolution of the board of directors of the Railroad Company, under the terms of this indenture, and are to be for such denomination or par value, at such rate of interest, and in such form consistent with the terms of this indenture as at the time of issue said board shall prescribe, the $20,000,000 of said bonds which, as hereinafter provided, may be forthwith issued, to be coupon bonds of the denomination of $1,000, numbered consecutively from 1 upwards, and registered bonds of the denominations of $1,000, $5,000, and $10,000, numbered consecutively from A 1 upwards for $1,000 bonds, B 1 upwards for $5,000 bonds, and C 1 upwards for $10,000 bonds, and to be substantially in the following tenor, unless at the time of issue the board of directors shall prescribe some other denomination and form consistent with the terms of this indenture.

51 [Form of coupon bond.]

No. —. $1,000.

United States of America.

State of Pennsylvania.

Lehigh Valley Railroad Company. General consolidated mortgage gold bond. Total issue, $150,000,000. Coupon bond.

Know all men by these presents, That Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter

called the "Railroad Company," for value received, promises to pay to the bearer or, if registered, to the registered holder of this bond one thousand dollars, gold coin of the United States of America, on the first day of May, in the year 2003, at the office or agency of the Railroad Company in the city of Philadelphia, and to pay interest thereon from November 1st, 1903, at the rate of per cent per annum, payable semiannually, in like gold coin, at said office or agency on the first days of May and November in each year, but only upon presentation and surrender of the annexed coupons as they severally mature, such United States gold coin in every case to be of the standard of weight and fineness as it existed July 1st, 1903.

Both the principal and interest of this bond are payable without deduction for any tax or taxes of the United States, or of any State, county, or municipality thereof, which the Railroad Company may be required to pay, or to retain therefrom, under any present or future law.

This bond is one of a series of coupon and registered bonds of the Railroad Company known as "General consolidated mortgage gold bonds," duly authorized and approved by the board of directors of the Railroad Company, and issued and to be issued to an amount not exceeding in the aggregate $150,000,000 at any one time outstanding; all of which bonds are issued under and in pursuance of, and are equally secured by, a mortgage or deed of trust dated September 30th, 1903, executed by the Railroad Company to Girard Trust Com-
52 pany, a corporation of the State of Pennsylvania, as trustee of all the property and franchises of the Railroad Company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises mortgaged and the nature and extent of the security, and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond may be registered as to principal in the owner's name on the books of the Railroad Company at the office or agency of the Railroad Company in the city of Philadelphia, such registry being noted on the bond by the Railroad Company's transfer agent, after which no transfer shall be valid unless made on the Railroad Company's books by the registered owner in person or by attorney duly authorized and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again, from time to time, be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust, on payment, if the Railroad Company shall so require, of the charge therein provided for.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage or deed of trust.

In witness whereof, Lehigh Valley Railroad Company has caused these presents to be signed by its president, or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary or its assistant secretary, and coupons for said interest, with the engraved signature of its treasurer, to be attested hereunto this thirtieth day of September, 1903.

LEHIGH VALLEY RAILROAD COMPANY,
By , *Vice-President.*

Attest:

, *Secretary.*

53 [Form of registered bond.]

No. A—. $——.

United States of America.

State of Pennsylvania.

Lehigh Valley Railroad Company. General consolidated mortgage gold bond. Total issue, $150,000,000. Registered bond.

Know all men by these presents, That Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter called the "Railroad Company," for value received, promises to pay or assigns, thousand dollars, gold coin of the United States of America, on the first day of May, in the year 2003, at the office or agency of the Railroad Company in the city of Philadelphia, and to pay interest thereon from the first day of May or November, as the case may be, next preceding the date of issue hereof, at the rate of per cent per annum, payable semiannually, in like gold coin, at said office or agency, on the first days of May and November, in each year, such United States gold coin in every case to be of the standard of weight and fineness as it existed July 1st, 1903.

Both the principal and interest of this bond are payable without deduction for any tax or taxes of the United States or of any State, county, or municipality thereof, which the Railroad Company may be required to pay, or to retain therefrom, under any present or future law.

This bond is one of a series of coupon and registered bonds of the Railroad Company, known as "General consolidated mortgage gold bonds," duly authorized and approved by the board of directors of the Railroad Company, and issued and to be issued, to an amount not exceeding in the aggregate $150,000,000 at any one time outstanding; all of which bonds are issued under and in pursuance of, and are equally secured by, a mortgage or deed of trust, dated Sep-
54 tember 30th, 1903, executed by the Railroad Company to Girard Trust Company, a corporation of the State of Pennsylvania, as trustee, of all the property and franchises of the Railroad Company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises

mortgaged, and the nature and extent of the security, and the rights of the holders of said bonds, under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the Railroad Company at the office or agency of the Railroad Company in the city of Philadelphia upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage or deed of trust, and on payment, if the Railroad Company shall so require, of the charge therein provided for.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the Trustee under said mortgage or deed of trust.

In witness whereof, Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary or its assistant secretary this day of .

LEHIGH VALLEY RAILROAD COMPANY,
By , *Vice-President.*

Attest:

, *Secretary.*

And whereas, there are to be annexed to the said coupon bonds, at the time of the issue thereof, coupons representing the semiannual interest installments which may become due thereon to and including the first day of May, 2003, each of which coupons is to be substantially of the following tenor:

55 [Form of interest coupon.]

No. —. $——.

On the first day of Lehigh Valley Railroad Company will pay to bearer at its office or agency in the city of Philadelphia, dollars gold coin, without deduction for taxes, being six months' interest then due on its general consolidated mortgage gold bond No. —.

, *Treasurer.*

And whereas, the coupons to be attached to said coupon bonds are to be authenticated by the engraved signature of the present treasurer or of any future treasurer of the company, it being intended that the company may adopt and use for that purpose the engraved signature of any person who shall have been its treasurer, at or subsequent to the date of these presents, notwithstanding the fact that he may have ceased to be such treasurer at the time when such bonds shall be actually certified and delivered;

And whereas, there is to be endorsed on each of such bonds a certificate of the Trustee that it is one of the general consolidated mortgage gold bonds herein described, and no bond will be valid or obligatory for any purpose until such certificate shall have been executed by the Trustee, such certificate to be substantially of the following tenor, viz:

[Form of trustee's certificate.]

This bond is one of the series of general consolidated mortgage gold bonds referred to in the within-mentioned mortgage executed by Lehigh Valley Railroad Company to the undersigned.

GIRARD TRUST COMPANY, *Trustee*,
By , *Vice-President.*

56 Now, therefore, this indenture witnesseth: That in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which such bonds are issued and received, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to the Railroad Company duly paid by the Trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged:

Lehigh Valley Railroad Company, party of the first part, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over, unto the trustee, party of the second part, its successors and assigns forever:

All and singular the following estates, railroads, lands, properties, rights, privileges, and franchises, and shares of capital stock, viz:

First. The main line of railroad of said Lehigh Valley Railroad Company, extending from Phillipsburg, in the State of New Jersey, on the eastern bank of the river Delaware, opposite the city of Easton, in the county of Northampton, in the State of Pennsylvania, to Wilkesbarre, in the county of Luzerne, in the said State of Pennsylvania; also the following branches, all in the said State of Pennsylvania: the Barber's Quarry Branch, West End Branch, and Jordan Loop, at Allentown, Lehigh County; the Egypt Branch, at Coplay, Lehigh County; the Slatedale Branch, extending from Slatington, Lehigh County, to Seagersville Quarry, Lehigh
57 County; the Welshtown Creek Branch, at Slatington, Lehigh County; the Mahoning Creek Branch, at Lehighton, Carbon County; the Silk Mill Branch, at Mauch Chunk, Carbon County; the Beaver Meadow Branch, extending from Penn Haven Junction on said main line, in the county of Carbon, to Audenried, in said county of Carbon; the Lehigh and Mahanoy Branch, extending from Black

Creek Junction, on the said Beaver Meadow Branch, in said county of Carbon, to Mount Carmel, in the county of Northumberland; the Ashland Branch, extending from Kohinoor Junction to Ashland in the county of Schuylkill; the Hazelton Branch, extending from Hazle Creek Junction on the said Beaver Meadow Branch, in the county of Carbon, through Hazleton, to Tomhicken, in the county of Luzerne; the Delano and Hazleton Branch, extending from Hazleton Junction, on the said Hazleton Branch, in said Luzerne County, to New Boston Junction, in the county of Schuylkill; the Lehigh Luzerne Branch, extending from Hazleton Branch at Lumber Yard, in the county of Luzerne, to Harleigh Junction, on the said Hazleton Branch, and to Milnesville, in the county of Luzerne; the Highland Branch, extending from Pink Ash Junction, on the Lehigh Luzerne Branch, in the county of Luzerne, to Sandy Run Junction in the same county; the Bear Creek Branch, extending from Bear Creek Junction in the county of Luzerne, to Beaupland in the same county; the Mountain Cut Off, from Fairview, in the county of Luzerne, to Avoca, in the same county; said railroads, with their branches, turnouts, and sidings, amounting in the aggregate to 798.75[a] miles of single track railroad; together with all other branches of the said railroads, and each of them, now belonging to, or which may hereafter be constructed by or belong to the said party of the first part, in the said State of Pennsylvania;

58 Including any and all roadbed, superstructure, rights of way, rails, tracks, sidetracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, coaling stations, machine shops, and other shops, turntables, water stations, fences, docks, structures, erections and fixtures, and all other things of whatever kind in any wise or now or hereafter belonging or appertaining to any line of railway, or to any branch or extension, at any time subject to the lien of this indenture, or provided for use thereon, or in connection therewith; and any and all lands now or hereafter designed for depots, warehouses or other structures at any terminus, or on and along such lines of railway, or upon or along any such branch or extension; and any and all locomotives, engines, cars, and other rolling-stock equipment, machinery, instruments, tools, implements, materials, and furniture now owned or hereafter acquired by the Railroad Company, and other chattels, wheresoever situated, now or hereafter held, acquired, or provided for use upon such lines of railway or branches or extensions, or upon any other line or branch or extension, or upon any operated line; and any and all leases, under which it now operates or may hereafter operate any railroads, and any and all other property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, any lines of railway, branches, or ex-

[a] The additional mileage of the lines of railroad whose capital stocks are pledged hereunder under Subdivisions I and II of section third of the granting clauses hereof is 761.46 miles.

tensions now or hereafter subject to the lien hereof; and any and all corporate or other rights, privileges, and franchises which the railroad company now has, or hereafter shall acquire, possess, or exercise for, or appertaining to, the construction, maintenance, use, or operation of such lines of railway or branches or extensions, or any part thereof; and any and all the rents, issues, profits, tolls, and other income of such lines of railway, or branches or extensions, or any part thereof; and any and all the rights, privileges, franchises, properties, real or personal, rights, and things which the railroad company
59 may or shall hereafter possess, or become entitled to possess, for the purpose of, or in connection with, the operation of such lines of railway or any such branch or extension.

The leases now existing and referred to above are:

Pennsylvania and New York Canal and Railroad Company to Lehigh Valley Railroad Company, dated Dec. 1, 1888.

The Lehigh Valley Rail Way Company to Lehigh Valley Railroad Company, dated April 14, 1891.

Lehigh and New York Railroad Company to Lehigh Valley Railroad Company, dated Aug. 24, 1895.

Second. All and singular the following estates, lands, wharves, and properties:

1. All that certain lot or piece of ground with the building thereon erected, situate on the west side of Third street (enlarged by a strip of ground ten feet in width thrown out for public use to widen the footway) and on the south side of Willing's alley, as at present laid out and opened, eighteen feet in width between Walnut and Spruce streets, in the city of Philadelphia, State of Pennsylvania, containing in front or breadth on Third street forty-two feet three inches, and extending of that width westward one hundred and seventy-eight feet six inches on the north line thereof, and one hundred and seventy-eight feet ten and one-fourth inches on the south line thereof, to the easternmost line of a private passageway or court.

Together with the free use, right, and privilege of the said passageway and water-course.

(Being the same premises which the Pennsylvania Railroad Company et al., by deed bearing date the tenth day of May, A. D. 1872, and recorded in the office for recording of deeds in and for the city and county of Philadelphia, in Deed Book F. T. W. No. 10, page 44, etc., granted and conveyed unto the Lehigh Valley Railroad Company, its successors and assigns.)

60 2. All that certain lot or piece of ground with the building thereon erected, situate on the west side of Third street (enlarged by a strip of ground ten feet in width thrown out for public use to widen the foot-way by Thomas Willing, Benjamin Chew, and others, by indenture of five parts, dated the twentieth day of December, A. D. 1809), between Spruce street and Willing's alley in the city of Philadelphia. Beginning at a point on the west side of Third street, enlarged, as aforesaid, at the distance of forty-two feet three

inches southward from the south side of Willing's alley aforesaid, containing in breadth, north and south, twenty feet six and a half inches, and in length or depth east and west one hundred and fifty-one feet ten and three-fourths inches on the north line, and one hundred and fifty-two feet on the south line thereof.

(Being the same premises which the Pennsylvania Railroad Company et al., by deed bearing date the tenth day of May, A. D. 1872, and recorded in the office for the recording of deeds, in and for the city and county of Philadelphia, in Deed F. T. W. No. 10, page 49, etc., granted and conveyed unto the Lehigh Valley Railroad Company, its successors and assigns.)

Together with all the rights and privileges mentioned and expressed in the above-mentioned indenture of five parts, which shall, or of right ought, to attach to the owners and occupiers of the said premises.

3. All those two certain lots or pieces of ground with the buildings and improvements thereon erected, situate in the sixth ward of the city of Philadelphia, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the eighth day of September, A. D. 1890, as follows, to wit:

One thereof, beginning at a point on the west side of Delaware avenue at a distance of two hundred and six and fifty-six one-hundredths feet northward from the north side of Arch street; thence extending northward along the west side of said Delaware avenue sixty-four feet to a point on the south side of a certain ten-feet wide alley; thence extending westward along the south side of said alley one hundred and thirty-seven and ninety-two one-hundredths feet to a point on the east side of Water street; thence extending
61 southward along said side of Water street fifty-three and eighty-five one-hundredths feet to a point; thence extending eastward ninety-one and fifty-eight one-hundredths feet to a point; thence extending southward twelve and fify-four one-hundredths feet to a point; thence extending eastward forty-six and forty-two one-hundredths feet to the first-mentioned point and place of beginning.

And the other thereof, beginning at a point on the east side of said Delaware avenue at a distance of one hundred and seventy-six and forty-eight one-hundredths feet northward from the north side of Arch street; thence extending northward along the said side of Delaware avenue ninety-three and twenty-seven one-hundredths feet to a point in the south line of a certain ten-feet wide alley; thence extending eastward along the south side of said alley two hundred and seventy-five and fifteen one-hundredths feet to the port warden's line in the river Delaware; thence extending southward along the said port warden's line eighty-nine and four hundred and twenty-six one-thousandths feet; thence extending westward two hundred and seventy-six and eighty-four one-hundredths feet to the first-mentioned point and place of beginning.

Excepting therefrom the following described tract:

Beginning at a point on the east side of Delaware avenue at its intersection with the southerly line of lands of the Lehigh Valley Railroad Company; thence westward along the southerly line of lands of the Lehigh Valley Railroad Company 118 feet $\frac{5}{8}$ inches more or less to a point in the former easterly side of Delaware avenue distant 176.48 feet northward measured along said former easterly line of Delaware avenue from the northerly line of Arch street; thence northward along the former easterly line of Delaware avenue 93.27 feet; thence eastward 118 feet more or less to the eastward side of Delaware avenue; thence southward along said easterly side of Delaware avenue 92 feet more or less to the place of beginning. Being a part of the tract of land which was dedicated by the Lehigh Valley Railroad Company to the city of Philadelphia, December 22, 1897, for the widening of Delaware avenue.

4. All that certain lot or piece of ground, with the buildings, wharves, and improvements thereon erected, situate in the sixth
62 ward of the said city of Philadelphia, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the eighth day of September, A. D. 1890, as follows, to wit:

Beginning at a point on the east side of Delaware avenue at the distance of one hundred and fifty-one and ninety-four one-hundredths feet southward from the south side of Race street; thence extending southward along the said side of Delaware avenue one hundred and eighty-two and twenty-nine one-hundredths feet to a point on the north side of a certain ten-feet wide alley; thence extending eastward along the north side of said alley two hundred and seventy-five and five one-hundredths feet to the port warden's line in the river Delaware; thence extending northward along the said port warden's line one hundred and eighty-three and fifty-six one-hundredths feet; thence extending westward two hundred and seventy-four and sixty-one one-hundredths feet to the first-mentioned point and place of beginning.

Excepting therefrom the following-described tract: Beginning at a point in the east side of Delaware avenue at its intersection with the northerly line of lands of the Lehigh Valley Railroad Company; thence westward along the northerly line of lands of the Lehigh Valley Railroad Company 117 feet $\frac{5}{8}$ inches more or less to a point in the former east side of Delaware avenue distant 151.94 feet southward measured along the said former easterly side of Delaware avenue from the southerly side of Race street; thence southward along said former easterly line of Delaware avenue 182.29 feet; thence eastward 117 feet more or less to the easterly side of Delaware avenue; thence northward along the said easterly side of Delaware avenue 181 feet more or less to the place of beginning. Being a part of the tract of land which was dedicated by the Lehigh Valley Railroad Company to the city of Philadelphia, December 22, 1897, for the widening of Delaware avenue.

Under and subject to a certain mortgage debt of one hundred and fifty thousand dollars ($150,000), secured upon the premises by indenture of mortgage given and executed by Charles Harthorne to Alexander Kerr, dated October 9th, 1890, and recorded at Philadelphia, in Mortgage Book G. G. P. No. 636, page 326, &c., together with the interest due and to become due thereon.

63 Also, all the right, title, and interest of the said Lehigh Valley Railroad Company in and to said ten-feet wide alley above mentioned, and extending from the easterly side of Delaware avenue to the port warden's line in the Delaware River, which said alley was, by ordinance of the select and common councils of the city of Philadelphia, approved the twenty-first day of September, A. D. 1896, stricken from the city plan.

5. All that certain lot or piece of ground, with the buildings and improvements thereon erected, situate in the sixth ward of the city of Philadelphia, in the State aforesaid, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the twelfth day of March, A. D. 1892, as follows, viz:

Beginning at a point on the west side of Delaware avenue at the distance of one hundred and sixty-two feet eight and three-quarter inches northward from the north side of Arch street (which said point is also in the middle of a certain alley eight feet eight inches front on the said Delaware avenue, which extends westward increasing in width to the east side of Water street on which it contains nine feet four inches); thence extending westward along the centre line of said alley one hundred and thirty-eight feet two and five-eighths inches to a point on the east side of said Water street at a distance of one hundred and sixty-three feet five and three-quarters inches northward from the north side of Arch street aforesaid; thence northward along the east side of said Water street fifty-five feet nine and three-quarters inches to a point; thence eastward ninety-one feet seven inches to a point; thence southward twelve feet six and one-half inches to a point; thence further eastward forty-six feet five inches to a point on the west side of said Delaware avenue; thence southward along the said side of Delaware avenue forty-three feet ten inches to the first-mentioned point and place of beginning.

Together with the free and common use, right, liberty, and privilege of the said alley as and for a passageway and water course at all times hereafter forever in common with the owners, tenants, and occupiers of the other lots of ground bounding thereon.

64 Under and subject to a certain mortgage debt of twenty thousand dollars ($20,000) secured upon the premises by indenture of mortgage given and executed by Charles Hartshorne to the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee, dated April 4th, 1892, and recorded at Philadelphia, in Mortgage Book T. G. No. 147, page 349, etc., together with the interest due and to become due thereon.

(Being the same premises [as to above tracts 3, 4, and 5] which Charles Hartshorne, by deed dated the thirtieth day of April, A. D. 1897, and recorded in the office for recording of deeds in and for the city and county of Philadelphia in Deed Book W. M. G. No. 194, page 83, etc., granted and conveyed [subject as aforesaid] unto the Lehigh Valley Railroad Company, its successors and assigns.)

6. The rights, interest, equities, claims, and demands as particularly set forth in certain declarations of trust made, executed, and delivered to the trustee herein for the benefit of the holders of the bonds secured hereby, to wit:

(a) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated the 14th day of July, A. D. 1903, as to certain real estate in Jersey City, N. J., containing 8¾ acres more or less, known as the Kellogg lots; conveyed to the United Real Estate Company by Charles Hartshorne by deed dated April 23, 1898, and recorded in Book 699 of Deeds, page 405, &c., in the office of the register of deeds of Hudson County, N. J.

(b) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated the 14th day of July, A. D. 1903, as to certain real estate in Jersey City, containing 4.7 acres more or less, known as the Edge lots; conveyed to the United Real Estate Company by two deeds; one, from Charles L. Carrick, special master in chancery, and the other from Benjamin Edge, each dated June 5, 1900, and recorded in Book 753 of Deeds, page 299, &c., and page 288, &c., respectively, in the office of the register of deeds of Hudson County, N. J.

65 (c) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to certain real estate in the city of Bayonne, N. J., containing 127.63 acres, known as the Constable Hook property; conveyed to the United Real Estate Company by Elisha P. Wilbur and wife by deed dated April 28, 1898, and recorded in Book 699 of Deeds, page 408, &c., in the office of the register of deeds of Hudson County, N. J.

(d) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to certain real estate in the city of Newark, containing 199 acres more or less, known as the Newark Meadow property; conveyed to the United Real Estate Company by sundry deeds, containing full description of same, as follows:

(1) L. D. H. Gilmour et ux. to the United Real Estate Company, dated October 12, 1899, and recorded in the office of the register of Essex County, N. J., in book T 32 of Deeds, page 550–552.

(2) Clarence T. Platt et ux. to the United Real Estate Company, dated October 14, 1899, and recorded in aforesaid office in Book Q 32, page 589–590.

(3) Clarence T. Platt et ux. to the United Real Estate Company, dated June 2, 1899, and recorded in said office in Book T 32, page 552–554.

(4) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 27, 1899, and recorded in said office in Book T 32, page 532–535.

(5) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book T 32, page 547–550.

(6) L. D. H. Gilmour et ux. to the United Real Estate Company, dated July 30, 1900, and recorded in said office in Book O 33, page 385–386.

66 (7) L. D. H. Gilmour et ux. to the United Real Estate Company, dated November 14, 1899, and recorded in said office in Book U 32, page 187–188.

(8) L. D. H. Gilmour et ux. to the United Real Estate Company, dated May 29, 1899, and recorded in said office in Book Q 32, page 593–594.

(9) L. D. H. Gilmour et ux. to the United Real Estate Company, dated June 9, 1899, and recorded in said office in Book T 32, page 545–547.

(10) John B. Stetson et ux. to the United Real Estate Company, dated May 6, 1899, and recorded in said office in Book Q 32, page 592–593.

(11) L. D. H. Gilmour et ux. to the United Real Estate Company, dated July 28, 1899, and recorded in said office in Book T 32, page 540–542.

(12) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 27, 1899, and recorded in said office in Book Q 32, page 595–596.

(13) William W. Winner to the United Real Estate Company, dated May 4, 1899, and recorded in said office in Book Q 32, page 590–591.

(14) L. D. H. Gilmour et ux. to the United Real Estate Company, dated August 2, 1899, and recorded in said office in Book Q 32, page 596–597.

(15) L. D. H. Gilmour et ux. to the United Real Estate Company, dated May 4 1899, and recorded in said office in Book T 32, page 543–545.

(16) L. D. H. Gilmour et ux. to the United Real Estate Company, dated October 12, 1899, and recorded in said office in Book U 32, page 1–2.

(17) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 21, 1899, and recorded in said office in Book T 32, page 537–540.

67 Company, dated June 1, 1899, and recorded in said office in book Q 32, page 598–599.

(19) L. D. H. Gilmour et ux. to the United Real Estate Company, dated May 11, 1899, and recorded in said office in book Q 32, page 599–600.

(20) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 29, 1899, and recorded in said office in book T 32, page 535–537.

(21) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 21, 1899, and recorded in said office in book U 32, page 2–3.

(22) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 29, 1899, and recorded in said office in book U 32, page 4–5.

(23) L. D. H. Gilmour et ux. to the United Real Estate Company, dated October 20, 1899, and recorded in said office in book U 32, page 5–6.

(24) Ada McGregor Clark and husband to the United Real Estate Company, dated May 26, 1900, and recorded in said office in book M 33, page 87–90.

(25) William P. Coe et ux. to the United Real Estate Company, dated April 12, 1900, and recorded in said office in book F 33, page 320–322.

(26) M. A. Pierson et als., executors, to the United Real Estate Company, dated April 12, 1900, and recorded in said office in book F 33, page 318–320.

(27) H. F. Osborne et als., to the United Real Estate Company, dated April 12, 1900, and recorded in said office in book F 33, page 315–317.

(28) L. D. H. Gilmour et ux. to the United Real Estate Company, dated August 9, 1900, and recorded in said office in book O 33, page 455–456.

(29) L. D. H. Gilmour et ux. to the United Real Estate Company, dated February 21, 1900, and recorded in said office in book F 33, page 7–9.

(30) L. D. H. Gilmour et ux. to the United Real Estate Company, dated February 21, 1900, and recorded in said office in book D 33, page 278–279.

(31) L. D. H. Gilmour et ux. to the United Real Estate Company, dated February 21, 1900, and recorded in said office in book F 33, page 9–11.

(32) L. D. H. Gilmour et ux. to the United Real Estate Company, dated May 21, 1900, and recorded in said office in book F 33, page 560–562.

(33) M. P. Guerin et al., executors, to the United Real Estate Company, dated February 20, 1900, and recorded in said office in book G 33, page 79–81.

(34) E. R. McGregor and husband to the United Real Estate Company, dated February 27, 1900, and recorded in said office in book G 33, page 77–79.

(35) George W. Weidenmayer et ux. to the United Real Estate Company, dated November 3, 1899, and recorded in said office in book V 32, page 495–497. Excepting therefrom all that portion of the tract conveyed which lies south of the southerly side of Murray street, being land included within the right of way lines of the Lehigh Valley Terminal Railway, and also land which was conveyed by the United Real Estate Company to the New York Bay Railroad Company, by deed dated May 23d, 1900.

(36) Robert H. Sayre et ux. to the United Real Estate Company, dated November 30, 1897, and recorded in the said office in book F 31, page 164–170.

(e) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to other real estate in the city of Newark, known as the Alpine street terminal; conveyed to the United Real Estate Company by sundry deeds containing full descriptions of same, as follows:

(1) David G. Baird et ux. to the United Real Estate Com-
69 pany, dated Nov. 30, 1897, recorded in office of register of Essex County, New Jersey, in deed book D 31, page 339.

(2) John C. Groel et ux. to the United Real Estate Company, dated March 31, 1902, recorded in office of register of Essex County, New Jersey, in book D 35 of deeds, page 382.

(3) Margaret W. Fort to United Real Estate Company, dated December 6, 1901, recorded in office of register of Essex County, New Jersey, in book W 34, page 251.

(4) L. D. H. Gilmour et ux. to the United Real Estate Company, dated April 21, 1902, recorded in office of register of Essex County, New Jersey, in book K 35, page 51.

(4) Willard S. Muchmore to United Real Estate Company, dated April 21, 1902, recorded in office of register of Essex County, New Jersey, in book K 35, page 50.

(5) Albert Lewis Lumber Company to United Real Estate Company, dated July 7, 1902, recorded in office of register of Essex County, New Jersey, in book L 35, page 544.

(6) John S. Howkins et ux. to United Real Estate Company, dated Nov. 8, 1902, recorded in office of register of Essex County, New Jersey, in book D 36, page 14.

(f) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to other real estate in the city of Newark, known as the Newark Coal Pockets, conveyed to the United Real Estate Company by David G. Baird et ux. by deed dated November 30th, 1897, and recorded in the office of the said register of deeds of Essex County in deed book D 31, page 349.

Third. Shares of capital stock of the following-named companies, in the amounts (at par) stated, belonging to the railroad company.

70 I.

The Lehigh Valley Railway Company[a]	$7,720,000
Lehigh & New York Railroad Company (preferred)	2,148,506
Pennsylvania & New York Canal & Railroad Company	1,051,200
Schuylkill & Lehigh Valley Railroad Company	1,998,950
Easton & Northern Railroad Company	300,000
Lehigh Valley Railroad Company of New Jersey[b]	16,454,000
National Docks Railway Company	3,854,000
Lehigh Valley Transportation Company	750,000
The Lehigh Valley Coal Company	1,000,000
Hazleton Coal Company	500,000

II.

The Elmira, Cortland & Northern Railroad Company	2,000,000
The Canal Railroad Company	60,000
The Canastota Northern Railroad Company	200,000
Loyalsock Railroad Company	300,000
The Wilkes-Barre & Harvey's Lake Railroad Company	150,000
Coal Ridge Improvement & Coal Company	1,335,450
Coal Ridge Improvement & Coal Company (preferred)	122,350
Mineral Spring Coal Company	300,000
New York & Middle Coal Field Railroad & Coal Company	1,061,150
Westwood Coal Company	165,000
National Storage Company	2,400,000

71 The said stocks comprise the entire capital stocks of the companies above named with the exception of the following three minority interests outstanding in the hands of the public, viz, $1,654,842 of the stock of the Lehigh and New York Railroad Company; $42,200 of the stock of the Coal Ridge Improvement and Coal Company; and $438,850 of the stock of the New York and Middle Coal Field Railroad and Coal Company.

Fourth. All right, title, and interest of the Lehigh Valley Railroad Company, that may be hereafter acquired, in or to any and all other shares of stock of any of the companies above enumerated in subdivision third.

Fifth. All property of every name and nature hereafter acquired by the Railroad Company which, by any of the provisions of this

[a] Formed by merger August 3, 1903, of the following corporations: The Lehigh Valley Railway Company, the Depew & Tonowanda Railroad Company, Rochester Southern Railroad Company, Middlesex Valley Railroad Company, the Seneca County Railway, and the Waverly and State Line Railway Company.

[b] Formed by merger July 29, 1903, of the following corporations: Easton and Amboy Railroad Company, Lehigh Valley Terminal Railway Company, Greenville and Hudson Railway Company, Middlesex Railway Company, Perth Amboy and Raritan Railway Company, and Pittstown Branch Railway Company.

indenture, it is required to convey, mortgage, pledge, assign, or transfer to the trustee.

Sixth. All property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned, or transferred by the Railroad Company or by anyone in its behalf to the trustee, which is hereby authorized to receive any property, at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of bonds issued or to be issued hereunder, and to hold and apply any and all such property subject to the terms hereof.

Seventh. All estates, lands, properties, rights, privileges, and franchises, real, personal, or mixed, hereafter acquired by the Railroad Company, as appurtenant or incidental to, or in replacement of, or in exchange or substitution for any of the mortgaged premises above described.

72 To have and to hold the premises, properties, real or personal, rights, franchises, estates, appurtenances, and stocks hereby granted, conveyed, and assigned, or mentioned or intended to be granted, conveyed, or assigned by the Railroad Company, with the appurtenances, unto the trustee, its successor or successors and assigns forever, but upon the trusts hereinafter declared:

Subject, as to certain portions of the property hereby mortgaged, conveyed, and pledged, to the mortgages of the Railroad Company recited in sec. 5 of article two hereof, so far as such mortgages respectively cover such property.

But as to all property hereby or hereunder conveyed or pledged, in trust nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and interest obligations, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture; without preference, priority, or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or date or negotiation thereof, so that each and every bond, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under and by this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been made, dated, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof without regard to the date of actual issue, sale, or disposition of said bonds as though upon such day all of said bonds were actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

73 The conditions, uses, and trusts upon which the said premises and property are to be held by the trustee shall be as follows, to wit:

ARTICLE ONE.

SECTION 1. All bonds to be secured hereby shall, from time to time, be executed and delivered by the Railroad Company to the trustee for certification, and thereupon the trustee shall certify and deliver the same as provided in this article, and not otherwise. The aggregate amount of bonds issued and outstanding under this indenture at any one time shall never exceed the principal sum of $150,000,000.

Only such bonds as shall bear thereon endorsed the trustee's certificate by it duly executed shall be secured by this indenture, and every such certificate of the trustee upon any bond executed in the behalf of the Railroad Company shall be conclusive evidence that the bond so certified is one of the series of general consolidated mortgage gold bonds executed by the Railroad Company under this mortgage.

Before certifying or delivering any coupon bond hereby secured the trustee shall cut off and cancel all coupons thereof then matured; and the trustee shall not certify or deliver any registered bond bearing interest from any date six months or more prior to such certification or delivery.

Prior to any issue or issues of bonds intended to be secured hereby and until such issues, after being duly authorized, can be engraved and printed from engraved plates, the Railroad Company may execute and deliver printed bonds, registered, or negotiable by delivery, and substantially of the tenor of the bonds proposed to be issued hereunder, except that no coupons shall be attached to any of said bonds, and the same may be for the payment of one thousand dollars
74 or any multiple thereof, as the Railroad Company may determine. All such printed bonds shall have stamped or printed upon their face "Temporary bond, exchangeable for engraved coupon or registered bonds," and shall after execution be duly certified by the trustee of this mortgage in the same manner as the bonds hereinbefore described, and such certificate shall be conclusive evidence that each of such bonds bearing such certificate is one of the temporary bonds executed by the Railroad Company hereunder. Such printed bonds, duly issued and certified hereunder, shall be exchangeable for engraved bonds, to be issued hereunder, and upon any such exchange such printed bonds shall forthwith be cancelled by the trustee. Until so exchanged, such printed bonds shall in all respects be entitled to the lien and security of these presents as bonds issued and certified hereunder, and interest, when and as payable, shall be paid thereon.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture:

(a) Immediately upon the execution and delivery hereof, or as and when requested thereafter by the Railroad Company, bonds to the

amount of ten million dollars ($10,000,000) shall be certified by the trustee and delivered to the Railroad Company.

(b) Bonds to the amount of ten million dollars ($10,000,000) additional shall, as and when requested by the Railroad Company, be certified by the trustee and delivered to the Railroad Company on account of capital advances heretofore made by it in the payment of the annual installments due on the following securities of the
75 Railroad Company, and to provide funds for further payments thereon, or on similar securities hereafter issued.

	Total issue.	
Car trust series A, due Feb. 1, 1906	$1,000,000	
Car trust series B, due Aug. 1, 1906	500,000	
Car trust series C, due June 1, 1909	2,000,000	
Car trust series D, due Mar. 1, 1910	3,000,000	
Car trust series E, due Feb. 1, 1909	656,000	
Car trust series F, due May 1, 1909	560,000	
Car trust series G, due Aug. 1, 1910	800,000	
		$8,516,000
Connell stock purchase bonds, due Mar. 1, 1906	$600,000	
Seneca stock purchase bonds, due June 1, 1907	665,000	
Righter stock purchase bonds, due Apl. 1, 1908	270,000	
		$1,535,000
		$10,051,000

(c) Ninety-six million dollars ($96,000,000) of said bonds shall be reserved to be used and applied for the redemption, purchase, exchange, acquisition, or payment at or before maturity of the following existing and outstanding obligations, constituting liens on property of the Railroad Company, and on property of corporations named in I and II of subdivision third of the granting clauses hereof. Such reserved bonds shall be called for by resolution of the Board of directors of the Railroad Company when and as required for the purposes aforesaid, and in the amounts required and stated in such resolution, and the Trustee shall, on the receipt of a copy of such resolution, certified by the secretary or assistant secretary of the Railroad Company, certify and deliver to the Railroad Company so many of said reserved bonds as shall, at par, equal the amount required for the redemption, purchase, exchange, acquisition, or payment by the Railroad Company of said obligations, if the price at which said obligations shall be redeemed, purchased, exchanged, acquired, or paid, shall, in the discretion of the Trustee, be approved by it, but if such price shall be higher than the Trustee shall approve, then the Trustee shall on the Railroad Company furnishing the aditional funds
76 required, certify and deliver to the Railroad Company so many only of said reserved bonds as shall equal in amount at par the price which the Trustee shall, in its discretion, approve paying for the bonds so redeemed, purchased, exchanged, acquired, or paid. Said reserved bonds shall be used and applied only for the purposes aforesaid until all of said obligations shall have been redeemed, purchased, exchanged, acquired, or paid, after which, if any of said re-

served bonds shall remain, they may be issued, used, and applied for such purposes as the board of directors of the Railroad Company shall decide, and shall, either at one time or from time to time, be certified by the Trustee and deliver to the Railroad Company on receipt of a copy, duly certified by the secretary or assistant secretary, of a resolution of said board calling for such issue and delivery. If any of said obligations shall be paid or acquired with funds provided by the Railroad Company from sources other than said reserved bonds, the Trustee shall, as in the foregoing case, if duly requested as aforesaid by resolution of the board of directors of the Railroad Company, certify and deliver to the Railroad Company so many of said reserved bonds as shall at par equal the amount paid by the Railroad Company for said obligations, if the price paid shall be approved by the Trustee, but if the price shall be higher than the Trustee shall approve, then the Trustee shall certify and deliver to the Railroad Company so many only of said reserved bonds as shall equal in amount at par the price which the Trustee shall, in its discretion, approve paying for the bonds so redeemed, purchased, exchanged, acquired, or paid. Upon the payment or acquisition either at their maturity, or from time to time prior thereto, of the whole or any part of the several issues of said obligations, by means of said reserved bonds or any part thereof, or by funds advanced by the Railroad Company and subsequently reimbursed to the Railroad Company by delivery of said reserved bonds, such obligations shall be delivered to the Trustee and cancelled; it being the intent that this mortgage securing the bonds issued hereunder shall ultimately become the first lien on the property of the Railroad Company, and that the liens, stated in the following table, on the properties of the companies whose stocks are pledged hereunder, shall be provided for by the bonds issued hereunder.

77	Date.	Date of maturity.	Rate of interest.	Bonds outstanding at date of this indenture.
LEHIGH VALLEY R. R. Co.				
First mortgage	May 15, 1868	June 1, 1948, as extended.	4%	$5,000,000
Second mortgage	June 29, 1870	Sept. 1, 1910	7%	6,000,000
Con. mortgage	Nov. 13, 1873	Dec. 1, 1923	6%	5,638,000
Con. mortgage	Nov. 13, 1873	Dec. 1, 1923	4½%	4,762,000
" " (ann. bonds)	" " "	Perpetual	6%	10,062,000
" " (ann. bonds)	" " "	Perpetual	4½%	2,538,000
Collateral trust mtge	May 1, 1897	May 1, 1997	5%	9,568,000
National storage trust certificates.	Dec. 8, 1899	Dec. 8, 1904–9	4%	5,000,000
LEHIGH VALLEY RAIL WAY COMPANY.				
First mortgage	June 23, 1890	July 1, 1940	4½%	15,000,000

	Date.	Date of maturity.	Rate of interest.	Bonds outstanding at date of this indenture.
LEHIGH VALLEY TERMINAL RAILWAY COMPANY.				
First mortgage	Oct. 1, 1891	Oct. 1, 1941	5%	$10,000,000
EASTON & AMBOY R. R. COMPANY.				
First mortgage	Apl. 13, 1880	May 1, 1920	5%	6,000,000
PENN. & NEW YORK CANAL & RAILROAD CO.				
First mortgage	June 1, 1866	June 1, 1906	7%	1,500,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	5%	4,000,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	4½%	1,500,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	4%	3,000,000
ELMIRA, CORTLAND & NORTHERN RAILROAD CO.				
First mtge (pref. bonds)	Apr. 1, 1884	Apr. 1, 1914	6%	750,000
First mtge	Apr. 1, 1884	Apr. 1, 1914	5%	1,250,000
CANASTOTA NORTHERN R. R. CO.				
First mortgage	July 1, 1886	July 1, 1906	6%	300,000
MIDDLESEX VALLEY R. R. COMPANY.				
First mortgage	Aug. 26, 1892	Nov. 1, 1942	5%	211,000
EASTON & NORTHERN R. R. COMPANY.				
First mortgage	Oct. 7, 1895	Nov. 1, 1935	4½%	51,000
LEHIGH VALLEY COAL COMPANY.				
Five-ten year coal pledge bonds.	Nov. 21, 1902	Dec. 1, 1907-12	5%	2,000,000
				$94,130,000

78 SEC. 3. The remainder of the authorized issue hereunder, amounting to $34,000,000 of said bonds, shall be reserved, to be executed, and to be certified by the Trustee, not immediately, but only when and as called for by resolution of the board of directors of the Railroad Company as next hereinafter provided, for the following purposes, or some one or more of them, viz:

(a) For the construction or acquisition, on and after January 1st, 1905, of railway lines, extensions, terminal properties or rolling stock;

or for the construction or acquisition on and after that date of other property, real or personal; or for the construction of betterments, improvements, or enlargements, on and after that date; all such construction, betterments, improvements, or enlargements or property acquired, to be upon, along, or appurtenant to the properties of the Railroad Company at the time subject to the lien of this indenture, or to be useful to the business of the Railroad Company, or upon, along, or appurtenant to properties of, or useful to the business of, some one or more of the companies mentioned in subdivision third of the granting clauses hereof whose stock is at the time pledged hereunder, or of some other company of whose capital stock no part is now pledged hereunder, but of whose capital stock more than one-half, at the time of such use, shall be pledged hereunder, it being intended that such lines, extensions, terminal properties, betterments, improvements, and enlargements or other property may be constructed or acquired by and in the name of the Railroad Company or by or in the name of or for account of any such other company; or for the acquisition on and after January 1st, 1905, of shares, bonds, or other obligations of any company owning any line, extension, terminal property, lands, coal estates, rolling stock, floating equipment, or other property, the
79 acquisition of which would, in the judgment of the board of directors of the Railroad Company, render the holding of such stock, bonds, or obligations useful or advantageous to the Railroad Company.

(b) For the acquisition of bonds of the Lehigh Valley Coal Company that may be issued under the provisions of sec. 12 of article two hereof; provided that, in every case of any such acquisition, the aggregate par value of such bonds so acquired shall be at least equal to the aggregate par value of the bonds hereby secured, used for such acquisition.

(c) To reimburse the Railroad Company for outlays or advances by it made for, or to promote, any construction or acquisition made pursuant to (a) or (b) hereof on or subsequent to January 1st, 1905, or made theretofore since January 1st, 1900, and not previously reimbursed to the Railroad Company by the issuance to it of bonds under its collateral trust mortgage, dated May 1st, 1897.

The bonds reserved under this section shall by the Trustee be certified and delivered to the Railroad Company, or upon its order, as follows, and not otherwise, viz:

(1) Such bonds shall be certified and delivered by the trustee from time to time only as and when it shall receive a copy of the resolution of the board of directors of the Railroad Company, certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and stating that such bonds or their proceeds will be used only for purposes authorized by this section.

(2) On January 1st, 1906, or on any day thereafter (prior to December 31st, 1906), bonds to such amount as shall be called for in such resolution, shall be so certified and delivered, but not exceeding

in the aggregate $2,000,000, par value, unless a larger issue shall be especially authorized as provided in (5) of this section.

80 (3) In each calendar year after December 31st, 1906, there shall be so certified and delivered such additional amount of such bonds, not exceeding $2,000,000 par value in any calendar year except to supply deficiencies and unless a larger issue shall be especially authorized, as provided in (5) of this section, as from time to time shall be called for in similar resolutions, but in every instance before certifying and delivering any of the bonds reserved under this section (except the $2,000,000 deliverable in the year 1906), the Trustee shall require the Railroad Company to furnish, in addition to such resolutions of its board of directors, the verified certificate or certificates of some person or persons, stating as of his or their own knowledge:

(a) That the bonds last certified and delivered under this section, or the proceeds of all such bonds, have been used for such purposes, or for some one or more of them, or to reimburse the Railroad Company as above provided, specifically indicating every such acquisition or construction of any railroad, structure, betterment, rolling stock, or other property, and every such acquisition of bonds of the Lehigh Valley Coal Company, and every such acquisition of stock, bonds, or other obligations of any other company owning any railroad or other property, and also stating in detail the amount of bonds, or proceeds of bonds, used or expended for each and every such purpose, and whether such acquisition was by or in the name of the Railroad Company, or by or for account of any other company as herein authorized; and also that no acquisition, construction, or expenditure stated in such certificate was stated in any previous certificate;

(b) That the price paid in such bonds, or their proceeds, for any such construction, or acquisition (other than for bonds of the Lehigh Valley Coal Company, as aforesaid), was not in excess of the fair value of the work done or property acquired.

81 (4) Every such verified certificate, unless signed (1) by the president, or by a vice-president, and (2) by the comptroller, or auditor, or treasurer of the Railroad Company, shall be accompanied by a written statement of one of the officers first above designated and one of the officers secondly above designated of the Railroad Company that they believe such certificate to be true, and that such bonds have not been used and the expenditures therein certified have not been made for ordinary maintenance of the property owned, leased or in any way controlled by the Railroad Company, or for replacements or other purposes ordinarily treated by similar companies, or companies owning similar properties, as a part of their operating expenses. Together with such statements and verified certificates, there shall be delivered to the Trustee all bonds and certificates for all shares of stock so acquired, and such further instruments and conveyances as may be necessary to vest in the Trustee all new property so acquired, so far as the same shall have been acquired by or for the Railroad Company, and so far as practicable, any and all other liens, charges,

or indebtedness taken up or acquired with the said bonds or their proceeds; and also the written opinion of counsel of the Railroad Company to the effect that such instruments and conveyances are sufficient for that purpose, or that no instrument or conveyance is necessary. The certificates for all shares of stock so acquired shall be duly transferred into the name of the Trustee, and shall be classified under either I or II of subdivision third of the granting clauses hereof, as shall, with the approval of the Trustee, be designated by the Railroad Company. Such resolutions, statements, instruments, and conveyances, verified certificates and opinion (together with the pledge with the Trustee of all bonds and certificates for all shares of stock so acquired) shall be deemed and taken as plenary authority to the said Trustee for its certification of such bonds under the foregoing provisions of this article.

82 (5) Except to supply deficiencies as next hereinafter provided, there shall not be issued or certified under this section in any one calendar year any of said $34,000,000 bonds in excess of an aggregate amount of $2,000,000; provided, however, that if a larger amount than $2,000,000 should in the opinion of the board of directors of the Railroad Company be required in any year or years for some of the purposes for which the said $2,000,000 in bonds may annually be issued as above provided, then and in that case if the stockholders of the Railroad Company shall at any annual meeting, or at any special meeting called for the purpose, approve by a vote of a majority in interest of the stock represented in person or by proxy at such meeting, the issue of additional bonds under this section, then any amounts so approved by the stockholders in excess of $2,000,000 may be issued in such year or years, and on demand of the Railroad Company shall be certified and delivered by the Trustee to the Railroad Company, or upon its order.

If in any calendar year after January 1, 1906, the Trustee shall not have certified and delivered to the Railroad Company or upon its order two million dollars ($2,000,000) of bonds authorized by (2) and (3) of this section to be certified and delivered for such calendar year, or any additional amount or amounts approved as aforesaid by the stockholders, the right of the Railroad Company to require certification and delivery of any such residue of such $2,000,000 bonds and of any additional amount or amounts so approved which may not have been actually certified and delivered in such calendar year, shall not lapse nor be extinguished, but such residue of such bonds not so certified and delivered in any calendar year shall be certified and delivered by the Trustee to the Railroad Company or upon its order from time to time in any subsequent year or years upon the resolution of the board of directors of the Railroad Company, as hereinbefore provided, accompanied by the statements, verified certificates, and

83 opinion hereinbefore prescribed, notwithstanding the fact that under the provisions of this section and to the extent herein authorized there shall thereby be certified and delivered by the Trustee in such year or years more than $2,000,000 bonds.

(6) The $150,000,000 of bonds to be issued hereunder may be issued in such denominations, at such rate of interest not exceeding five per cent per annum, and in such form, consistent with the terms of this indenture, as the board of directors of the Railroad Company shall prescribe at the time or times of such issue; and any bonds which may have been part or all of said entire $150,000,000 of bonds issued under this mortgage may at any time be extended at a less rate of interest than that named therein, or the interest on any bond hereby secured may at any time and from time to time be reduced with the consent of the then holder of such particular bond.

SEC. 4. Whenever any coupon bond or bonds issued hereunder, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for a registered bond or for registered bonds, as the case may be, the Railroad Company shall issue, and the Trustee shall certify and deliver in exchange for such coupon bond, a registered bond without coupons; or if there be more than one coupon bond so surrendered, then a like amount of registered bonds without coupons, of the same or of other denominations, as herein authorized. Such registered bond or bonds shall bear interest at the same rate as the surrendered coupon bond or bonds, and from the date of the last matured coupon thereof. In every case of such exchange the Trustee forthwith shall cancel the surrendered bond or bonds and coupons and shall deliver the same to the Railroad Company.

Whenever any registered bond or bonds issued hereunder shall be surrendered for transfer the Railroad Company shall issue and the Trustee shall certify and deliver, upon surrender and cancella-
84 tion of the bond or bonds transferred, a like amount of new registered bonds of the same or of other denominations as herein authorized; but no registered bond may be converted into a coupon bond.

The board of directors of the Railroad Company may at the time of issue (or of any reissue as hereinafter provided) of any bonds hereunder order that such bonds shall at the election of the holder be convertible at any half-yearly interest period into common stock of the Railroad Company at par; provided, that notice in writing of such election on the part of such holder, specifying the numbers of the bonds to be converted, shall have been given to the Railroad Company at its office or agency in the city of Philadelphia, or in the city of New York, at least thirty days prior to the half-yearly interest day on which such conversion is desired (which shall be the half-yearly interest day next ensuing the giving of such notice). Upon surrender of any such bond or bonds to the Railroad Company at any interest period, after notice as aforesaid, interest thereon shall cease, and the Railroad Company shall deliver such bond or bonds duly cancelled to the Trustee and shall issue to the holder in exchange therefor so many shares of the capital stock of the Railroad Company at the par value thereof as shall equal the par value of the bond or bonds so surrendered. Any bonds surrendered as aforesaid for con-

version into stock may be reissued, but only for the purposes stated in (a), (b), and (c) of sec. 3 of this article, and such reissue may be made as often as such conversion of bonds into stock shall have been made and in such amounts as said board of directors shall from time to time order; and the bonds so reissued shall be of such denomination, at such rate of interest, and in such form as said board shall at the time of reissue order; provided, that the total amount of bonds issued or reissued and outstanding under this mortgage containing the said provisions for conversion into capital stock shall not at
85 any time exceed $25,000,000. Such bonds shall, on demand made by the Railroad Company on the Trustee, be certified and delivered to the Railroad Company by the Trustee from time to time in such amounts as the Railroad Company shall demand, but only on receipt by the Trustee from the Railroad Company of a copy of a resolution of the board of directors of the Railroad Company, certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and stating that such bonds, or their proceeds, will be used only for the purposes stated in (a), (b), or (c) of sec. 3 of this article, with also (except in respect to the first lot of such bonds so reissued) verified certificates showing the uses to which the previous reissue of bonds or their proceeds have been applied, with also any necessary instruments and conveyances, and opinion of counsel, such certificates, resolutions, statements, instruments, conveyances, and opinions to be similar to those provided for in (a) and (b) of (3) and in (4) of sec. 3 of this article. In case of reissue the Trustee shall certify any new bonds issued in place of any bonds of other form or denominations so surrendered. Provided always that the total outstanding bonds under this mortgage shall in no case and at no time exceed $150,000,000.

For any exchange of coupon bonds for registered bonds, or of bonds for stock, and for any transfer of registered bonds without coupons, the Railroad Company, at its option, may make a charge not exceeding fifty cents for each new registered bond issued in exchange for any surrendered bond or bonds; but no charge shall be made for registration of the principal of coupon bonds.

In case any coupon bond issued hereunder, with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the Railroad Company, in its discretion, may issue, and the Trustee thereupon may certify and deliver, a new bond of like tenor and date bearing the same serial number, in exchange and substitution for and upon cancellation of the mutilated
86 coupon bond and its coupons or of the registered bond, or in lieu of and substitution for the coupon bond and its coupons or the registered bond so destroyed, upon receipt by the Railroad Company of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond, and upon receipt also of satisfactory indemnity.

SEC. 5. Nothing in this article, or in any other article of this indenture expressed or implied, is intended, or shall be construed, to confer

upon any person or corporation, other than the parties hereto and the holders of bonds secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or any covenant, condition, or stipulation thereof; all its covenants, conditions, and stipulations being intended to be, and being for the sole and exclusive benefit of the parties hereto and of the holders of bonds hereby secured.

ARTICLE TWO.

The Railroad Company covenants as follows:

SEC. 1. It will well, duly, and punctually pay, or cause to be paid to every holder of any bond issued and secured hereunder, the principal and interest accruing thereon, at the dates and place and in the manner mentioned in such bonds, and in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States, or any State, county, or municipality therein, which the Railroad Company may be required to pay, or to retain therefrom, under or by reason of any present or future law. When and as paid, all coupons shall forthwith be canceled.

SEC. 2. All lines of railway and all property of every kind,
87 and all interest therein, when and as and to the extent hereafter acquired by the Railroad Company as above provided, out of bonds, or the proceeds of bonds, issued pursuant to the provisions of (a) or (b) of sec. 2, or of sec. 3 or of sec. 4, of article one hereof, immediately upon, and subject to the terms and conditions of such acquisition, and without any further conveyance or assignment, shall become and be subject to the lien of this indenture as fully and completely as though now owned by the Railroad Company, and expressly and specifically conveyed by, and embraced in, the several granting clauses of this indenture; but at any and all times the Railroad Company will execute and deliver any and all such further assurances or conveyances thereof as the Trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

Immediately upon payment of the bonds of the Railroad Company secured by its collateral trust mortgage dated May 1st, 1897, and upon the transfer and delivery to the Railroad Company by the Trustee under said collateral trust mortgage of such stocks pledged under said mortgage, as are also pledged hereunder, such stocks shall be transferred and delivered to and held by the Trustee under this indenture; and similarly, immediately upon the payment of the certificates issued by the Central Trust Company of New York under agreement dated December 8th, 1899, between said trust company and the Railroad Company and upon the transfer and delivery to the Railroad Company by the said Central Trust Company, Trustee, of the stocks pledged under said agreement which stocks are also pledged hereunder, said stocks shall be transferred and delivered to and held by the Trustee under this indenture.

SEC. 3. Whenever demanded by the Trustee, the Railroad Company will grant, convey, confirm, assign, transfer, and set over unto the Trustee, all real and personal estate, corporate rights, and franchises which, in any way or manner it shall acquire (out of such bonds,
88 or the proceeds of bonds, issued, as aforesaid, pursuant to the provisions of (a) or (b) of sec. 2, or of sec. 3, or of sec. 4, of article one hereof), as incidental or appurtenant to, or for use upon, any property mortgaged hereunder, and will also do, execute, acknowledge, and deliver, and cause to be done, executed, acknowledged, and delivered, all and every such further acts, deeds, conveyances, and transfers, and assurances in the law, for better assuring, conveying, and confirming unto the Trustee all and singular the hereditaments and premises, estates, and property hereby conveyed, or intended so to be, or which it has herein covenanted and agreed hereafter to convey to the Trustee, as the Trustee shall reasonably require for better accomplishing the provisions and purposes of this indenture, and for securing payment of the principal and interest of the bonds intended to be hereby secured.

But nothing expressed or implied in this indenture is intended, or shall be construed, to limit the right or power of the Railroad Company, hereby expressly reserved, by the use of its credit or in any manner, except by the use of bonds issued hereunder, or funds received pursuant to ay provision hereof, to construct or to acquire property of any kind, or interest therein, free from the lien hereof.

SEC. 4. The Railroad Company will, at an office or agency to be maintained by it in the city of Philadelphia, keep a sufficient register or registers of bonds issued hereunder, which registers at all reasonable times shall be open to the inspection of the Trustee; and, upon presentation for such purpose, it will, under such reasonable regulations as it may prescribe, register therein any coupon bonds and any bonds without coupons issued under the provisions hereof.

Upon presentation of any such registered coupon bond by the holder thereof in person, or upon its presentation with an instrument in writing authorizing the transfer of the same, executed by the registered holder, such bond shall be transferred upon such reg-
89 ister, and thereafter the transferee or transferees of such bond upon such register shall be held to be the owner or owners thereof, and from time to time such transfers may be made as shall be so directed by the registered holder of any such bond for the time being. The registered holder of any such registered coupon bond shall have the right also to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal thereof shall be payable to any person presenting the same.

Any holder of a coupon bond registered to bearer may cause such bond to be registered in the name of such holder with the same effect as a first registration thereof; and successive registrations and transfers to bearer as aforesaid may be made from time to time as desired; and such registration shall by the bond registrar be noted on the bond.

Any registered bond without coupons may be transferred by the registered holder in person, or by instrument in writing executed by the registered holder, upon surrender of the bond, in which case a like amount of new registered bonds will be issued to the transferee as provided in sec. 4 of article one hereof, on payment of the charge provided for in said section.

As to all bonds so registered, the persons in whose name the same shall be registered shall for all purposes of this indenture be deemed and regarded as the owner hereof, and thereafter payment of or on account of the principal of such bond, if it be a coupon bond, and of the principal and interest, if it be a registered bond without coupons, shall be made only to such registered holder or upon his order; but such registration may be changed as hereinbefore provided. All such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

No registration of any coupon bond shall restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely.

90 SEC. 5. Until such bonds shall be paid and discharged, the Railroad Company will duly, punctually and regularly pay or cause to be paid as from time to time the same shall accrue the interest on its following bonds outstanding at the date of this indenture:

First mortgage	4%	bonds due 1948	$5,000,000
Second mortgage	7%	" " 1910	6,000,000
Consolidated mortgage	6%	" " 1923	5,638,000
do	6%	annuity bonds	10,062,000
do	4½%	bonds due 1923	4,762,000
do	4½%	annuity bonds	2,538,000
Collateral trust mortgage	5%	bonds, due 1997	9,568,000
Equipment trust bonds			5,547,000
Connell stock purchase	4%	bonds	300,000
Seneca " "	"	"	400,000
Righter " "	"	"	225,000
National storage	"	certificates	5,000,000
			55,040,000

and in the meantime it will observe, or will cause to be observed, all the covenants, terms and conditions undertaken by, or imposed upon said Railroad Company, in or by any such bonds or the several respective mortgages securing the same, and in all cases it will duly and punctually pay the principal of such bonds at the several dates of the maturity thereof as now fixed or as from time to time hereafter extended as in this section permitted. But nothing in this article or in any other article of this indenture is intended, or shall be construed, to require the Railroad Company, not then being otherwise in default hereunder, to pay the principal of any such outstanding bond during any period for which the same shall have been extended or renewed as next hereinafter permitted; the right being hereby expressly reserved by the Railroad Company in the discretion of its board of directors, from time to time, with the consent of the

91 holders thereof, to extend the time for the payment of the prin-

cipal of any said outstanding bonds for any period not exceeding two years, if at the date of maturity thereof it shall not in the opinion of the board be advisable to arrange for the refunding or payment thereof through and by the bonds reserved hereunder for the purpose, reserving in case of such extension the right on sixty days' notice published once a week in one newspaper published in the city of Philadelphia and in one newspaper published in the city of New York, to call in and pay off the same at any interest period through and by means of the bonds so reserved hereunder: Provided that the aggregate principal sum or the rate of interest of such outstanding bonds shall not be increased, through the principal and interest of all such extended bonds may be made expressly payable in gold coin of the United States of the standards of weight and of fineness at the time of the extension thereof.

SEC. 6. The Railroad Company will not (except as above provided) voluntarily create or suffer to be created any new lien or charge upon the mortgaged premises of the Railroad Company, or any part thereof, or upon the income thereof, having priority to the lien of this indenture; and will not after the execution of this mortgage issue any bonds theretofore unissued under any of its mortgages prior to this indenture: Provided, however, that bonds reserved under the terms of said prior mortgages for the purpose of providing for prior liens may be issued unless due provision can be made, as set forth in (c) of sec. 2 of article one hereof, for the redemption, purchase, exchange, acquisition, or payment by bonds issued hereunder, of such prior liens; and provided, that the $1,668,000 of bonds under its collateral trust mortgage which have been issued to the Railroad Company and are now in its treasury (and are included in the $9,568,000 stated in sec. 5 of this article), and represent dis-
92 bursements heretofore made on the property of the company, may be issued from its treasury and sold or disposed of by it. And the Railroad Company will not at any time sanction or permit the issue, by any company whose stock at the time shall be pledged hereunder, of any bonds reserved under mortgages of said companies respectively for the purpose of providing for the payment of prior liens if due provision can be made, as set forth in (c) of sec. 2 of article one hereof, for such prior liens; and will immediately, on the payment of its outstanding $5,000,000 of National Storage Company trust certificates, secured by agreement dated December 8, 1899, and on the release and delivery to it of the $2,000,000 of its collateral trust mortgage bonds pledged under said agreement, cause the said pledged bonds to be cancelled. And, within six months after the same shall accrue, the Railroad Company will from time to time pay all lawful claims and demands of mechanics, laborers, and others, which, if unpaid, might by law be given priority to this indenture as a lien or charge upon the mortgaged premises or any part thereof or the income thereof; and if any company, of whose capital stock the greater part now is or hereafter shall be pledged hereunder, shall create or suffer to be created any lien or charge upon its property or income,

or shall create or suffer to be created any indebtedness, other than (1) mortgage indebtedness as hereinafter permitted, (2) indebtedness of the coal company as hereinafter permitted, (3) indebtedness to the Railroad Company, or (4) indebtedness for the current operating expenses of such company during a period not exceeding six months; then it, the Railroad Company, will pay and discharge the same, or will acquire the same and transfer the same to the Trustee for the benefit of this mortgage.

SEC. 7. The Railroad Company from time to time will pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the premises hereby mortgaged, or upon any
93 part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this indenture shall be fully preserved in respect of such properties; and if any company of whose capital stock the greater part now is, or hereafter shall be, pledged hereunder, shall, at any time during the continuance of any such pledge, fail to pay all such taxes, assessments, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then it, the Railroad Company, will itself pay and discharge the same; provided that the covenants of this section shall not require the Railroad Company to pay any tax, assessment or charge, so long as the validity thereof is in good faith contested.

SEC. 8. The Railroad Company from time to time and at all times during the continuance of this indenture, and until the payment of all bonds issued hereunder, will maintain the mortgaged premises and each and every part thereof, and will replace the same and all parts thereof lost, destroyed or used up so far as the same may be needed. The mining and selling of coal by any coal company the stock of which is owned or controlled by the Railroad Company, without replacement, reservation of royalty, or provision for sinking fund, shall not be construed as a violation of this covenant.

SEC. 9. The Railroad Company will exercise the voting power on all stocks pledged hereunder in such manner that it shall retain in itself the rights and powers of the holder of the greater part of the capital stock of such company; and as such holder of stock of any company above mentioned in I and II of subdivision third of the granting clauses hereof, or of stock of any other company whose stock the greater part shall at such time be pledged hereunder, the Railroad Company will not, by affirmative vote, or by abstaining from voting, sanction or permit any increase of the capital stock of any such
94 company or the creation of any so-called "floating" indebtedness of any such company (except current operating accounts for a period not at any date exceeding six months prior thereto), or (except in respect of the Lehigh Valley Coal Company as hereinafter permitted) the issue or guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company (except bonds or mortgages or other liens in extension or replacement of those now existing), unless effect-

ive provision be made that all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously pledged hereunder), and (except as hereinafter provided in respect of the Lehigh Valley Coal Company) that any such indebtedness and the evidences thereof, and any such bonds issued or guaranteed, and any such mortgage or other lien, immediately upon the issue of such stock, or creation of such indebtedness, shall be delivered to and pledged with the Trustee, by it to be held subject to all the trusts of this indenture, with the same effect as if such stock, indebtedness, bonds, mortgage or other lien, had been delivered and pledged to it hereunder at the time of the making hereof; and all such additional stock shall be fully paid and non-assessable. But nothing in this article or in any other article of this indenture is intended, or shall be construed, to require the Railroad Company to so deliver and pledge any bonds or obligations of such companies heretofore issued. And the right is hereby expressly reserved by the Railroad Company, in the discretion of its board of directors, from time to time, to take all necessary steps to procure the extension, for a period not exceeding two years, of the time for the payment of the principal of such of the existing bonds of such companies, for the payment of which provision has been made by (*c*) of sec. 2 of article one hereof, if at the date of maturity thereof it shall not be advisable in the opinion of the said board to arrange for
95 the redemption, purchase, exchange, acquisition or payment thereof through and by the bonds reserved hereunder for the purpose, reserving in case of such extension the right on sixty days' notice, published once a week in one newspaper published in the city of Philadelphia, and in one newspaper published in the city of New York, to call in and pay off the same at any interest period through and by means of the bonds reserved hereunder, but in such extension the aggregate principal sum or the rate of interest now charged on such property by such existing liens shall not be increased though the principal and interest of all such extended bonds may be made expressly payable in gold coin of the United States of the standards of weight and of fineness at the time of such extension.

SEC. 10. The Railroad Company will not by affirmative vote, or by abstaining from voting, permit any Railroad Company, of whose capital stock the greater part shall at the time be pledged hereunder under I of subdivision third of the granting clauses hereof, to sell or dispose of its railroad, except to some company of whose capital stock there shall then be held or received by the Railroad Company, and pledged or assigned to the Trustee hereunder, an amount not proportionately less than the amount then held hereunder of the capital stock of the company whose railroad shall be so sold. Provided that any parts of such railroad not required for the proper exercise of the public franchises of such company may be sold or disposed of with the approval of the Trustee. The Railroad Company may, however, permit any Railroad Company, of whose capital stock the greater part shall at the time be pledged hereunder under II of subdivision

third of the granting clauses hereof, to sell or dispose of its railroad, or any part thereof, to any company or other party, or to exchange its railroad, or any part thereof, for property of such other company or party if in the opinion of the Trustee such sale shall not be prejudicial to the security of the bonds issued and secured hereunder.

96 In case of any sale as aforesaid the proceeds of such sale shall be applied as provided by any mortgage then existing on such property; and if not so subject, then so far as may be practicable, as provided under sec. 2 of article six hereof in respect to other property sold or disposed of.

Sec. 11. The Railroad Company will not issue, negotiate, sell, or disposed of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture, and the agreements in that behalf herein contained; and in issuing, selling, negotiating, or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for purposes herein prescribed, and to and for no other or different purpose.

Sec. 12. It is expressly understood, anything in this indenture to the contrary notwithstanding, that the Lehigh Valley Coal Company may, from time to time, borrow money and may secure the repayment thereof by a pledge or hypothecation of coal when actually mined, or the representatives or proceeds of coal when actually mined, it being further understood, however, that the amount of money so borrowed shall never exceed the fair market value of coal so actually mined and the coal accounts, bills receivable, notes, and other representatives and proceeds of such coal then held by the coal company; and may execute and issue bonds, to be secured by mortgage upon its property, to provide for the improvement of its property, and for the acquisition of new coal properties, all such mortgages to contain proper sinking-fund provisions, by which the payment of such bonds shall be provided for out of and from the coal to be mined from the property of said company.

Sec. 13. The Trustee from time to time, upon written request of the Railroad Company signed by the president or any vice-presi-

97 dent and under its corporate seal, duly attested by the secretary or assistant secretary, shall give to the Railroad Company or its nominees suitable proxies to give full effect to the provisions of this article.

ARTICLE THREE.

Sec. 1. Unless (a) the Railroad Company shall be in default in the payment of interest on any bond secured by this indenture, or unless default shall be made in the payment of interest on any bond mentioned in sec. 5 of article two hereof, and such default shall have continued for a period of six months; or unless (b) the Railroad Company shall be in default in the due and punctual pay-

ment of the principal of any bond secured hereby, or of any bond mentioned in sec. 5 of article two hereof; or unless (c) the Railroad Company shall be in default in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or the income and profits thereof, and such default shall have continued for a period of six months after written notice thereof from the Trustee or from holders of five per cent in amount of the bonds secured hereby; or unless (d) the Railroad Company shall be in default in the due performance and observance of any covenant or condition of this indenture and such default shall have continued beyond the period of grace, if any, herein provided for in respect of such default, and the Trustee shall have entered or shall have elected to enter into possession under the power of entry hereinafter conferred; or unless (e) the Railroad Company shall have voluntarily surrendered to the Trustee possession of the mortgaged premises as hereinafter authorized—the Trustee (unless with the assent of the Railroad Company) shall not collect or be entitled to collect the interest of any bonds or the principal or interest of other claims or indebtedness hereafter pledged with, or assigned to, the Trustee under
98 this indenture; and (1) the Railroad Company shall be entitled to receive all interest due and dividends declared in respect of any bonds or stocks transferred to or pledged with the Trustee pursuant to any of the provisions of this indenture; and from time to time (subject to the covenants in respect hereof in this section contained), upon the request of the Railroad Company, the Trustee shall deliver to it the coupons for such interest, in order that the Railroad Company may receive payment thereof for its own use, and shall deliver to the Railroad Company suitable orders in favor of the Railroad Company or its nominee for the payment of such dividends and for the payment of such interest on registered bonds; and the Railroad Company may collect such interest and dividends, but not by any proceeding which the Trustee shall deem and declare to be prejudicial to the trusts hereunder; and the Trustee shall at once pay over to the Railroad Company any such interest and dividends which may be collected or received by it; and (2) the Railroad Company shall be entitled for its own use to demand, receive, and collect, release, and discharge, the principal or interest of any such claim against, or indebtedness (other than bonds) of, any other company assigned to or pledged with the Trustee hereunder, and upon request of the Railroad Company the Trustee shall execute any reassignments or releases which may be required for that purpose.

If any such coupon, or if any evidence of any such claim or indebtedness delivered to the Railroad Company as aforesaid shall not as aforesaid forthwith be paid and cancelled, the Railroad Company shall return the same to the Trustee; and in case of the payment of any such coupon, claim, or indebtedness, shall upon demand of the

Trustee furnish satisfactory evidence of the cancellation and extinguishment thereof.

Provided, however, and it is hereby declared and agreed that, except as herein otherwise expressly provided, (1) the Railroad Company shall not be entitled to receive, and the Trustee shall not pay over to it, any principal of any bond pledged or assigned to the
99 Trustee hereunder; (2) the Railroad Company shall not be entitled to receive, and the Trustee shall not pay over, any interest on any such bond or any principal or interest of any such other claim or indebtedness which shall have been collected or paid out of the proceeds of any sale of any property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, claims, or indebtedness, it being the intention that the Railroad Company shall be entitled to receive only payments made out of the rents, revenues, income, or proceeds of operation of such properties; (3) the Railroad Company shall not sell, assign, or transfer any such coupon or right to dividend, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the Railroad Company shall not collect any such coupons or other claims or indebtedness by legal proceedings or by enforcement of any security therefor, except with the assent of the Trustee, nor in any manner which the Trustee shall deem prejudicial to the Trust hereunder; and (5) until actually paid or discharged, every such coupon or right to dividends and other claims and indebtedness shall in all respects remain subject to the lien of this indenture.

Sec. 2. In case any sum shall be paid to the Trustee on account of the principal of any bond hereafter pledged with the Trustee hereunder, or in case, upon the dissolution or liquidation of any company, or out of any sale of the property of any company, any sum shall be paid to the Trustee upon any shares of stock of such company held by the Trustee hereunder, or upon any claims against or indebtedness of such company, as mentioned in sec. 1, of this article, then, in every such case (unless applied as in section 5 of this article provided), such sum shall be received by the Trustee and shall be held, used, and applied in the same manner as the proceeds of similar property released under article six hereof.

100 Sec. 3. Unless (1) the Railroad Company shall be in default, and such default being one mentioned under (a), (b), or (c) of sec. 1 of this article shall have continued as therein provided, or being one mentioned under (d) in said section, the Trustee shall have entered, or shall have elected to enter, into possession, or unless (2) the Railroad Company shall have voluntarily surrendered possession of the mortgaged premises as hereinafter authorized, the Railroad Company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such pledge had not been made. The Trustee from time to time, upon written request of the Railroad Company, signed

by the president or any vice-president and under its corporate seal, duly attested by the secretary or assistant secretary, shall give to the Railroad Company or its nominees suitable proxies for such purposes, it being expressly understood that, notwithstanding any other provision of this indenture, and in addition to all other purposes not inconsistent with the provisions or purposes of this indenture, such proxies may and shall, if desired by the Railroad Company, be given to enable it or its nominees to vote, and that accordingly it or they may vote, upon all shares of stock of any company pledged hereunder (1) to enable such company to change, alter, or renew, or terminate any existing lease of railway or other property leased to or by it, or (2) to make a new lease of all or any part of the railway or other property covered by any such existing lease, or to lease additional lines of railway or other property, unless, in the opinion of the Trustee, such a change, alteration, renewal, or termination, or such new lease or such lease of additional lines is likely to be prejudicial to this trust; (3) to authorize the merger or consolidation of any two or more of the companies whose capital stock is or shall be
101 pledged hereunder with each other, or the merger or consolidation of any one or more of said companies with some company or companies whose stock shall not prior to such merger be pledged hereunder, or the merger or consolidation of any one or more of such companies into or with the Railroad Company or into or with the Railroad Company and other companies; provided, always, that stock issued to the Railroad Company of any consolidated company formed by the merger or consolidation of any companies the capital stock of one or more of which is or shall be pledged hereunder, with each other, or with any company or companies whose stock shall not prior to such merger be pledged hereunder, shall be transferred to and deposited with the Trustee hereunder, in lieu of the stock of the respective companies so merged or consolidated. In the case of a merger or consolidation into or with the Lehigh Valley Railroad Company, provision shall be made, if it shall be practicable so to do, for the lien of this mortgage to attach to the property or properties of the company or companies so merged or consolidated into or with the Lehigh Valley Railroad Company prior to any of the mortgages of the Lehigh Valley Railroad Company mentioned in section 5 of article 2 hereof. And it is further expressly understood that, notwithstanding any other covenant or provision of this indenture, and for the full accomplishment of the purposes of any vote or power given as in this section permitted, the Railroad Company and any such other company severally and respectively, from time to time, may take any and all action authorized by any such vote or power.

SEC. 4. The Trustee is authorized to cause to be registered in its name as Trustee any and all coupon bonds having provision for registration which may be hereafter pledged at any time with it hereunder, or to cause the same to be exchanged, if practicable, for registered bonds of any denomination without coupons, or if the Railroad Company shall, in writing, consent thereto to cause

102 the same to be stamped "Not negotiable. Held by Girard Trust Company as Trustee, under the mortgage of Lehigh Valley Railroad Company, dated September 30th, 1903," the Trustee shall cause to be transferred into its name as Trustee hereunder all registered bonds and all shares of stock which at any time may be delivered and assigned to it as security hereunder.

The Trustee may do whatever it may deem necessary for the purpose of maintaining or preserving the corporate existence of any and all companies, any of whose shares shall, at any time, be pledged hereunder, and for such purposes it may from time to time assign and transfer so many shares of the stocks of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; and in all cases the Trustee may make such arrangements as it shall deem necessary for the protection of the trusts hereunder.

SEC. 5. If any default shall be made in the payment of the principal or interest of any mortgage bonds at any time hereafter pledged hereunder, or of other bonds secured by the same mortgage as secures such bonds held by the Trustee, then, in any such case, the Trustee, upon the written request of the Railroad Company, and upon being provided with the necessary funds or provided with satisfactory security for costs and expenses, shall cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose the mortgage or mortgages by which such bonds are secured.

In case the Railroad Company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default shall have continued for a period of six months, or in case a receiver of the premises mortgaged hereby shall have been appointed, or in case the Trustee shall have entered, or shall
103 have elected to enter, into possession of any such mortgaged premises under the power hereinafter conferred or by the voluntary action of the Railroad Company, then the Trustee, in its discretion, may institute such proceedings of its own motion without such written request.

In case, at any time, any company of whose capital stock the greater part shall be held by the Trustee hereunder shall be dissolved or liquidated, or in case all or any of the property of any such company shall be sold upon the insolvency of such company, at any judicial or other sale, or in case any property covered by a mortgage securing any bonds held by the Trustee hereunder shall be sold to satisfy such mortgage, then (1), in any such case, if the property of such company or the property sold can be acquired by crediting on the bonds, claims, indebtedness, or stock held by the Trustee hereunder the amount accruing thereon out of the proceeds of such property, the Trustee may, in its discretion, and (2) in any case, if by the Railroad Company requested in writing, and by it provided with the necessary funds therefor, the Trustee shall purchase or cause to be purchased such property, either in the name and on behalf of the Railroad Company or in its own name or by purchasing Trustees, and shall use such

bonds, claims, indebtedness, and stock to make payment for such property; and in case of any such purchase, the Trustee shall take such proceedings as it may deem best to cause such property to be vested either in the Railroad Company, subject to the lien of this indenture, or in some other corporation organized, or to be organized, for that purpose, of whose bonded debt and capital stock all, excepting the amount thereof required to qualify directors, shall be received and held by the Trustee, and shall be vested in the Railroad Company, subject to the lien of this indenture.

The Railroad Company covenants that, on demand of the Trustee, it will forthwith pay or satisfactorily provide for all expendi-
104 tures incurred by the Trustee under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any properties which the Trustee shall purchase or cause to be purchased pursuant to the provisions of this section; and in case the Railroad Company shall fail so to do, then, without impairment of or prejudice to any of its rights hereunder by reason of the default of the Railroad Company, the Trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances, made by the Trustee, or by others at its request, with interest thereon, the Trustee shall have a lien on the property hereby mortgaged and pledged, which lien shall be prior to the lien of the bonds hereby secured, but in no event shall the principal of such lien exceed in the aggregate at any one time a sum equal to five per cent of the principal of the total amount of bonds issued hereunder and then outstanding.

In case the Trustee shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stock, the Trustee shall receive any portion of the proceeds of the sale accruing on the securities by it held hereunder, and shall apply the same in the manner provided in article six hereof in respect of moneys arising from the sale of similar property released from the lien hereof as therein provided.

SEC. 6. Anything herein contained to the contrary notwithstanding the Trustee may also in any of the cases herein stated or in any other case not specifically provided for in this instrument take such steps or assent to such action, in respect to any of the premises or property, real or personal, now or hereafter mortgaged or pledged hereunder, as in the opinion of the Railroad Company, expressed by resolution of the board of directors and in the discretion of the Trustee, shall be for the benefit of such premises and property or any part thereof, and for such purpose the Trustee may join in any plan of
105 reorganization, or other action, or in any agreement approved by it, in respect of any such premises and property and may accept any new securities representing any such premises and property issued under any such plan.

SEC. 7. The Trustee, at any time in its discretion, may, and, if requested in writing by the Railroad Company, shall consent to the extension of any bonds which hereafter shall be pledged with or assigned to the Trustee hereunder, and of the martgages securing the same, to the extent provided in sec. 9 of article two hereof; provided that such extended bonds shall be secured by a lien and charge upon the same property equal or superior to that of the bonds extended. The Trustee may receive the certificate of counsel of the Railroad Company as conclusive evidence that such extended bonds are so secured.

ARTICLE FOUR.

SEC. 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond, which in any way, on or after the maturity thereof, shall have been transferred or pledged, separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of, or from, this indenture, except after the prior payment in full of the principal of all bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond at any time issued under and secured by this indenture, or on any bond mentioned in section 5 of article two hereof, and any such default shall continue for a period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond secured hereby or of any bond men-
106 tioned in section 5 of article two hereof; or in case (3) default shall be made by the Railroad Company in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or upon the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the Trustee or from holders of five per cent in amount of the bonds hereby secured and then outstanding; or in case (4) the Railroad Company shall make default in the due observance and performance of any other covenant or condition herein contained, and any such default shall continue for a period of six months after written notice thereof to the Railroad Company from the Trustee or from the holders of five per cent in amount of the bonds hereby secured and then outstanding; then, and in each and every such case of default (provided, however, in respect of any of the three cases so indicated, that such default shall have continued for six months as aforesaid), the Trustee personally, or by its agent or agents, attorney or attorneys, may enter into and upon all or any part of the railroads, property and premises, lands, rights, interests, and franchises hereby conveyed, or intended so to be, and each and every part thereof, and may exclude the Railroad Company, its agents and servants, wholly therefrom, and having and holding the same, may use, operate, manage, and control said premises,

and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents, and servants or attorneys, to the best advantage of the holders of the bonds hereby secured in accordance with law and with any statute relating to said premises or any part thereof, or to the operation thereof; and, upon every such entry, the Trustee, at the expense of the trust estate, from time to time, by purchase, repairs, or construction, may maintain and restore, and insure or keep insured, the railroads, property, buildings, and
structures erected or provided for use in connection with said
107 premises, and whereof it shall become possessed, as aforesaid, in the same manner and to the same extent as is usual, and likewise, from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals, and replacements and useful alterations, additions, betterments, and improvements thereto and thereon; and the Trustee in such case shall have the right to manage the mortgaged premises as aforesaid, and to carry on the business and exercise all rights and powers of the Railroad Company, either in the name of the Railroad Company, or otherwise, as the Trustee shall deem best; and it shall be entitled to collect and receive all incomes, rents, issues, and profits of the same and every part thereof, and also the income from stocks and bonds pledged hereunder, and after deducting the expenses of operating said premises, and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance and prior or other proper charges upon the said premises and property, or any part thereof, including any interest paid on bonds prior in lien to those secured hereby, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest remaining in default, in the order of the maturity of the instalments of such interest, with interest thereon at the rate of five per cent per annum, such payments to be made ratably to the persons or parties entitled thereto without discrimination or preference.

In case the principal of the bonds hereby secured shall have
108 become due by declaration or otherwise, first, to the payment of the accrued interest, with interest thereon at the rate of five per cent per annum, in the order of the maturity of the instalments thereof, and next, to the payment of the principal of all bonds hereby secured; in every instance such payments to be made ratably to the person or persons entitled to such payment without any discrimination or preference.

All the foregoing provisions are, however, subject to the provisions postponing the rights of holders of detached coupons and assignments of interest, not accompanied by the bond to which they relate.

In case, and during such continuance, of any such default in either of the first three cases specified in this section, either with or without entry by the Trustee, and also in the fourth case, if the Trustee shall have entered or shall have elected to enter as aforesaid, the Trustee shall have, exercise, and enjoy the right to vote on all shares of stock pledged or agreed to be pledged hereunder, and, for the benefit of the holders of bonds hereby secured, the right to receive and collect all interest moneys and dividends maturing or payable upon all pledged bonds and stocks, and to apply as hereinbefore provided the net moneys received, and as holder of such shares of stock and of such bonds that may be hereafter pledged under this indenture, to perform any and all acts, and to make or execute any and all requests, requisitions, or other instruments in the premises. In the event that a receiver of the hereby mortgaged premises shall have been appointed and shall be in possession thereof, the Trustee, from time to time, in its discretion, may turn over any part or all of the interest moneys and dividends so collected by it to such receiver, and may cooperate with such receiver in managing and operating the entire properties mortgaged or pledged hereunder in such manner as the Trustee shall deem for the best interests of the holders of the bonds hereby secured.

109 SEC. 3. In case default shall be made by the Railroad Company in the payment of any interest on any bond hereby secured, and such default shall continue for a period of six months, then and in every case of such continuing default, upon the written request of the holders of a majority in amount of the bonds hereby secured then outstanding, the Trustee, by notice in writing delivered to the Railroad Company, shall declare the principal of all bonds hereby secured then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in anywise notwithstanding. This provision is, however, subject to the condition that if at any time after the principal of said bonds shall have been so declared due and payable all arrears of interest upon all such bonds, with interest at the rate of five per cent per annum on overdue instalments of interest, shall either be paid by the Railroad Company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the Railroad Company and to the Trustee, may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

In case the Trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other lawful reason, or shall have been determined adversely to the Trustee, then and in every such case the Railroad Company shall be restored to its former position and rights hereunder

in respect of the mortgaged premises and the shares of stock and bonds and other property herein pledged or agreed to be pledged; and, upon its written request, the Trustee shall do, make, exe-
110 cute, acknowledge, and deliver such acts, deeds, instruments, and assurances in the law as may be required to effectuate such purpose; but, nevertheless, all rights, remedies, and powers of the Trustee shall survive and continue as though no such proceedings had been taken.

SEC. 4. In case (1) default shall be made by the Railroad Company in the payment of any interest on any bond at any time issued under and secured by this indenture, or on any bond mentioned in section 5 of article two hereof, and any such default shall continue for a period of six months; or in case (2) default shall be made by the Railroad Company in the due and punctual payment of the principal of any bond secured hereby, or of any bond mentioned in section 5 of article two hereof; or in case (3) default shall be made by the Railroad Company in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or upon the income and profits thereof, and such default shall continue for a period of six months after written notice thereof to the Railroad Company from the Trustee or from holders of five per cent in amount of the bonds hereby secured and then outstanding; or in case (4) the Railroad Company shall make default in the due observance and performance of any other covenant or condition herein contained, and any such default shall continue for a period of six months after written notice thereof to the Railroad Company from the Trustee or from the holders of five per cent in amount of the bonds hereby secured and then outstanding; then, and in each and every such case of default (provided, however, in respect of any of the three cases so indicated that such default shall have continued for six months as aforesaid) the Trustee, with or without entry, personally or by attorney, in its discretion (a) may sell to the highest and best bidder, all and singu-
lar, the mortgaged and pledged property and premises, bonds
111 and stocks, rights, franchises, and interests, lands, and appurtenances, and other real and personal property of every kind, and all right, title, and interest, claim, and demand therein, and right of redemption thereof, in one lot as an entirety; provided, however, in respect of such lot that if a sale thereof in parcels shall be required under the provisions of section 6 of this article, sale may be made in parcels as in said section provided; which sale shall be made at public auction at such place in the city of Philadelphia, in the State of Pennsylvania, or at such other place and at such time and upon such terms as the Trustee may fix and briefly specify in the notice of sale to be given as herein provided; or (b) immediately upon the expiration of the six months in any of the three cases so indicated, and immediately upon default in payment of principal in the other case, may proceed to protect and enforce the right of bondholders under this indenture by a suit or suits in equity or at law, whether for the specific perform-

ance of any covenant or agreement contained herein or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the Trustee, being advised by counsel learned in the law, shall deem most effectual to protect and to enforce any of its rights or duties hereunder.

Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding, in case of any such default (continued in any of said three cases for six months as aforesaid), it shall be the duty of the Trustee, upon being indemnified as hereinafter provided, to take all needful steps for the protection and enforcement of its rights and the rights of the bondholders secured hereby, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit, or otherwise, as the Trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured.

112 SEC. 5. Anything in this indenture contained to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding, in case of any subsisting default, from time to time, shall have the right to direct and control the method and place of conducting any and all proceedings for any sale of the property and premises hereby conveyed and pledged, or agreed, or intended so to be, or for the foreclosure of this indenture, or for the appointment of a receiver, or for the purpose of taking any other proceedings hereunder.

SEC. 6. In the event of any sale, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property hereby mortgaged and pledged shall be sold as provided in section 4 of this article in one lot, as an entirety, including all the rights, title, estates, lands, rights to lands, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature, unless the holders of a majority in amount of the bonds hereby secured then outstanding shall in writing request the Trustee to cause the same to be sold in parcels, in which case the sale thereof shall be made in such parcels as may be specified in such request or petition, or unless such sale as an entirety is impracticable by reason of some statute or other cause; and this provision shall bind the parties hereto and each and every of the holders of the bonds and coupons hereby secured or intended so to be.

SEC. 7. Notice of any such sale pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in the city of New York, and in a newspaper published in the city of Philadelphia.

113 SEC. 8. Upon the completion of any sale or sales under this indenture, the Trustee shall make, execute, and deliver to the accepted purchaser or purchasers a good and sufficient deed or good and sufficient deeds, of conveyance, of the property and franchises sold. And the Trustee and its successors are hereby appointed the true and lawful attorney or attorneys, irrevocable, of the Railroad Company in its name and stead to make all necessary deeds and conveyances of property and all necessary transfers of shares of stock or bonds or other obligations thus sold, and for that purpose it and they may execute all necessary acts of assignment and transfer, and may substitute one or more persons with like power, the Railroad Company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, shall operate to divert all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the Railroad Company of, in, and to the premises sold, and shall be a perpetual bar both at law and in equity against the Railroad Company, its successors and assigns, and against any and all persons claiming or to claim the premises sold, or in any part or parcel thereof, by, from, through, or under the Railroad Company, its successors and assigns, or any of them.

The personal property and chattels conveyed, or intended to be conveyed by or pursuant to this indenture, other than stocks, bonds, and other securities, and property pledged or to be pledged with the Trustee, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the railroads, and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

114 SEC. 9. The Trustee, from time to time, may adjourn any sale to be made by it under the provisions of this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and without further notice or publication it may make such sale at the time and place to which the same shall be so adjourned.

SEC. 10. The receipt of the Trustee shall be a sufficient discharge to the purchaser or purchasers of the property sold as aforesaid, for the purchase money, and no such purchaser or purchasers, or his, their, or its representatives, vendees, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money, or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 11. In case of any such sale, whether under the power of sale hereby granted, or pursuant to judicial proceedings, the whole of the

principal sum of the bonds hereby secured, if not previously declared due, shall at once become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 12. The proceeds or avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, and the purchase money paid thereon, together with any sums which may be held by the Trustee under any of the provisions of this indenture, at the time of, or after, such sale, as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the Trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances
115 made and incurred by the Trustee in managing and maintaining the property hereby conveyed or so intended to be, and of all taxes, assessments, or liens prior to the lien of these presents, except any taxes, assessments, or other superior liens to which such sales shall have been made subject.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of five per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal, and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest.

Third. To the payment of the surplus, if any, to the Railroad Company, or to whomsoever may be lawfully entitled to receive the same.

All the foregoing provisions are, however, subject to the provisions postponing the rights of holders of detached coupons and assignments of interest not accompanied by the bond to which they relate.

SEC. 13. The Railroad Company covenants that in case (1) default shall be made in the payment of any interest on any bonds at any time outstanding and secured by this indenture, or in case (2) default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds or by declaration as authorized by this indenture, or by a sale of the mortgaged premises as hereinbefore provided, then, upon demand of the Trustee, it will pay to the Trustee the whole
116 amount of the interest, or of the interest and principal, due and payable on all the bonds hereby secured then outstanding, with interest at the rate of five per cent per annum upon the overdue principal and installments of interest; and in case it shall fail to pay the same forthwith upon such demand, the Trustee, in its own name and as Trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The Trustee shall be entitled to recover judgment as aforesaid, either before or after, or during the pendency of any proceedings for

the enforcement of the lien of this indenture upon the mortgaged and pledged premises, and the right of the Trustee to recover such judgments shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises and of the application of the proceeds of sale to the payment of the mortgage debt, the Trustee, in its own name and as Trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgage debt remaining unpaid, with interest. No recovery of any such judgment by the Trustee and no levy of any execution upon any such judgment upon property subject to the lien of this indenture, or upon any other property, shall in any manner, or to any extent, affect the lien of the Trustee upon the mortgaged premises or any part thereof, or any rights, powers, or remedies of the Trustee hereunder, or any rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies shall continue unimpaired as before.

Any moneys collected by the Trustee under this section shall
117 by it be distributed and paid over to the persons registered as holders of the registered coupon bonds and registered bonds without coupons at the time of payment, and to the persons presenting the coupon bonds and coupons for such payment, without any preference or priority of any kind and ratably according to the amounts which shall have become due upon such bonds and coupons, respectively.

SEC. 14. The Railroad Company will not, at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force in any locality where the mortgaged premises or pledged property, or any part of either, may or shall be situate, nor will it claim, take, or insist on any benefit or advantage from any law now or hereafter in force, providing for the valuation, or appraisement, of the mortgaged premises, or pledged property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or prior to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by the Congress of the United States, or by the legislature of any State, to redeem the property so sold or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws; and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the Trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SEC. 15. Upon filing a bill in equity, or upon commencement of any other judicial proceedings to enforce any right of the Trustee or of the bondholders under this indenture, the Trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein and hereby conferred and pro-
118 vided to be exercised by the Trustee upon the occurrence and continuance of default as hereinbefore provided; and, in any case of any default entitling the Trustee to enter as provided in section 2 of this article, the Trustee, as matter of right, shall be entitled to the appointment of a receiver of the premises hereby mortgaged, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but, notwithstanding the appointment of any receiver, the Trustee shall be entitled, as pledgee, to continue to retain possession and control of the stocks, bonds, cash, and other property pledged or to be pledged with the Trustee hereunder.

SEC. 16. The Railroad Company at any time hereafter, before full payment of the bonds secured hereby, and whenever deemed expedient for the better security of such bonds, although there be then no default entitling the Trustee to enter into possession, may, with the consent of the Trustee, surrender and deliver to the Trustee full possession of the whole or any part of the property, premises, and interests by it hereby conveyed, or intended so to be, for any period, fixed or indefinite. Upon such surrender and delivery to the Trustee, with its consent, the Trustee shall enter into and upon the premises so surrendered and delivered, and shall take and receive possession thereof, for such period fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon and to maintain such possession though beyond the expiration of any such prescribed period. Upon any such voluntary surrender and delivery of said property and premises, or any part thereof, the Trustee, from the time of its entry, shall work, maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenue thereof as provided in section 2 of this article. Upon application of the Trustee,
119 and with consent of the Railroad Company if there be then no subsisting default hereunder, and without such consent, if there shall then be a subsisting default entitling the Trustee to enter as provided in section 2 of this article hereof, a receiver may be appointed to take possession of, and to operate, maintain, and manage the whole or any part of said property wheresoever the same may be situated, with all the rights, powers, and duties by this section conferred upon the Trustee, and the Railroad Company shall transfer and deliver to such receiver all such property in its possession wheresoever the same may be situated; provided, however, that notwithstanding the appointment of any such receiver, the Trustee, as pledge, shall be entitled to retain possession and control of the stocks, bonds,

cash, and other property pledged or to be pledged with the Trustee hereunder.

SEC. 17. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture or for the execution of any trust hereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder shall previously have given to the Trustee written notice of default and of the continuance thereof as hereinbefore provided, nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding shall have made written request of the Trustee, and shall have afforded to it reasonable opportunity, either itself to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name, nor unless, also, they shall have offered to the Trustee adequate security and indemnity against the cost, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared in every such case, at the option of the Trustee, to be conditions precedent to the execution of the powers and trusts of this indenture and to any action, or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 18. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the Trustee, or upon or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 19. In case of any sale hereunder, any and all purchasers in making settlement or payment shall be entitled to turn in any bonds and any matured and unpaid interest obligations hereby secured, estimating the value of such bonds and coupons for that purpose at the sum payable out of the net proceeds of such sale to the holder or holders of such bonds and coupons as his or their ratable share of such net proceeds, after allowing for the proportion of the total payment required to be made in cash for the costs and expenses of the sale or otherwise; and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, such purchaser or purchasers may make such settlement by receipting on the bonds the amount to be credited thereupon; and at any such sale any bondholders may bid for and purchase such property, and, upon compli-

ance with the terms of sale, may hold, retain, and dispose of such property without further accountability therefor.

121 SEC. 20. No delay or omission of the Trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein.

SEC. 21. If, in order to preserve the franchises of the Railroad Company, and to avoid a sale hereunder, any plan of reorganization shall be proposed with provisions for the modification of this mortgage, so far as to authorize and require the creation of new liens upon the mortgaged premises prior and superior to the lien hereof, then and in every such case registered holders of four-fifths in amount of all outstanding bonds herdby secured, may, in writing, direct the Trustee, in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan; which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the Railroad Company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to amount or date of payment of principal or rate or dates of payment of interest. Thereupon, but not otherwise, the Trustee shall by writing acquiesce in such provisions of such plan, and such acquiescence by the Trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured shall be reduced to a written agreement between the Railroad Company and the Trustee, and such agreement shall be recorded in Philadelphia County, Pennsylvania; and thenceforth shall be deemed to be part of this indenture, and thereafter the lien of this indenture and of the bonds hereby secured shall be deemed to be and shall be subordinate to such new and

122 prior liens created pursuant to such plan, but only to the extent specified in such written agreement.

Registration of bonds for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 4 of article two of this indenture.

ARTICLE FIVE.

SEC. 1. Any request or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent instruments of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be

sufficient for any purpose of this indenture, if made in the following manner:

The fact and date of the execution by any person of any such request, or other instrument of writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in Pennsylvania, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as the holder of bonds, and the issue numbers of the bonds held by such person, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), whose certificate may be deemed by the Trustee to be satisfactory, showing that such person had on deposit with such depositary the bonds described in such certificate at the date
123 therein mentioned. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds as provided in section 4 of article two hereof.

Such proof shall be conclusive in favor of the Trustee with regard to any action taken by it under such request or other instrument.

Article Six.

Sec. 1. Upon the written request of the Railroad Company, approved by resolution of its board of directors or executive committee, from time to time, while the Railroad Company, not being in any default hereunder, is in possession of the mortgaged premises, but subject to the conditions and limitations in this section prescribed, and not otherwise, the Trustee, by proper instruments of writing, shall release from the lien and operation of this indenture any part of the premises and property, real or personal, now or hereafter mortgaged or pledged hereunder, except any of the shares of stock mentioned in I of sub'ivision third of the granting clauses hereof, and except also any shares of stock that may hereafter be pledged hereunder, and at the time of pledge classified, with the approval of the Trustee under said I, but no release of stocks pledged hereunder shall be made except upon the redemption thereof as hereinafter provided.

No release hereunder of real estate shall be made unless the Railroad Company shall have sold, or shall have contracted to sell or to exchange for other property, the property so to be released.

The Railroad Company shall have the right at any time and from time to time to redeem from the lien hereof any or all of the shares of stock mentioned in II of subdivision third of the granting clauses hereof or hereafter pledged hereunder, and at the time of pledge classified with the approval of the Trustee, under said II, and any or all bonds hereafter pledged hereunder, at prices which, in its discretion, the Trustee shall approve; provided, that in the case

124 of the alienation of the said shares of stock, the Railroad Company and the Trustee, in the discretion of the Trustee, shall be of the opinion that the alienation of such stocks on the terms proposed will not be detrimental to the security of the bonds issued hereunder and secured hereby; and such redemption may be made either in money or in bonds hereby secured at the par value thereof, with five per cent premium added thereto, and for the purpose of any such redemption the Railroad Company may use any of the bonds hereby secured when duly issued or re-issued hereunder and held or acquired by it from time to time. All of said bonds hereby secured so applied in redemption of securities shall thereupon be cancelled by the Trustee, and, when cancelled, shall be surrendered to the Railroad Company.

The Railroad Company shall have the right at any time to exchange for other stocks the stocks named in II of subdivision third of the granting clauses hereof or hereafter pledged hereunder and at the time of pledge classified with the approval of the Trustee under said II, provided such exchange shall be approved by the Trustee, and the stock received by way of exchange shall be deposited and pledged with the Trustee of this mortgage and classified under II.

The Trustee shall deliver to the Railroad Company, with all rights unimpaired, any stock or bonds so redeemed from the lien hereof by the Railroad Company, and shall execute and deliver all proper instruments of transfer and assignment in respect thereof.

SEC. 2. The proceeds of any and all such sales of property, or of stocks or bonds pledged hereunder, and also all moneys received as compensation for any such property subject to this indenture taken by exercise of the power of eminent domain, may be disposed of as required by any mortgage thereon or pledge thereof prior hereto, and the Trustee may acquiesce in such disposition. So far as such

125 proceeds and moneys shall not be disposed of pursuant to any such requirement, they shall be set apart and, at the option of the Railroad Company, shall be applied, either (1) to the purchase of bonds hereby secured in such manner and at such prices as the Railroad Company and the Trustee shall deem expedient (including bonds held or acquired by the Railroad Company, from time to time), all of which bonds so applied in disposition of proceeds of sale as aforesaid shall thereupon be cancelled by the Trustee, and when cancelled shall be surrendered to the Railroad Company, and to the extent that bonds hereby secured cannot be bought on terms deemed expedient by the Railroad Company and the Trustee, then to the purchase of securities in which at such time savings banks shall be authorized under the laws of Pennsylvania to invest their funds, such securities to be held by the Trustee as a part of the trust estate hereunder, and the interest thereon or income therefrom, to be paid to the Railroad Company; or (2), to the improvement of, or additions to, any part of the mortgaged premises of the Railroad Company, or of the premises of any company, the entire capital stock (or in the opinion of the Trustee substantially the entire capital

stock) of which shall, at the time, be pledged hereunder, or to the purchase of other property, real or personal, by the Railroad Company, or by any such other company, or to the purchase by the Railroad Company of stocks or bonds of other companies, which shall be assigned in trust by the Railroad Company to the Trustee, subject to all the trusts hereby declared, and shall be classified under I or II of subdivision third of the granting clauses hereof as the trustee shall approve. And if such proceeds and money shall have been applied, under (1) hereof, to the purchase of securities in which at such time savings banks shall be authorized under the laws of Pennsylvania to invest their funds, the Trustee shall at any time
126 or times on the request of the Railroad Company, sell such securities at prices satisfactory to the Trustee, and apply the proceeds as above provided under (2) of this section. Any new property acquired by the Railroad Company to take the place of any property released hereunder, shall ipso facto become and be subject to the lien of this indenture, as fully as if hereby specifically mortgaged, but if requested by the Trustee, the Railroad Company will convey or assign the same to the Trustee by appropriate instruments upon the trusts and for the purposes of this indenture.

SEC. 3. The Railroad Company, from time to time, while in possession of the mortgaged premises as provided in article nine hereof, and not being in default hereunder, shall have full power, in its discretion, to dispose of any portion of the machinery, equipments, and implements, at any time held or acquired, which may have become unfit for use or unnecessary, replacing the same so far as may be necessary by new machinery, equipments, or implements, which immediately, upon such acquisition, shall become subject to the lien and operation of this indenture, and the Railroad Company may, notwithstanding anything herein contained, consent to such disposition by any of the companies whose stocks are at the time pledged hereunder, of like property of such companies.

In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article of this indenture be required to see to the application of the purchase money.

In case any portion of the mortgaged or pledged premises shall be in the possession of a receiver lawfully appointed, the powers in and by this article conferred upon the Railroad Company may be exercised by such receiver with the approval of the Trustee; and if the Trustee shall be in possession of the mortgaged or pledged premises under any provision of this indenture, then all the powers by this article conferred upon the Railroad Company may be exercised by the Trustee in its discretion.

127 SEC. 4. In case at any time it shall become necessary, or in the judgment of the Trustee shall be for the interest of the bondholders hereby secured, or for the benefit of the mortgaged property, that the Railroad Company shall terminate or renew or shall make changes or alterations in or a substitution of any of the leases embraced in the granting clauses of this mortgage, the Railroad Com-

pany, with the written consent of the Trustee, may make any such terminations, renewals, changes, alterations, or substitutions, and may make or cause to be made, executed, and delivered all such instruments in writing as may be proper and necessary to carry out and perfect any and all terminations, renewals, changes, alterations, or substitutions authorized in this section. At the same time provision shall be made by instruments in writing satisfactory to the Trustee so that any renewed, changed, altered, or substituted leases shall forthwith become bound by and be subject to the terms of this indenture in the same manner as the original lease.

Article Seven.

Sec. 1. The Trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; or for anything whatever in connection with this trust, except its own wilful misconduct or gross negligence. The Trustee shall not be personally liable for any debts contracted by it or for damages to persons or property carried or injured, or for salaries or nonfulfilment of contracts, during any period wherein the Trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. The Trustee shall not be under any obligation to take any action towards the execution or enforcement of the trust hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless and as often as required by the Trustee, the Trustee shall be furnished with reasonable indemnity against
128 such expense or liability; nor shall the Trustee be required to take notice of any default hereunder unless notified in writing of such default by the holders of at least five per cent in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested in writing to take such action by the holders of not less than twenty-five per cent in amount of the bonds hereby secured then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such notice or request, nor this provision therefor, shall restrict any discretion herein given to the Trustee to determine whether or not it shall take action in respect of such default, or to take action without such request. The Trustee shall not be responsible for the recording of this indenture.

The Trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

Sec. 2. The Trustee, or any Trustee hereafter appointed, may resign and be discharged of the trusts created by this indenture by giving notice thereof to the Railroad Company and to the bondholders through publication at least twice a week for four successive weeks, in one newspaper at that time published in the city of New York, and in one newspaper published in the city of Philadelphia, and by due execution of the conveyances hereinafter required.

The Trustee may be removed at any time by an instrument or concurrent instrument in writing delivered to it signed by the holders of three-quarters in amount of the bonds secured hereby and then outstanding, or by their attorneys in fact duly authorized.

SEC. 3. In case at any time the said Trustee, or any Trustee hereafter appointed, shall resign or be removed or otherwise become incapable of acting, a successor, or successors, may be appointed by the holders of a majority in amount of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writ-
129 ing signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared that, in case at any time there shall be a vacancy in the office of Trustee hereunder, the Railroad Company, by an instrument executed by order of its board of directors, may appoint a Trustee to fill such vacancy until a new Trustee shall be appointed by the bondholders as herein authorized. The Railroad Company shall thereupon publish notice of such appointment once a week for six successive weeks in a newspaper published in the city of New York, and in a newspaper published in the city of Philadelphia, and any new Trustee so appointed by the Railroad Company shall immediately and without further act be superseded by a Trustee appointed in the manner above provided by the bondholders prior to the expiration of ninety days after such publication of notice. In case no such appointment shall be made by the bondholders prior to the expiration of such ninety days, a new Trustee, to supersede the Trustee appointed by the Railroad Company, may nevertheless be appointed by any judge of the United States Circuit Court for the Third Circuit, or by any court of competent jurisdiction in the premises, upon the application of one-quarter in amount of the bondholders. Every such Trustee appointed in place of Girard Trust Company, Philadelphia, or its successor in the trust, shall always be a trust company in good standing, doing business in the city of Philadelphia or in the city of New York, and having a capital and surplus aggregating at least $2,000,000, if there be such a trust company willing and able to accept the trust upon satisfactory terms.

Any new Trustee appointed hereunder shall execute, acknowledge, and deliver to the Trustee last in office and also to the Railroad Company an instrument accepting such appointment hereunder, and thereupon such new Trustee shall become vested with all the estates, properties, rights, powers, and trusts of its or his predecessor
130 in the trust hereunder with like effect as if originally named as Trustee herein, without any further act, deed, or conveyance; the Trustee ceasing to act shall, on the written request of the new Trustee, execute and deliver an instrument transferring to such new Trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the Trustee so resigning or removed, and shall duly assign, transfer, and deliver any and all stocks, bonds, or other property, and moneys held by such Trustee to the new Trustee so appointed in its or his place.

Should any deed, conveyance, or instrument in writing from the Railroad Company be required by any new Trustee for more fully and certainly vesting in and confirming to such new Trustee such estates, rights, powers, and trusts, any and all such deeds, conveyances, and instruments in writing shall, on due request, be made, executed, acknowledged, and delivered by the Railroad Company.

Article Eight.

Sec. 1. No recourse under any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, shall be had against any incorporator, stockholder, officer, or director of the Railroad Company or of any successor corporation, either directly or through the Railroad Company, by any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this mortgage and the obligations hereby secured are solely corporate obligations and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, or directors of the Railroad Company, or of any successor corporation, or any or either of them, under or by reason of any or either of the obligations, covenants, or agreements in this indenture, or in any of the bonds or coupons hereby secured, expressed, and contained, or that may be implied
131 therefrom, and that any and all personal liability, if any there should be, of every name and nature, either at common law or in equity, or by existing or future statutes, of every such incorporator, stockholder, officer, or director, is hereby expressly waived as a condition of, and consideration for, the execution and issue of this mortgage and such bonds and coupons.

Article Nine.

Sec. 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal, of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the Railroad Company, and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the Railroad Company voluntarily shall have surrendered possession to the Trustee as herein permitted, the Railroad Company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the premises hereby mortgaged (other than the bonds, certificates of stock, cash, and other property pledged or to be pledged hereunder with the Trustee), and the same and every part thereof, with the rights and franchises appertaining thereto, and the tolls, income, rents, issues, and profits thereof, to manage, operate, collect, receive, use, and enjoy in any manner not inconsistent with the provisions hereof.

SEC. 2. If, at any time, under the provisions hereof, the entire amount of the bonds and coupons hereby secured, shall have been acquired by the Railroad Company, or if when the bonds hereby secured shall have become due and payable, the Railroad Company shall well and truly pay, or cause to be paid, the whole amount of the principal moneys and interest due upon all the bonds and coupons for interest thereon hereby secured then outstanding, or
132 shall provide for such payment by depositing with the Trustee hereunder for the payment of such bonds and coupons the entire amount due thereon for principal and interest, and shall also pay, or cause to be paid, all other sums payable hereunder by the Railroad Company, and shall well and truly perform all the things herein required to be performed by it according to the true intent and meaning of this indenture, then all property, rights, and interest hereby conveyed or pledged shall revert to the Railroad Company, and the estate, right, title, and interest of the Trustee shall thereupon cease, determine, and become void, and the Trustee in such case, on demand of the Railroad Company, and at its cost and expense, shall assign and deliver to the Railroad Company all stocks, bonds, and other property pledged with or held by said Trustee and shall enter satisfaction of this indenture and of any conveyances made in trust to it, pursuant to this indenture, upon the records; otherwise, the same shall be, continue, and remain in full force and virtue.

ARTICLE TEN.

SEC. 1. All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the Railroad Company, shall bind not only it but also its successors or assigns, whether so expressed or not.

SEC. 2. Nothing contained in this indenture, or in any bond hereby secured, shall prevent the Railroad Company from entering into any lawful consolidation or merger with, or any lease to, any other corporation or corporations, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof), of all the hereby mortgaged and pledged premises as an entirety to a corporation at that time existing under and by virtue of the laws of the United States or any State thereof, and lawfully entitled to acquire the property affected by this mortgage; pro-
133 vided, however, that such consolidation, merger, lease, or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the Trustee, or of the bondholders hereunder, and that, upon any such consolidation, merger, lease, or sale, the due and punctual payment of the principal and interest of all said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by any corporation formed by such consolidation or merger, or leasing or purchasing as aforesaid.

SEC. 3. In case the Railroad Company, pursuant to sec. 2 of this article, shall be consolidated or merged with any other corporation, or shall sell, convey, and transfer, subject to this indenture, all its mortgaged and pledged premises as an entirety as aforesaid, every successor corporation formed by such consolidation or into which the Railroad Company shall have been merged, or which shall have purchased and received any conveyance and transfer as aforesaid, shall, upon executing and causing to be recorded an indenture with the Trustee, satisfactory to the Trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance of all the covenants and conditions of this indenture, succeed to, and be substituted for, the Railroad Company, party of the first part hereto, with the same effect as if it had been named herein as party of the first part hereto, and every such successor corporation may thereupon cause to be signed and may issue, either in its own name or in the name of the Railroad Company, any or all of such bonds which shall not theretofore have been signed by the Railroad Company and delivered to the Trustee, and, subject to all the terms, conditions, and restrictions herein prescribed, the Trustee shall certify and deliver any of such bonds which shall have been previously signed and delivered by the officers of the Railroad Company to the
134 Trustee for certification, and any of such bonds which such successor corporation shall, as above provided, thereafter cause to be signed and delivered to the Trustee for that purpose upon the order of such successor corporation. All bonds so issued shall in all respects have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the term "Lehigh Valley Railroad Company" includes and means not only the corporation of that name, party of the first part hereto, but also any such successor corporation, as provided in sec. 3, now existing or hereafter formed under the laws of the United States or of any State or States thereof. Every such successor corporation shall possess and from time to time may exercise each and every right and power hereunder of Lehigh Valley Railroad Company in its name or otherwise.

SEC. 5. Any act or proceeding by any term of this indenture, or of any bond or resolution herein recited, required or provided to be done or performed by any board or officer of the Railroad Company, shall and may, in event of any change in its corporate existence, be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be lawful sole successor of the Railroad Company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the Railroad Company, by instrument in writing executed by authority of its board of directors and delivered to the Trustee, may surrender any of the powers reserved to the Railroad Company or to such successor corporation under this article, and thereupon such power so surrendered shall terminate.

135 ARTICLE ELEVEN.

SEC. 1. The Railroad Company may deem and treat the registered holder of any registered bond without coupons, or of any registered coupon bond, or the bearer of any coupon bond hereby secured which shall not at the time be registered, as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond or coupon, as the case may be, for the purpose of receiving payment of the interest or principal of such bond, or the amount of such coupon, and for all other purposes, and the Railroad Company shall not be affected by any notice to the contrary.

ARTICLE TWELVE.

SEC. 1. Girard Trust Company, trustee, party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

The words "the trustee," or "said trustee," or any other equivalent term, as used in this indenture (except when otherwise clearly indicated), shall be held and construed to mean the trustee, or trustees, for the time being, whether original or successor, and the words "trustee," "bond," "coupon," "bondholder," and "holder" shall include the plural as well as the singular number, and the terms "majority" and "per cent" shall signify "majority in amount," or "per cent in amount," whether or not so expressed.

In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

Lehigh Valley Railroad Company doth hereby constitute
136 and appoint D. G. Baird to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

Girard Trust Company doth hereby constitute and appoint Samuel W. Morris to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

137 In witness whereof, Lehigh Valley Railroad Company, the party thereto of the first part, has caused this indenture to be signed by its , and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and Girard Trust Company, the party of the second part, has caused this indenture to be signed by its , and its corporate seal to be hereunto affixed and the same to be attested by the signature of its secretary, the day and year first above written.

[Seal of the Lehigh Valley Railroad Co.]

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Attest:
D. G. BAIRD, *Secretary.*

Signed, sealed, and delivered on behalf of Lehigh Valley Railroad Company in the presence of—

D. G. BAIRD.
HENRY S. DRINKER.
J. WM. ROBBINS.

[Seal of the Girard Trust Co.]

GIRARD TRUST COMPANY,
By E. B. MORRIS, *President.*

Attest:
E. S. PAGE, *Secretary.*

Signed, sealed, and delivered on behalf of Girard Trust Company in the presence of—

W. N. ELY.
W. J. DICKSON.
E. S. PAGE.

138 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I hereby certify that on this 30th day of September, in the year of our Lord one thousand nine hundred and three (1903), before me, the subscriber, a notary public, in and for the State and county aforesaid, personally appeared D. G. Baird, the attorney named in the foregoing mortgage, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage to be the act of the said Lehigh Valley Railroad Company.

Witness my hand and notarial seal the day and year aforesaid.

[Seal of J. Wm. Robbins, notary public.]

J. WM. ROBBINS,
Notary Public.

My commission expires March 4th, 1907.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I hereby certify that on this thirtieth day of September, in the year of our Lord one thousand nine hundred and three (1903), before me, the subscriber, a notary public, in and for the State and county afore-

said, personally appeared Samuel W. Morris, the attorney named in the foregoing mortgage, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage to be the act of the said Girard Trust Company.

Witness my hand and notarial seal the day and year aforesaid.

[Seal of William J. Dickson, notary public.] WILLIAM J. DICKSON, *Notary Public.*

Commission expires May 12th, 1905.

I am not a stockholder, director, or clerk in the corporation for which I hereby act as notary public.

139 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the 30th day of September, in the year 1903, before me, personally came D. G. Baird, to me known, who being by me duly sworn, did depose and say that he resided in the city of Beverly and State of New Jersey; that he is the secretary of Lehigh Valley Railroad Company, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

J. WM. ROBBINS,

[Seal of J. Wm. Robbins, Notary Public.] *Notary Public.*

My commission expires March 4th, 1907.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the thirtieth day of September, in the year 1903, before me, personally came E. B. Morris, to me known, who being by me duly sworn, did depose and say that he resided in the county of Montgomery and State of Pennsylvania; that he is the president of Girard Trust Company, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

WILLIAM J. DICKSON,

[Seal of William J. Dickson, Notary Public.] *Notary Public.*

Commission expires May 12, 1905.

140 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be it remembered, that on this 30th day of September, A. D. 1903, before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared David G. Baird who, being

by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Lehigh Valley Railroad Company, party to the foregoing mortgage; that he well knows the corporate seal of the said Lehigh Valley Railroad Company, that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said mortgage signed and delivered by E. B. Thomas, who was, at the date and execution thereof, the president of the said company, in the presence of deponent, as the voluntary act and deed of the said company; and that deponent thereupon signed the same as subscribing and attesting witness.

D. G. BAIRD.

Subscribed and sworn to before me, the day and year last above written.

J. WM. ROBBINS,
Notary Public.

[Seal of J. Wm. Robbins, Notary Public.]

My commission expires March 4th, 1907.

141 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be is remembered, that on this thirtieth day of September, A. D. 1903, before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared E. S. Page, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Girard Trust Company, party to the foregoing mortgage, that he well knows the corporate seal of the said Girard Trust Company, that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said mortgage signed and delivered by E. B. Morris, who was, at the date and execution thereof, the president of the said company, in the presence of deponent, as the voluntary act and deed of the said company; and that deponent thereupon signed the same as subscribing and attesting witness.

E. S. PAGE.

Subscribed and sworn to before me the day and year last above written.

[Seal of Wiliam J. Dickson, Notary Public.]

WILLIAM J. DICKSON,
Notary Public.

Commission expires May 12, 1905.

143 EXHIBIT B.

COLLATERAL TRUST AGREEMENT.

This agreement, made this first day of November, one thousand nine hundred and five (1905) between the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania (hereinafter called the Railroad Company) of the first part; and the Girard Trust

Company, also a corporation of the State of Pennsylvania (hereinafter called the Trustee) of the second part:

Whereas, the Railroad Company has purchased all the capital stock of Coxe Brothers and Company, Incorporated, amounting to fifty-eight thousand two hundred and three (58,203) shares, at the par value of two million nine hundred and ten thousand one hundred and fifty dollars ($2,910,150), and all of the capital stock of the Delaware, Susquehanna and Schuylkill Railroad Company, amounting to thirty thousand (30,000) shares, at the par value of one million five hundred thousand dollars ($1,500,000);

And whereas, at a meeting of the board of directors of the Railroad Company, duly called and held in its office at the city of Philadelphia on the thirteenth day of October, in the year one thousand nine hundred and five, a draft of an agreement, in the form of this agreement, was submitted and read, and a resolution in the following words was duly and unanimously adopted, viz:

"Resolved, That the proper officers of this company be and they are hereby authorized and directed in its behalf and under its corporate seal and in form substantially that now submitted to this board, to execute an agreement with the Girard Trust Company to secure an issue of bonds for an aggregate principal sum of nineteen million dollars ($19,000,000) each bond of the denomination of one thousand dollars ($1,000), payable in gold coin of the United States of America of the present standard of weight and fineness, as
144 in said agreement to be provided, at the office of the Lehigh Valley Railroad Company in the city of Philadelphia, Pennsylvania, on the first days of August and February, from August 1st, A. D. 1907, with interest thereon from the first day of August, A. D. 1905, at the rate of four per cent per annum, payable semi-annually on the first days of the months of February and August in each year thereafter at the said office until the respective series of bonds shall become due and payable as in said agreement provided; principal and interest of said bonds payable without deduction from either principal or interest of any tax or taxes of the United States or of any State or municipality thereof which the Lehigh Valley Railroad Company may be required to pay or retain therefrom under any present or future law."

And whereas, the bonds to be secured by this agreement are to be coupon bonds of the denomination of one thousand dollars ($1,000.00) to be issued in series of five hundred thousand dollars ($500,000.00), the series to be numbered one (1) to thirty-eight (38) both inclusive, said bonds to be retired in the order of their serial number on the dates hereinafter mentioned, or after July 31st, 1912, at the option of the Railroad Company, as hereinafter provided, viz:

Series 1, payable August first, nineteen hundred and seven (1907).
Series 2, payable February first, nineteen hundred and eight (1908).
Series 3, payable August first, nineteen hundred and eight (1908).
Series 4, payable February first, nineteen hundred and nine (1909).
Series 5, payable August first, nineteen hundred and nine (1909).

Series 6, payable February first, nineteen hundred and ten (1910).
Series 7, payable August first, nineteen hundred and ten (1910).
145 Series 8, payable February first, nineteen hundred and eleven (1911).
Series 9, payable August first, nineteen hundred and eleven (1911).
Series 10, payable February first, nineteen hundred and twelve (1912).
Series 11, payable August first, nineteen hundred and twelve (1912).
Series 12, payable February first, nineteen hundred and thirteen (1913).
Series 13, payable August first, nineteen hundred and thirteen (1913).
Series 14, payable February first, nineteen hundred and fourteen (1914).
Series 15, payable August first, nineteen hundred and fourteen (1914).
Series 16, payable February first, nineteen hundred and fifteen (1915).
Series 17, payable August first, nineteen hundred and fifteen (1915).
Series 18, payable February first, nineteen hundred and sixteen (1916).
Series 19, payable August first, nineteen hundred and sixteen (1916).
Series 20, payable February first, nineteen hundred and seventeen (1917).
Series 21, payable August first, nineteen hundred and seventeen (1917).
Series 22, payable February first, nineteen hundred and eighteen (1918).
Series 23, payable August first, nineteen hundred and eighteen (1918).
Series 24, payable February first, nineteen hundred and nineteen (1919).
Series 25, payable August first, nineteen hundred and nineteen (1919).
Series 26, payable February first, nineteen hundred and twenty (1920).
146 Series 27, payable August first, nineteen hundred and twenty (1920).
Series 28, payable February first, nineteen hundred and twenty-one (1921).
Series 29, payable August first, nineteen hundred and twenty-one (1921).
Series 30, payable February first, nineteen hundred and twenty-two (1922).
Series 31, payable August first, nineteen hundred and twenty-two (1922).
Series 32, payable February first, nineteen hundred and twenty-three (1923).

Series 33, payable August first, nineteen hundred and twenty-three (1923).

Series 34, payable February first, nineteen hundred and twenty-four (1924).

Series 35, payable August first, nineteen hundred and twenty-four (1924).

Series 36, payable February first, nineteen hundred and twenty-five (1925).

Series 37, payable August first, nineteen hundred and twenty-five (1925).

Series 38, payable February first, nineteen hundred and twenty-six (1926).

Now, this agreement witnesseth:

First. It is agreed that fifty-eight thousand one hundred and seventy-eight (58,178) shares of the capital stock of Coxe Brothers and Company, Incorporated, at the par value of two million nine hundred and eight thousand nine hundred dollars ($2,908,900) and twenty-nine thousand nine hundred and sixty-five (29,965) shares of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company of the par value of one million four hundred and ninety-eight thousand two hundred and fifty dollars ($1,498,-
147 250), being the entire capital stocks of the said companies, respectively, with the exception of twenty-five shares (25) of the par value of twelve hundred and fifty dollars ($1,250) of the capital stock of Coxe Brothers and Company, Incorporated, and thirty-five (35) shares of the par value of seventeen hundred and fifty dollars ($1,750) of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company, held by the directors thereof (the certificates thereof to be held by the Trustee subject to the terms of this agreement) shall be this day transferred to and deposited with the Trustee, for the purpose of securing an issue of bonds in the following form:

(Form of coupon bonds.)

Series----------

UNITED STATES OF AMERICA.

STATE OF PENNSYLVANIA.

No. ------ $1,000.

LEHIGH VALLEY RAILROAD COMPANY.

Collateral trust four per cent gold bond.

Total issue, $19,000,000.

Know all men by these presents, that the Lehigh Valley Railroad Company, for value received, acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars in gold coin of the

United States of America, of the present standard of weight and fineness, which sum the said Railroad Company promises to pay in like gold coin to the bearer, or if registered, as hereinafter provided, to the registered owner of this bond, at the office or agency of the said Railroad Company in the city of Philadelphia, Pennsylvania, on the first day of A. D. 19 , with interest thereon from the first day of August, A. D. 1905, at the rate of four per centum per annum,
148 payable semi-annually, in like gold coin, on the first days of the months of February and August in each year, on delivery of the annexed coupons therefor. The principal and interest of this bond are payable without deduction from either principal or interest for any tax or taxes which may be payable under any present or future laws of the United States of America, or of any State or municipality thereof for national, State or municipal purposes, the said Railroad Company hereby agreeing to pay any such tax or taxes, which it may now, or hereafter be required by any such law to retain therefrom.

This bond is one of an issue of bonds of like tenor and date, but maturing at various times, amounting in the aggregate to nineteen million dollars ($19,000,000), secured by, and subject to, the provisions of an agreement duly executed and delivered by the Lehigh Valley Railroad Company to the Girard Trust Company, bearing even date herewith, assigning and transferring to the said Girard Trust Company, in trust, fifty-eight thousand one hundred and seventy-eight (58,178) shares of the capital stock of Coxe Brothers and Company, Incorporated, and twenty-nine thousand nine hundred and sixty-five (29,965) shares of the capital stock of the Delaware, Susquehanna and Schuylkill Railroad Company, upon the terms and conditions which by said agreement will appear, to all the terms of which reference is had and of which the holder hereof is required to take notice. The modes prescribed in said agreement for the recovery of the principal and interest of the said bonds are exclusive of all others. This bond shall pass by delivery unless registered. The holder hereof may have the ownership of this bond registered on the books of said Railroad Company, in the city of Philadelphia, Pennsylvania, such registry being noted on the bond, after which no transfer shall be valid unless made on the said books by the registered holder in person or by attorney duly authorized, and noted on the bond; but the same may be discharged from registry by being in like manner transferred to bearer,
149 after which it shall be transferable by delivery, such registration, however, shall not affect the negotiability of the coupons by delivery merely. Or the holder hereof may at any time surrender to the said Railroad Company all the coupons hereto annexed, not then due, for cancellation, and have this bond entered on the company's books as a registered bond, transferable only on the books of the company, and the interest thereon semiannually at the rate of four per centum per annum, and the principal thereof, when due, shall be payable only to the registered holder hereof or his legal representatives or assigns.

The Railroad Company may redeem any of the bonds due and payable after July thirty-first, 1912, on the first day of August and February in any year, after said thirty-first day of July, 1912, at two and a half per cent premium upon sixty days' notice thereof, advertised not less than once a week in a newspaper published in the city of Philadelphia, Pa., and in one published in the city of New York, N. Y., under and in pursuance of the terms and provisions in said agreement contained. Upon the dates so fixed for redemption, interest hereon shall cease.

This bond is not to become obligatory upon the Railroad Company until the certificate indorsed hereon shall have been signed by the Trustee under said agreement.

In witness whereof, the said Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereunto, this first day of November, 1905.

LEHIGH VALLEY RAILROAD COMPANY,

[L. S.] By , *Vice-President.*

Attest:

, *Secretary.*

150 (Coupon.)

On the first day of the Lehigh Valley Railroad Company will pay to bearer twenty dollars in gold coin at the office or agency of the said Lehigh Valley Railroad Company, in Philadelphia, Pennsylvania, being six months' interest then due on its collateral trust gold bond No.

$20.

, *Treasurer.*

(Trustee's Certificate.)

This bond is one of a series of nineteen thousand bonds of one thousand dollars each, referred to in the within-mentioned trust agreement executed by Lehigh Valley Railroad Company, and delivered to the undersigned.

GIRARD TRUST COMPANY,
Trustee.

By *Vice-President.*

151 Second. The said bonds shall be issued in series and amounts as above stated. The Railroad Company shall execute said bonds, and upon receipt of the collateral hereinbefore mentioned the Trustee shall certify and deliver said bonds to the Railroad Company upon the written order of the president of the Railroad Company. The Railroad Company hereby expressly reserves the right to be exercised by itself or the Trustee by the use of any funds under the con-

trol of the Railroad Company to redeem any bond or bonds hereby secured, the principal whereof is payable after July 31, 1912, on the first day of August and February in any year after said 31st day of July, 1912, at par with two and a half per cent premium added thereto (in addition to all interest accrued on such bond to such date of redemption) after sixty days' notice published not less than once a week in one newspaper published in the city of Philadelphia, Pa., and in one published in the city of New York, N. Y. Such notice shall designate by serial number the bonds so to be redeemed, unless all the outstanding and theretofore uncalled bonds be called, in which case a statement to that effect will be sufficient. All bonds hereby secured when and as redeemed shall be cancelled by the Trustee and surrendered to the Railroad Company.

In making any redemption of less than all the bonds hereby secured at such time outstanding and uncalled, the bonds so to be redeemed shall be in the order of their serial number, but not less than all of any one series, and the bonds so redeemed shall be redeemed on the first day of August or the first day of February next thereafter ensuing after advertisement as aforesaid.

Third. If at any time the Railroad Company shall make
152 default in the payment of interest or principal of said bonds when and as the same shall severally be due and payable, and such default shall continue for sixty (60) days after such interest and principal or either of them shall become due and payable, or if the said Railroad Company shall at any time fail to pay the rents or royalties reserved in the several coal leases to said Coxe Brothers and Company, Incorporated, for a period of sixty days from the times fixed in said several leases for the payment of said rents or royalties, or shall fail in the performance of any of the covenants and conditions herein provided, then and in such case, the Trustee may and upon the written request of the holders of a majority in amount of the said bonds outstanding and unpaid, shall sell at public sale at the best price that can be obtained therefor, the whole of the said stocks then in possession of the Trustee, or so much thereof as may be necessary to pay the said bonds and all arrears of interest thereon, and any surplus remaining after the application of the net proceeds of such sale of stocks by the Trustee shall be paid over to the Railroad Company; if, after the sale of the said stocks, any balance shall still remain unpaid of the amount due upon said bonds the holders thereof may proceed to collect the same directly from the obligor; it being expressly understood by and between the parties hereto that in case default in payment of principal or interest, or of the rents or royalties or in the performance of any of the covenants and conditions herein provided, shall be made as aforesaid, then the whole of the said bonds outstanding and unpaid shall, upon the demand of the holders of a majority thereof being made as aforesaid, become due and payable forthwith; and except as herein otherwise provided any proceeding at law or in equity to enforce any covenant of the Railroad
153 Company contained herein or in the said bonds shall be only

in the name of the Trustee for the benefit of the holders of all the bonds then outstanding.

Fourth. Until default shall be made in the payment of interest or principal as herein provided, or of the rents or royalties as aforesaid, the said Trustee shall permit and suffer the Railroad Company to retain and exercise all the rights, powers, and privileges belonging to or incident to the ownership of the stocks hereby deposited with the Trustee, and to receive the dividends thereon, and the said Trustee shall and will from time to time execute and deliver to the Railroad Company powers of attorney or orders for the collection of such dividends, and proxies to be used at annual or special meetings of stockholders for the election of directors, or for any purpose incident to the ordinary and usual business of the company, except, however, and provided always, that such proxies shall in no case be used for the creation of any mortgage indebtedness of Coxe Brothers and Company (Incorporated) or of the Delaware, Susquehanna and Schuylkill Railroad Company; it being understood and agreed that until the payment of the last instalment of principal as hereinbefore provided and the termination of this agreement, the Railroad Company will not, as the owner of the capital stock of Coxe Brothers and Company (Incorporated) or of the Delaware, Susquehanna and Schuylkill Railroad Company, consent to the sale or encumbering of the property of the said companies, or either of them, or cause or consent to the increase of the capital stock of either of said companies, or to the increase of the indebtedness to any extent that will diminish the value of the capital stock, and that no indebtedness beyond that arising in the ordinary and usual conduct of the business of either of said companies shall be created.

154 And the Railroad Company also agrees that it shall not suffer or allow any leases now held by Coxe Brothers and Company (Incorporated) to be forfeited nor cause or permit any breach of the lessee's covenants in any of the said leases.

Fifth. It is hereby further covenanted and agreed and this trust is accepted upon the express condition that neither the said Trustee nor any successors in the trust shall incur any responsibility or liability by reason of permitting and allowing the Railroad Company to retain and preserve the powers and authority hereinbefore provided for in regard to the stock of Coxe Brothers and Company (Incorporated) and the Delaware, Susquehanna and Schuylkill Railroad Company, nor shall the said Trustee or any successors in the trust be in any way responsible for any other matter or thing whatever except its negligent, wilful, or intentional breaches of the trust herein expressed and contained; and the said Trustee or any successors in the trust shall not at any time be bound or required to road Company, nor shall the said Trustee or any successors in the protection of the bondholders, involving expenditures of or liability for the payment of money, unless (if the Trustee shall see fit to require it) adequate indemnity against such liability or outlay be furnished it by the bondholders asking of it such action or proceeding.

Sixth. The Railroad Company agrees to pay the charges of the Trustee and the expenses attending the execution of this trust, and of any sale or sales thereunder.

Seventh. The Railroad Company shall from time to time execute any other and further instruments or assurances necessary or requisite to carry out the purposes hereof.

155 Eighth. If the interest and principal of the said bonds shall be paid when and as the same shall become payable according to the tenor and effect of the said bonds, and according to the provisions of this agreement, then the said Trustee, at the request of the Railroad Company, shall re-transfer and deliver to the Railroad Company the said stocks, and upon such transfer and delivery and full settlement of the trust account with the Railroad Company the said Trustee shall be thenceforth discharged from further duties under this trust, and this agreement shall thereupon be terminated.

In witness whereof the Lehigh Valley Railroad Company, the party hereto of the first part, has caused this agreement (executed in duplicate) to be signed by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Girard Trust Company, the party hereto of the second part, has caused this agreement to be signed by its vice-

156 president, and its corporate seal to be hereunto affixed, and the same to be attested by its secretary, the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

[Seal Lehigh Valley R. R. Co.]

Attest:

D. G. BAIRD, Secretary.

[Seal Girard Trust Co.]

GIRARD TRUST COMPANY,
By W. N. ELY, *Vice-President.*

Attest:

E. S. PAGE, *Secretary.*

160 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA ex rel. the Attorney-General of the United States
vs.
LEHIGH VALLEY RAILROAD COMPANY.
} April session, 1908. No. 214.

It is stipulated and agreed between counsel in the above cause that its submission on petition and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter

instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 214. April session, 1908. U. S. v. Lehigh Valley Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Bobb, clerk. L.

(Pages 161–236 omitted in printing.)

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of The United States ex rel. the Attorney-General of the United States, plaintiff in error, *v.* The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.]

237 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
LEHIGH VALLEY RAILROAD COMPANY. } April sessions, 1908. At law. No. 214.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above-entitled cause having come on to be heard upon petition and answer, the petition is refused and judgment is entered in favor of defendant.

BY THE COURT.

Attest: HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. C. E. D. of Penna. No. 214. U. S. v. Lehigh Valley Railroad Company. Order directing judgment. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

238 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. the Attorney-General of the United States
vs.
LEHIGH VALLEY RAILROAD COMPANY. } April session, 1908. No. 214.

Now comes the plaintiff and, in connection with the petition for writ of error, assigns the following errors in the action and proceed-

ings of the Circuit Court of the United States for the Eastern District of Pennsylvania in the above-entitled case, that is to say:

1. That the Circuit Court erred in denying the petition for writ of mandamus in this case;

2. That the Circuit Court erred in refusing to grant an order for the issuance of a peremptory writ of mandamus and for the relief prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
239 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the so-called "commodities clause;"

5. That the circuit court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the circuit court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the circuit court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the circuit court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the circuit court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

240 10. That the circuit court erred in sustaining the objections raised by the defendant's answer to the constitutional validity

of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said plaintiff and petitioner prays that the said judgment and order of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 214. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States v. Lehigh Valley Railroad Company. Assignment of errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

241 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA EX REL. The Attorney-General of the United States *vs.* LEHIGH VALLEY RAILROAD COMPANY.	April session, 1908. No. 214.

To the honorable, the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

And now comes the United States of America, on relation of Charles J. Bonaparte, Attorney-General of the United States, plaintiff herein, and says that on the sixth day of October, in the year nineteen hundred and eight, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this case certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in its behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

242 (Endorsed:) U. S. C. C. E. D. of Penna. No. 214. April session, 1908. At law. The United States of America ex rel. the Attorney-General of the United States vs. Lehigh Valley Rail-

road Company. Petition for writ of error. The clerk will please file within petition for writ of error, the assignment of errors herewith, and order of court allowing the writ when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

243 No. 214. April session, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, EX REL. The Attorney-General of the United States,
vs.
LEHIGH VALLEY RAILROAD COMPANY.

Before DALLAS, C. J.

This sixth day of October, in the year nineteen hundred and eight, comes the plaintiff, by Charles J. Bonaparte, Attorney-General of the United States, and files herein, and presents to the court, a petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged; praying also that a transcript of the record, proceedings, and papers upon which judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

In consideration whereof the court does allow the writ of error as prayed.

BY THE COURT.

Attest: HENRY B. ROBB, *Clerk.*

(Indorsed:) U. S. C. C., E. D. of Penna., No. 214, April session, 1908. At law. The United States of America, ex rel. The Attorney-General of the United States *v.* Lehigh Valley Railroad Company. Order allowing writ of error. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

244 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of the United States of America, ex rel. the Attorney-General of the United States *v.* Lehigh Valley Railroad Company, No. 214, April session, 1908, on

file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

(Indorsement on cover:) File No. 21360. E. Pennsylvania C. C. U. S. Term No. 564. The United States of America, ex rel. the Attorney-General of the United States, plaintiff in error, *vs.* Lehigh Valley Railroad Company. Filed October 10th, 1908. File No. 21360.

7

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 565.

THE UNITED STATES OF AMERICA, APPELLANT,

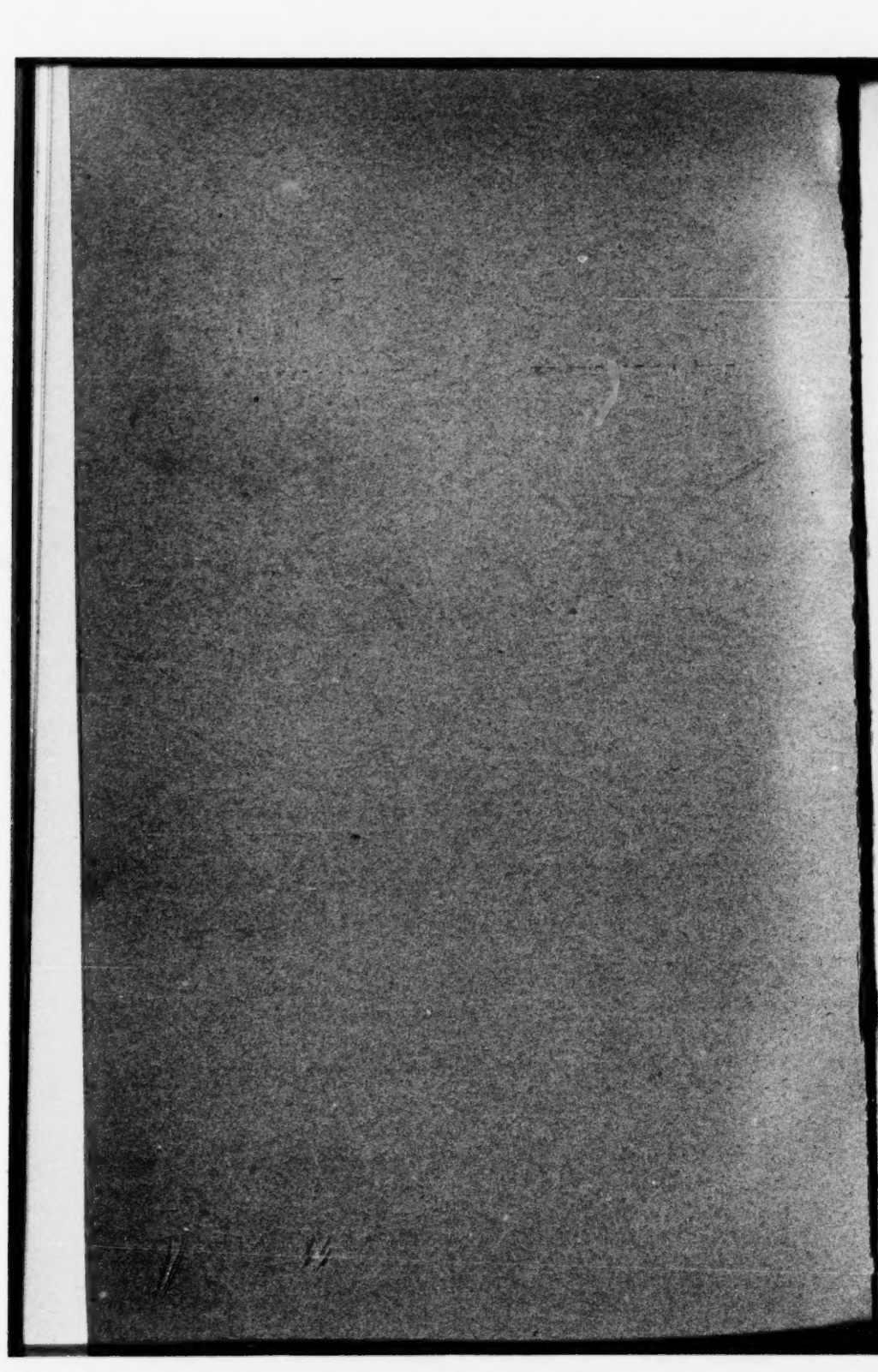
vs.

THE DELAWARE AND HUDSON COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 19, 1908.

(21361.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 565.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE DELAWARE AND HUDSON COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Bill of complaint	2	1
Appearance for defendant	14	5
Answer	15	5
Exhibit A 1. New York act, approved April 23, 1823	29	14
A 2. New York act, approved April 7, 1824	42	24
A 3. New York act, approved April 20, 1825	43	25
A 4. New York act, approved March 10, 1827	45	26
A 5. New York act, approved May 2, 1829	49	29
A 6. New York act, approved May 9, 1867	51	30
A 7. New York act, approved June 4, 1881	53	31
A 8. New York act, approved April 28, 1899	54	31
B 1. Pennsylvania act, approved March 13, 1823	57	33
B 2. Pennsylvania act, approved April 1, 1825	70	43
B 3. Pennsylvania act, approved April 5, 1826	74	46
B 4. Pennsylvania resolution, approved March 23, 1830	77	48
B 5. Pennsylvania act approved April 30, 1852	79	49
B 6. Pennsylvania act, approved March 12, 1859	80	49
B 7. Pennsylvania act, approved April 11, 1861	82	50
B 8. Pennsylvania act, approved April 11, 1861	84	51
B 9. Pennsylvania senate committee report, April 13, 1863	85	52
B 10. Pennsylvania act, approved September 20, 1866	88	54
B 11. Pennsylvania act, approved April 13, 1868	89	54
B 12. Pennsylvania act, approved March 24, 1870	90	55
B 13. Pennsylvania act, approved May 12, 1871	91	56
B 14. Pennsylvania act, approved April 15, 1869	93	56

	Original.	Print.
Answer—Continued.		
Exhibit B 15. Pennsylvania act, approved May 18, 1871	94	57
C. Mortgage of the Delaware and Hudson Canal Company to the Union Trust Company, of New York, trustee, August 13, 1877	96	58
Stipulation as to submission on bill and answer	111	67
Replication	112	68
Opinions	113	....
Gray, J. (omitted in printing)	114	....
Dallas, J. (omitted in printing)	168	....
Buffington, J. (omitted in printing)	174	....
Decree	189	68
Assignment of errors	190	69
Petition for appeal	193	70
Order allowing appeal	195	71
Citation and service	196	71
Clerk's certificate	197	72

1 APRIL SESSION, 1908.

Charles J. Bonaparte.
85
Robert W. de Forrest.
John G. Johnson.

United States of America
vs.
The Delaware & Hudson Company.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July next.
1908, June 5. Order for the appearance of Robert W. de Forrest and John G. Johnson, esquires, for defendant filed.
1908, June 12. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendants file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 85. April sessions, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE DELAWARE AND HUDSON COMPANY, DEFENDANT.

Bill of complaint.

Filed Jun' 5, 1908. Henry B. Robb, clerk. By G., deputy clerk.

3-4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE DELAWARE AND HUDSON COMPANY, DEFENDANT.

April sessions, 1908.
No. 85. In Equity.

To the honorable the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against The Delaware

and Hudson Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "The Delaware and Hudson Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New York, having its principal office in the State of New York, at the city of New York, and also an office in the State of Pennsylvania, at the city of Scranton, and has been such corporation since long before
5 the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New York, Vermont, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity know' as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Luzerne, Lackawanna, Susquehanna, and Wayne, in the said State of Pennsylvania, and owns, and has an interest in, the anthracite coal therein or thereupon and mined, and being
6 mined, therefrom; and said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the authority of the defendant.

(4) That, apart from the coal lands, coal mines, and coal held and owned by the defendant as hereinbefore stated, the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Hudson Coal Company, the Northern Coal and Iron Company, and the Jackson Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of the said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Luzerne, Lackawanna, Susquehanna, and Wayne; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year

nineteen hundred and eight, all now being operated, in the mining of anthracite coal, by and under the direct management of officers and directors all of whom are, as they have been for a long time past, officers or directors of the defendant, the president of each of said coal companies being, as he has been for a long time past, the
7 president of the defendant. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by the president and other officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(5) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said
8 State of Pennsylvania to and into the States of New York, Vermont, and other States for sale and delivery at the markets of the said States of New York, Vermont, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(6) That, the defendant being the owner, and part owner, of the anthracite coal mined and being mined, and transported and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any other foreign country, any

article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(7) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(8) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "The Delaware and Hudson Company," may make full answer under oath to all the allegations herein; and that an injunction be granted to enjoin and prohibit the said "The Delaware and Hudson Company" from further transporting, in interstate commerce, the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna, to be directed to the said "The Delaware and Hudson Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to perform and abide by such order, direction, and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* DELAWARE & HUDSON COMPANY.	April session, 1908. No. 85.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 85. 1908. U. S. of America v. Delaware & Hudson Company. Order for appearance. Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 Filed June 12, 1908. Henry B. Robb, clerk. L., deputy clerk.

United States Circuit Court, Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* THE DELAWARE AND HUDSON COMPANY.	April sessions, 1908. No. 85.

The answer of The Delaware and Hudson Company to the above-mentioned bill in equity, or to so much thereof as this defendant is advised it is material or necessary for it to answer, respectfully shows:

1. The defendant, The Delaware and Hudson Company, admits that it is a corporation created and existing under the laws of the State of New York, having its principal office in the city, county, and State of New York; also maintaining an office at Scranton, Pennsylvania, for its coal business and an office at Albany, New York, for its transportation business. Its capital stock is $42,400,000.

This defendant was incorporated by an act of the legislature of the State of New York, approved April 23, 1823, constituting its charter and entitled "An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company." Its said charter authorized it to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal, and to employ its capital in the busi-

16 ness of transporting to market coal mined from such lands.

Its charter was afterwards amended and supplemented by subsequent acts of the legislature of the State of New York, one of

which, enacted on April 28, 1899, authorized this defendant to abandon and sell its canal and changed its name to "The Delaware and Hudson Company." Printed copies of all the acts before referred to, as well as of the said charter, are hereunto annexed marked, respectively, Exhibits A 1, 2, 3, 4, 5, 6, 7, and 8, and made part of this answer.

The State of Pennsylvania, between the years 1823 and 1871, passed divers special statutes enabling this defendant to purchase and hold coal lands in Pennsylvania, to mine coal therefrom, and to transport the coal mined by this defendant from such lands owned by it. Printed copies of all the said Pennsylvania statutes are hereunto annexed marked, respectively, Exhibits B 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, and made part of this answer.

2. This defendant denies that it is a railroad company within the meaning of section 1 of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended by the act of Congress entitled "An act to amend an act entitled 'An act to regulate commerce,' approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29, 1906; and especially within the meaning of the fifth paragraph of said section 1 as amended by the said act approved June 29, 1906, which paragraph is commonly and hereafter in this answer called the "commodity clause."

Prior to the year 1823, when the defendant's charter was granted, as before stated, it was a fact of common knowledge that there was a large supply of anthracite or stone coal lying along the Lackawanna River, in the county of Luzerne, in the State of Pennsylvania, and in the regions thereunto adjacent. The section of Pennsylvania in which these deposits of anthracite coal were situated was at that time wild, mountainous, and sparsely inhabited, and of no appre-
17 ciable value except by reason of such deposits of anthracite coal, which, in connection with similar deposits in other sections of Pennsylvania, were so abundant in quantity as to far exceed the necessary consumption of the people of Pennsylvania. To utilize these great deposits of coal for the benefit of the people of the United States it was essential that means of communication should be created to points within and outside of Pennsylvania for the transportation of such commodity when mined. The State of Pennsylvania at that time, and thereafter, desired to create and foster the industry of mining such coal and to develop and facilitate the transportation thereof to the settled portions of that State and adjoining States. The State of New York was also desirous of securing a supply of such coal for the citizens of its State. By an act of the legislature of the State of Pennsylvania, approved March 13, 1823, entitled "An act to improve the navigation of the River Lackawaxen," one Maurice Wurts, who then owned large tracts of coal-bearing lands on the Lackawaxen River, in the State of Pennsylvania, was authorized to improve the navigation of that river so as to afford canal or slack-water navigation thereon to the boundary line between the States of

Pennsylvania and New York on the Delaware River. The New York charter of this defendant, which was enacted one month later, in terms authorized this defendant to acquire all the rights of Maurice Wurts under the said Pennsylvania act and also to purchase any lands containing coal that he or any other person might own at or near the headwaters of the Lackawaxen River, to construct a canal from the Delaware River to the Hudson River, and to transport to market coal mined from the land so purchased. The State of Pennsylvania, by an act passed April 1, 1825, entitled "A supplement to the act entitled 'An act to improve the navigation of the River Lackawaxen,'" authorized this defendant to acquire the rights of Maurice Wurts under the aforesaid act of March 13, 1823, and also to purchase and hold lands within ten miles of the waters of the Lackawaxen not to exceed five thousand acres. The benefits of this act were duly accepted by this defendant on or before June
18 21, 1825. Subsequently the State of Pennsylvania passed divers supplemental and amendatory special statutes (being Exhibits B 3 to 15, both inclusive) authorizing this defendant to acquire additional lands in the State of Pennsylvania and to build railroads to facilitate the transportation of its coal and the purposes of its coal business.

Under the authority of the statutes of the State of Pennsylvania, and of the State of New York before set forth and made a part of this answer, this defendant, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the State of Pennsylvania from Maurice Wurts and others and in the construction of slack water or canal navigation on the Lackawaxen River to the Delaware River and in the construction of a canal from the Delaware River to the Hudson River. Later, under statutes of both said States, fully set forth in the exhibits annexed to this answer and forming part thereof, this defendant invested further portions of its capital in the construction of railroads in the State of Pennsylvania and in the construction and acquisition of leasehold estates in railroads in the State of New York.

This defendant therefore avers and submits that it was organized as, has always been, and still is a coal mining company, and is not a "railroad company" within the meaning of the said commodity clause, although by the special statutes hereinbefore set forth it has power from the States of Pennsylvania and New York to acquire, maintain, and operate canals and railroads, principally for the transportation of coal mined by it, and incidentally only as a common carrier of passengers and property for others.

3. This defendant admits that by virtue of the rights, powers, and privileges granted and conferred upon it by the States of New York and Pennsylvania, as before set forth, it has been continuously since the year 1870, and still is, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property, and that in respect to such passengers and property

of others as are moved in commerce between the States of Pennsylvania and New York, it has been and still is engaged in interstate commerce.

4. This defendant has acquired under the powers, rights, and privileges given to it as before set forth by the States of Pennsylvania and New York, large amounts of coal properties within the counties of Luzerne, Lackawanna, Susquehanna, and Wayne, in the State of Pennsylvania, and has invested large sums of money in the purchase of such lands and in the erection of suitable structures and appurtenances necessary for the mining of coal therefrom; and this defendant has similarly expended large sums of money in aiding the three coal companies hereinafter in this answer mentioned to acquire other coal lands and to equip such lands for the mining of coal therefrom.

As to many of the coal properties so acquired, the interests of this defendant and of the said three coal companies therein were respectively acquired through leases upon royalties payable to the lessors in respect to each ton of coal mined from such properties and many of such leases contain provisions requiring the payment in each year of large fixed minimum amounts by way of royalties irrespective of amounts actually mined in such years; so that this defendant will have to make large annual payments under the said leases, whether or not it actually mines coal from the said leased lands. Many of such leases, of great value to the defendant, also contain provisions forfeiting the same in case the same are assigned to others without the consent of the lessor. The defendant can not therefore dispose of such leases without such consent.

This defendant under the powers, rights, and privileges given to it has also expended large sums of money in the acquisition of railroads and leasehold estates in railroads within the States of Pennsylvania and New York, and such leasehold estates in railroads are subject to the payment of large fixed rentals.

This defendant would never have acquired these property interests, which were duly vested in it by the fully competent powers respectively of the States of New York and Pennsylvania, and would never have so invested its capital, except on the expectation that it could freely utilize the means thereby created for the interstate transportation of coal which it had mined; and the denial of such right of free interstate transportation is, this defendant avers, a destruction of such vested right, and the defendant's property therein invested, and a virtual confiscation or appropriation for public use of valuable rights heretofore acquired by this defendant under the powers of the States of New York and Pennsylvania, and in the belief that the Constitution of the United States insured and guaranteed freedom of interstate commerce.

The said coal lands acquired as before stated by this defendant and the said three coal companies have little, if any, value except for the mining of coal therefrom and its sale as a commercial commodity, and if this defendant is forbidden such use thereof it will be

deprived of the only possible enjoyment of property lawfully acquired by and vested in this defendant long prior to February 4, 1887.

The said mining lands and mines acquired as aforesaid by this defendant and the said three coal companies are located either directly upon or so contiguous to the said railroads of this defendant as to make such railroads the only reasonably practical and conveniently available avenues of transportation whereby the coal produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic, and transportation uses.

This defendant has constructed lateral railroads and switches connecting its railroad lines with the mines acquired by this defendant and the said three coal companies, in order to enable the coal taken from the said mines to be loaded at the mines upon the railroad coal cars of this defendant ready for shipment upon this defendant's railroads. The said lateral railroads and switches together aggregate several miles in length, and have been constructed at considerable cost to this defendant. If this defendant is practically prohibited from mining coal from the said mines and from transporting the same in its cars upon its railroads, the said lateral railroads and switches will be absolutely of no use or value, and this defendant will be deprived of the only possible enjoyment of property lawfully acquired by and vested in this defendant long prior to February 4, 1887.

21

The railroads acquired by this defendant were so acquired in the expectation that this defendant would be able to secure the transportation upon such railroads of the coal mined from the lands acquired by this defendant and the said three coal companies. If this defendant is prohibited from transporting in interstate commerce the coal mined by it from its said lands over its said railroads, the gross earnings derived by it from the operation of such railroads would be largely decreased and the property rights of this defendant would be largely destroyed. The prohibition of the right hereafter possessed and enjoyed by this defendant of transporting coal mined by it interstate would result in the disintegration of its business and its organization.

The defendant moreover avers that these purchases, leases, and investments constitute a unified system, which can not be thus disintegrated without great loss and damage to this defendant and without serious impairment of its ability to pay its fixed charges and carry out its contracts.

5. This defendant admits that it is now and has been for many years past the owner of all the shares of the capital stock of and in several coal mining companies duly incorporated in the State of Pennsylvania, to wit:

(a) The whole capital stock, consisting of 10,000 shares of $100 each, and aggregating at such par value $1,000,000, of the Northern Coal and Iron Company, a corporation duly constituted by a special

statute of the State of Pennsylvania, entitled "An act to incorporate the Northern Coal and Iron Company," approved April 27, 1864; and by a supplement thereto entitled "A supplement to an act entitled 'An act to incorporate the Northern Coal and Iron Company,' approved the 27th day of April, A. D. 1864," approved April 20, 1866.

22 (b) The whole capital stock, consisting of 2,000 shares of $50 each, and aggregating at such par value $100,000, of the Jackson Coal Company, a corporation duly constituted by articles of agreement, dated November 1st, 1866, pursuant to a general statute of the State of Pennsylvania entitled "An act relating to corporations for mechanical, manufacturing, mining, and quarrying purposes," approved July 18, 1863, and the several supplements thereto.

(c) The whole capital stock, consisting of 2,000 shares of $50 each, and aggregating at such par value $100,000, of the Hudson Coal Company, a corporation duly constituted by a special statute of the State of Pennsylvania entitled "An act to incorporate the Susquehanna Improvement Company," approved June 2, 1871; and its name changed by three decrees of court in Pennsylvania made respectively as follows:

(1) On April 14, 1883, in Common Pleas No. 4 for Philadelphia County, No. 870, March term, 1883, changing name of the Susquehanna Improvement Company to the Metal Railroad Tie Construction Company.

(2) On March 29, 1890, in Common Pleas No. 1 for Philadelphia County, No. 600, March term, 1890, changing name of the Metal Railroad Tie Construction Company to the Continental Trust and Finance Company of Philadelphia, Pennsylvania.

(3) On April 6, 1901, in Common Pleas No. 5 for Philadelphia County, No. 230, March term, 1901, changing name of the Continental Trust and Finance Company of Philadelphia, Pennsylvania, to the Hudson Coal Company.

This defendant further admits that by reason of stock ownership it does elect the managing directors and officers of the said corporations and that it controls and manages the same to the extent that within the meaning of the law the stockholders of a corporation control and manage its affairs.

Defendant further admits the averment of the bill that the officers and directors of these corporations, the stock of which is owned by this defendant, are substantially the same as the officers and directors of this defendant. To the extent indicated, this defendant admits the further allegations of paragraph 4 of the bill of complaint.

23 This defendant further states and avers that most of the said shares of the said several mentioned coal companies were duly acquired and possessed by it before February 4, 1887, and all of them many years before June 29, 1906.

6. This defendant admits that anthracite coal mined by this defendant from its own lands in the State of Pennsylvania and from the lands of the three several coal companies before mentioned, has

been, both before and since the first day of May, 1908, transported and is still being transported by it or under its authority, but only at lawfully established uniform and published rates, upon and over its lines of railroad, and that approximately seventy per cent of the same or about 4,300,000 gross tons is moved by it from originating points in Pennsylvania to different destinations in New York and other States; and that the transportation of such portion thereof by this defendant constitutes commerce between different States. In such interstate commerce its daily shipments average about 12 trains of 37 coal cars each.

This defendant avers that such coal so mined and transported in interstate commerce, including the coal mined from the lands of the three coal companies before mentioned, is sold, before such transportation begins, by this defendant to third persons (except as hereinafter stated as to steam sizes) at the mines in Pennsylvania from which such coal has been produced, and that this defendant does not, at the times when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligations and rights as a common carrier in the transportation thereof. It carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal. To some extent, however, the smaller sizes of coal (known as steam sizes) so mined by this defendant and in fact owned by it, are transported by this defendant for its own convenience from Pennsylvania to its storage yards in the State of New York and there stored by this defendant,
until the same is either used by it in the conduct of its business
24 as a carrier or sold to purchasers after such transportation
and storage. The demand by consumers for such smaller sizes of coal produced in preparing coal for sale is often proportionately less than such demand for the larger sizes, thus making necessary a storage thereof by this defendant until the same can be sold; but this defendant denies that such transportation of such coal for its own account over its own railroad, constitutes interstate commerce, or is within the provisions of the commodity clause of the act of June 29, 1906.

7. For the reasons before and hereafter in this answer given, and with the exception referred to in the preceding paragraph as to steam sizes, this defendant denies that it is the owner or part owner of the anthracite coal mined and transported as aforesaid, at the time when such transportation begins or at any time during the course of such transportation or at any time after its delivery at the point of destination; and this defendant further denies that within the provisions of the comomdity clause of the said act of June 29, 1906, it has any interest, direct or indirect, in said coal so sold by it at the mines as aforesaid at the time when it is so transported; and this defendant further denies that such transportaion by it is unlawful and violative of any statute of the United States and particularly of the said commodity clause.

This defendant further avers and submits that if it can not freely transport the coal mined by it from its own coal lands or those of the said three coal companies, whether owned by it or its vendees, or their subsequent assignees, from the State of Pennsylvania to points of destination in other States, it could not find a market for the larger part of such coal within the State of Pennsylvania, and the value of property lawfully acquired by this defendant would be seriously impaired, so that the denial of such freedom of interstate transportation would result in destroying rights of this defendant in and to its said property.

8. This defendant admits that in the manner aforesaid it has, since May 1, 1908, transported and now transports coal from one State to another State, either after it is sold to a purchaser or for
25 itself as owner of said steam sizes for the purpose of storage in the State of New York as aforesaid, and this defendant is advised by counsel and believes that it may lawfully continue to do so, and that the said commodity clause act of June 29, 1906, does not forbid such transportation, and that if it does forbid such transportation, the said act is, for reasons hereinafter specified, invalid as violative of the Constitution of the United States.

9. This defendant denies all of the allegations of the eighth paragraph of the bill, except as hereinbefore admitted.

10. Nearly all of the coal-bearing lands owned by this defendant in the State of Pennsylvania, together with all its railroads in the State of Pennsylvania situated north of Scranton, are subject to the lien of a mortgage made by this defendant to the Union Trust Company of New York as trustee, bearing date August 13, 1877, and securing an issue of $5,000,000 of this defendant's bonds maturing in 1917, which are now outstanding and in the hands of third parties largely unknown to this defendant. Liens were created by the said mortgage and still exist upon both the railroads and the coal properties owned by this defendant in the State of Pennsylvania, which liens can not be separated without the consent of all of the holders of the said bonds. A copy of this mortgage is hereunto annexed, marked Exhibit C.

11. This defendant is informed and believes and therefore alleges that there are railroad corporations and other common carriers by railroad engaged in interstate commerce other than this defendant which transport from one State or Territory to another State or Territory timber and the manufactured products thereof produced or manufactured by such railroad corporations or common carriers, or under their authority, or which they own or are interested in, other than timber and the manufactured products thereof which are necessary and intended for the use of such railroad corporations or common carriers in the conduct of their business as common carriers.

26 12. For further answer to the bill, this defendant avers and submits that if the amendment of section one of the said act to regulate commerce, made June 29, 1906, and known as the " commod-

ity clause," be construed as applying to it and its business conducted as aforesaid, or any part thereof, the same constitutes invalid legislation in that it would deprive the defendant of any valuable enjoyment of property lawfully acquired and held by it, without compensation and without due process of law, contrary to the provisions of the fifth amendment of the Constitution of the United States.

The right of this defendant to acquire coal lands in Pennsylvania, and to make the only available use of the greater part thereof by mining coal therefrom and transporting the same to market beyond the State of Pennsylvania, was lawfully acquired by it more than eighty years before June 29, 1906, by the joint action of the States of New York and Pennsylvania. The right of citizens, including lawfully created corporations, to engage in interstate commerce, is not a right created either by the Constitution of the United States or by the Congress of the United States, such right having existed before the Constitution and independently of congressional permission. Investments made by this defendant under the circumstances set forth in this answer have resulted in vested rights which are beyond the power of Congress to impair or take away.

13. This defendant avers and submits that the said commodity clause is also invalid under the said fifth amendment in that it discriminates between those common carriers that are corporations and those that are not corporations; and between carrier corporations that are railroad companies and those that are not railroad companies; there being no facts or circumstances which would justify a separate classification of railroad companies for purposes of any such legislation.

14. This defendant avers and submits that the said commodity clause is also invalid under the said fifth amendment in that it
27 discriminates between common carriers of timber and the products thereof and common carriers of other commodities, there being no facts or circumstances justifying a separate classification of timber and its products, and the only motive for such discrimination being to foster shippers and common carriers of lumber while denying equal rights to shippers and common carriers of other commodities.

15. This defendant avers and submits that the said commodity clause is also invalid for the reason that its operation and effect is not merely to regulate interstate commerce, but to prohibit such commerce, which prohibition was not made for any purpose within any power in that behalf possessed by Congress under the commerce clause of the Constitution.

16. This defendant avers and submits that the said commodity clause is also invalid under the provisions of the eighth amendment to the United States Constitution in that it imposes excessive fines for its violation.

17. This defendant avers and submits that the said commodity clause is also invalid because it imposes such excessive penalties both upon this defendant itself and also upon such of its officers and

directors for each violation thereof as would naturally operate, and must be construed as having been intended to operate, to deter a railroad company from contesting the validity of the statute, which contest could be made only after a violation thereof.

18. This defendant further avers and submits that the said commodity clause is also invalid because under the tenth amendment to the Constitution of the United States the power which it seeks to exercise has been expressly reserved to the States and to the people thereof and has been withheld from the United States.

And this defendant avers that if there is any other matter, cause, or thing in the bill contained material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed, and avoided or de-
28 nied, the same is not true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in its behalf wrongfully sustained.

THE DELAWARE AND HUDSON COMPANY,
By JAMES H. TORREY,
[SEAL OF COMPANY.] *Its Solicitor.*
JAMES M. BECK,
WM. S. OPDYKE,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

L. F. Loree, being duly sworn, doth depose and say: I am the president of the Delaware and Hudson Company, the above-named defendant, and as such am authorized to make this affidavit for and on behalf of said corporation. So much of the foregoing answer as concerns the acts and deeds of the said defendant is true to the best of my knowledge, and so much thereof as concerns the acts and deeds of any other person or persons I believe to be true.

L. F. LOREE.

Sworn to before me this ninth day of June, 1908.

[SEAL.] THOS. J. CURRAN,
Notary Public (139), N. Y. Co., N. Y.

29 EXHIBIT A1.

New York act, approved Apr. 23, 1823. (Laws of 1823, chap. 238.)

An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company. (Passed April 23, 1823.)

Whereas it is desirable that a channel should be opened through which the city of New York and other parts of this State may re-

ceive a supply of stone coal which is found in the interior of the State of Pennsylvania; and, whereas there is a large body of this valuable article belonging to Maurice Wurts, of the said State of Pennsylvania, situated near the headwaters of the river Lackawaxen, which empties into the river Delaware opposite the county of Sullivan; and the legislature of that State has recently passed an act authorizing the above-named individual to improve the navigation of the said river; and whereas it is represented that a water communication can be formed between the rivers Delaware and Hudson through the counties of Orange, Sullivan, and Ulster, or some one or more of them, so that a supply of this coal may be had from the source aforesaid; and a number of the citizens of this State have petitioned the legislature to incorporate a company for the purpose of making such a communication between the said rivers: Therefore,

I. Be it enacted by the people of the State of New York, represented in senate and assembly, that for the purpose of cutting a canal and making a complete slack-water navigation between the rivers Delaware and Hudson, it shall be lawful to open books for receiving and entering subscriptions to the amount of five hundred thousand dollars, in shares of one hundred dollars each share, under the management and superintendence of G. B. Vroom, Philip Hone, Lynde Catlin, Jonathan Thompson, Garret B. Abeel, George Janeway, and Elisha Tibbits, of the city of New York, or any three or more of them in the city of New York; and under the management and superintendence of George D. Wickham and Hector Craig, of the county of Orange, and Abraham Hasbrouck and John C. Broadhead, of the county of Ulster, or any two of them, at such place or places within the counties of Orange, Sullivan, or Ulster as they, or any two of them, may deem expedient; the said books shall be opened at such time as the above-named commissioners may think most suitable, of which they shall give at least thirty days' notice, by advertisement inserted in at least two newspapers printed in the city of New York and one newspaper printed within the counties of Orange, Sullivan, or Ulster, and they shall continue open for the space of thirty days, if the whole number of shares aforesaid should not sooner be subscribed; and if at the expiration of that time the whole number of shares aforesaid, or any part thereof, shall not have been subscribed, then it shall be lawful for the commissioners above named to adjourn from time to time, and place to place, until the whole number of shares shall be subscribed, of which adjournment they shall give such public notice as the occasion may require: Provided, that every person offering to subscribe to the said stock shall previously pay to the attending commissioners the sum of five dollars for every share by him subscribed, out of which shall be defrayed the expenses attending the taking of such subscriptions and other incidental expenses, and the remainder shall be paid by the said commissioners to the treasurer of the corporation

hereby created as soon as the same shall be organized and the officers chosen, as hereinafter mentioned.

II. And be it further enacted, that whenever two thousand shares shall have been subscribed, as aforesaid, the persons so subscribing, and those who may thereafter subscribe, to the stock of the company hereby incorporated shall be, and they are hereby, made and constituted a body politic and corporate, by the name, style, and title of "The President Managers, and Company of the Delaware and Hudson Canal Company;" and by that name shall be capable of perpetual succession, may sue and be sued, defend and be defended, in law and equity, in all courts whatsoever, may have and use a common seal, such as they shall devise, and the same may alter and change at pleasure; and may make and establish such by-laws, rules,
and regulations as shall from time to time appear necessary
31 and convenient for the good government of said corporation,
and the due management of their property, interests, and affairs, provided the same be not repugnant to the constitution and laws of this State or of the United States; and shall be capable of taking and holding their capital stock, and the increase and profits thereof, and of enlarging the same from time to time, by new subscriptions, in such manner and form as they shall think proper, under the same rules, regulations, and penalties, however, as are or may be imposed on the original subscribers, if such enlargement shall be found necessary to fulfill the intention of this act; and shall be capable, also, of purchasing, taking, and holding, to them, their successors and assigns, in fee simple, or for any less estate, all such lands, tenements, hereditaments, and estate, real and personal, as shall be necessary to them in the prosecution of their works, and generally shall have power to do and execute, all and singular, the acts, matters, and things which to the said corporation it may appertain to do, under the regulations, restrictions, limitations, and provisions herein prescribed and declared.

III. And be it further enacted, That the management of the concerns of the said corporation shall be entrusted to thirteen managers, who shall be stockholders; and the commissioners named in the first section of this act, or a majority of those of them who may attend to the receiving of subscriptions, shall designate the time and place of holding the election for the first board of managers, and give reasonable notice thereof; and the said commissioners, or a majority of them, as aforesaid, shall be inspectors of said election, and shall certify under their hands, the names of those duly elected, and shall deliver over to them the subscription books; and the managers so elected shall hold their office for one year after their election, as aforesaid, or until others shall be elected in their places; and that, at the first, and all subsequent elections for managers of said company, each share shall entitle the holder to one vote: Provided, however, That no transfer of stock shall entitle any person to vote, unless such transfer of stock shall have been entered upon the books of the cor-

poration, at least three days previous to the election at which the vote is offered.

IV. And be it further enacted, That all elections for managers, after the first, shall be held annually, at such times and places, and under such regulations, as shall be prescribed by the by-laws of the corporation; and the board of managers shall give thirty days'
32 notice of each and every election, by advertisement in at least two of the newspapers of the city of New York; and all elections shall be by ballot, by the stockholders, either in person or by proxy; and the persons who shall have the greatest number of votes shall be the managers; and if two or more persons shall have an equal number of votes, then the said commissioners, at the first election, and afterwards the managers in office, at any future election, or a majority of them, shall, by a plurality of ballots, determine which of the said persons so having an equal number of votes, shall be a manager or managers, so as to complete the whole number to be elected; and all vacancies that may occur by death, resignation, or otherwise, in the board of managers, shall be filled, for the remainder of the year in which they shall happen, by such person or persons as the residue of the managers, or a majority of them shall appoint; and the corporation hereby created shall not be dissolved, by reason of not holding an annual election on the day prescribed by the by-laws; but it shall be lawful for the board of managers to provide for and direct an election on any other day, in case the stockholders shall neglect to make an election on the day fixed by the by-laws; and until such provisional election, the managers for the time being shall continue to discharge the duties of their office.

V. And be it further enacted, That the managers shall choose a president, a secretary and treasurer, to hold their offices during the pleasure of the board; and a majority of the managers shall be a quorum for the transaction of business; and the said managers shall have power to declare the stock of such persons as shall neglect to pay for the same, according to the terms of the subscription, and all previous payments thereon to be forfeited to the use of said company, or may sue for, and recover from such delinquent subscribers and stockholders, the amount due on such shares, in an action of assumpsit, in any court having cognizance thereof, whether any payment shall have been made by such delinquent subscriber on said stock or not; and no stockholder, whether an original subscriber or an assignee, shall be entitled to vote at any election, or at any general or special meeting of the said company, on whose share or shares any installment or arrearages may be due and payable more than thirty days previously to such election, or meeting.

33 VI. And be it further enacted, That the board of managers shall meet at such times and places as shall be found most convenient for the transacting of their business; and, when met, in the absence of the president, may choose a chairman; and they shall keep minutes of all their transactions fairly entered in a book; and a quorum being formed, they shall have full power and authority to

appoint all such surveyors, engineers, superintendents, and other artists and officers, as they shall deem necessary to carry on their intended works, and to fix their salaries and wages; to ascertain the times, manner, and proportions in which the stockholders shall pay the monies due on their respective shares; to draw orders on the treasurer: Provided, That such drafts or orders be signed by the president, or in his absence, by a majority of the quorum present; and generally to do all such other acts, matters, and things, as, by this act, and by the by-laws and regulations of the company, they may be authorized to do.

VII. And be it further enacted, That the managers first chosen shall procure certificates or evidence of stock for all the shares of the said company, and shall deliver one such certificate, signed by the president, and countersigned by the treasurer, and sealed with the common seal of the said corporation, to each person, for every share by him subscribed and held; which certificates or evidence of stock shall be transferable at the pleasure of the holder, in person, or by attorney duly authorized, in presence of the president or treasurer, each of whom shall keep a book for that purpose, subject, however, to all payments due, or to become due thereon; and the assignee holding any certificate, having first caused the assignment to be entered in a book of the company, to be kept for the transfer of stock, shall be a member of the said corporation, and for every certificate assigned to him as aforesaid, shall be entitled to one share of the capital stock, and to all the estates and emoluments of the company, incident to one share, and to vote as aforesaid at the meetings thereof, and shall be subject to all the forfeitures, and to being sued for all the balance due or to become due on each share, as the original subscribers would have been.

VIII. And be it further enacted, That the corporation created by this act be, and they hereby are, authorized and empowered to make, construct, and forever maintain, a canal or slack-water navigation, of suitable width, depth, and dimensions, to be determined
34 by the said corporation, from such point on the river Delaware, within the jurisdiction of this State, through any one or more of the counties of Orange, Sullivan, and Ulster, to such point on the river Hudson as the said corporation shall judge best; said corporation may form and construct a towing path, or paths, all necessary locks, aqueducts, culverts, dams, waste weirs, and toll houses, artificial harbors for boats, side cuts or lateral canals, connected with said basins, or with the said Delaware or Hudson River, at such place or places, as shall be found expedient, and all necessary feeders from said rivers, or from other streams, if more convenient, and all other works, incident to or necessary and convenient for constructing, maintaining, and repairing said canal or navigation.

IX. And be it further enacted, That said corporation may purchase, and forever hold, any and all lands and real estate necessary for constructing, maintaining, and repairing said canal, and the works connected therewith, as aforesaid; and may also receive, hold,

and take, all voluntary grants and donations of real estate and lands which shall be made to them to aid the objects of said corporation; and whenever, in either of the ways aforesaid, said corporation shall become possessed of and own any lands and real estate which it may be unnecessary for them to retain for the purposes aforesaid, it shall be lawful for them to lease, occupy, alien, and convey the same, by lease or deed, with their seal affixed thereto; and to sell or lease any and all surplus waters of said canal not wanted for the most commodious navigation thereof, on such terms and for such purposes, as they shall deem expedient; and for the purpose of assuring to said corporation, all the lands, real estate, and waters requisite for most economically constructing and maintaining said canal, and the works connected therewith, and incident and necessary to the navigation of the same, whenever the said lands and waters shall not be obtained by voluntary donation or fair purchase, it shall be lawful for said corporation, by their agents, superintendents, or engineers, to enter upon, take possession of, and use all such lands, real estate, and streams, as shall be necessary for the purposes aforesaid; and in case of disagreement between the managers of the company and any person or persons owning any land or property which the said corporation may so occupy as aforesaid, or which may be injured by the necessary operations to complete such navigation, respecting the amount of the damages sustained by such person or persons, it shall be
35 lawful for the parties to appoint five suitable and judicious persons, who shall be under oath or affirmation fairly and impartially to estimate the same, and who shall reside within the proper county where the land lies; but if the parties can not agree upon such persons, or if either party shall refuse or neglect to join in such appointment within twenty days after requisition for that purpose upon him made, or if the owner of such lands shall be feme covert, under age, non compos mentis, or out of the State, or if the person, or a majority of the persons appointed by the parties, shall not, within thirty days after receiving notice of their appointment, file a report of their estimate in the office of the clerk of the court of the county where the land lies, then, and in either of these cases, either of the parties may apply to the court of the county where the land lies; and the said court shall award a venire, directed to the sheriff, requiring him to summon a jury of disinterested men, in order to ascertain and report to the said court, under their oaths or affirmation, what damages, if any, have been sustained by the owner or owners of said land or property; which report being confirmed by the court, judgment shall be entered thereon, and execution may issue, in case of nonpayment, for the sum awarded, with reasonable costs, to be assessed by the court; and it shall be the duty of the jury, or five appraisers, as the case may be, in valuing any land or property, or in estimating the damage done thereto, to take into consideration the advantages derived to the owner or owners of the premises from the said navigation passing through the same; and it shall further be the duty of the said jury or appraisers to describe and ascertain the

bounds of the lands or premises by them valued, and annex the same to their report or appraisement: Provided, always, That either party may appeal to the court of the county in which the premises are situated, within thirty days after such report may have been filed in the office of the clerk of the court of the county, in the same manner as appeals are allowed in other cases. And on payment by the company to the owner or owners of the premises, of the sum awarded by the five appraisers, or by the report of the jury, or by final judgment on appeal from such report, as the case may be, the said company shall be seized in fee of the premises by them occupied and used as aforesaid, as if the same had been conveyed by the owner or owners to them and their successors, in fee, by legal conveyance.

36 X. And be it further enacted, That if any person or persons shall be injured by means of any dam or dams being erected under the provisions of this act, or the land of any person shall be inundated by swelling the water by means of any dam, or dams, or any mill, or other waterworks, injured by swelling the water into the tail race of any such mill, or other waterworks which may have been erected on any stream that the corporation hereby created may use for the improvements authorized by this act; and if the managers of the said corporation can not agree with the owner or owners thereof as to the compensation to be paid for such injury, the same proceedings shall be had as is provided in the preceding section of this act; and the persons or jury valuing the damages, having been first sworn or affirmed justly and impartially to assess the same, shall take into consideration the advantages which may be derived by such owner or owners from the navigation aforesaid.

XI. And be it further enacted, That the managers of the said corporation, by and with their superintendents, engineers, artists, workmen, and laborers, with their tools, instruments, carts, wagons, and other carriages, and beasts of draught and burthen may enter upon the lands contiguous and near to the track of the said intended canal or navigation, giving notice to the owners or occupiers of such lands; and from thence take and carry away any stone, timber, gravel, sand, earth, or other material, doing as little damage thereto as possible, and repairing any breach they may make in the enclosures thereof, and making amends for any damages that may be done thereon, and paying for the materials so taken away, the amount whereof, if the parties cannot agree, shall be assessed and valued by any three disinterested freeholders residing in the neighborhood, under oath or affirmation, to be appointed by the parties; or, if they cannot agree in their appointment, then to be appointed by any disinterested justice of the peace of the township; and it shall be the duty of the said freeholders to file a report of their assessment, within seven days after they shall have agreed upon the same, with a neighboring justice of the peace, by whom the same shall be entered upon his docket; and the said freeholders shall, also, within the said seven days, notify each of the parties of the name of the justice of the peace with whom their report has been filed; and either party may

37 appeal from the said report to the court of the county, at any time within thirty days after the same shall have been so filed.

XII. And be it further enacted, That it shall and may be lawful for the managers of the said company, as soon as the said canal and navigation, or any fifteen miles thereof, shall be completed so as to allow of the passage of boats, to appoint such and so many collector of tolls for the passage of boats and vessels in and through the same, and in such places as they shall think proper; and that it shall and may be lawful for such collectors of tolls, and their deputies, to demand and receive of and from the persons having charge of any boat, ark, craft, raft, or other vessel, passing through the said canal and navigation, such toll and rates as the said managers shall think proper, at any lock or other convenient place: Provided, That the said toll shall not, in the whole, exceed the rate of eight cents per mile for every ton weight of the ascertained burthen or capacity of any boat, ark, craft, or vessel laden with, or engaged in the transportation of stone coal, and one-half that sum for every ton weight of the ascertained burthen or capacity of any boat, ark, craft, or vessel laden with or engaged in the transportation of any other article of merchandise; and the same for every hundred feet, cubic measure, of timber, and one thousand feet, board measure, of boards, plank, or scantling, and for every five thousand shingles; and so, in proportion, for any other distance and less number of locks.

XIII. And be it further enacted, That the collectors of tolls, duly appointed by the managers of the company, may stop and detain all boats, vessels, craft, or rafts using the said canal and navigation, until the owner, or commander, or supercargo of the same shall pay the toll so as aforesaid fixed; and if any owner, skipper, or supercargo of any boat or ark, craft, or raft shall pass by any place appointed for receiving tolls without making payment thereof, according to the provisions of this act, and with intent to defraud the said company out of such toll, he, she, or they so offending shall forfeit and pay, for every time they shall so pass by each appointed place, to the said company, the sum of twenty dollars, to be sued for and recovered by action of debt, in like manner and subject to the same rules and regulations as debts under fifty dollars may be sued for and recovered, together with the costs of suit.

38 XIV. And be it further enacted, That in order to ascertain the tonnage of boats using and passing the said navigation, and to prevent disputes between the supercargoes and collectors of tolls, concerning the same, upon the request of the owner, skipper, or supercargo of such boat, or of the collector of said tolls, at any lock or place appointed for receiving of tolls, upon the said navigation, it shall and may be lawful for each of them to choose one skillful person to measure and ascertain the tonnage the said boat is capable of carrying, and to mark the said tonnage so ascertained, in figures upon the head and stern of said boat, in colors mixed with oil or other durable matter; and the said boat or vessel so measured and marked shall be permitted to pass through the said canal and navi-

gation, for the price to which the number of tons so marked on her shall amount, agreeably to the rates fixed in the manner aforesaid; and if the owner, shipper, or supercargo of any boat shall decline choosing a person to ascertain the tonnage thereof, then the amount of such tonnage shall be fixed and ascertained by the person appointed for that purpose by the managers of the corporation, or chosen by the said collector of tolls; and the tolls shall be paid according to such measurement, before any such boat shall be permitted to pass the place where such toll is made payable.

XV. And be it further enacted, That if any person shall wilfully and knowingly do any act or thing whereby the navigation shall be impeded, or any dam, lock, gate, canal, engine, machine, property, or device whatsoever, thereunto belonging, shall be injured or damaged, he, she, or they so offending shall forfeit and pay to the said corporation four times the amount of the damages by them sustained, together with costs, to be recovered by action of debt, before a justice of the peace, or in any court of competent jurisdiction.

XVI. And be it further enacted, That it shall be the duty of the master or commander of any boat, ark, raft, or vessel passing through said navigation, when he shall arrive within one-fourth of a mile from any lock erected in said navigation, under the penalty of two dollars, to blow a trumpet or horn, whereupon the keeper of such lock shall attend for the purpose of opening the gate or sluice, to let the said boat, ark, raft, or other vessel pass, without unnecessary delay, and in safety; and if any boat, ark, raft, or other vessel shall be prevented from passing up or down any of said locks or sluices, by reason of the lock not being raised, for more than thirty minutes,
39 the said corporation shall, on conviction thereof before any justice of the peace of the proper county, forfeit and pay to the person so hindered the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportion for any longer or shorter time; and the service of any civil process upon the toll-gatherer, in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served upon the president of the said corporation.

XVII. And be it further enacted, that if the said corporation shall neglect or refuse to keep in repair and good order any dam, lock, or sluice of their own construction, or shall neglect to remove any obstacle which may occur so that boats, arks, rafts, or other vessels may safely use said navigation in the manner provided by this act, the said corporation shall, for every such offence, forfeit and pay the sum of one hundred dollars, to be sued for and recovered in any court of competent jurisdiction, one-half to the use of the informer and the other half to the use of the poor of the township or county where the neglect may occur; and the service of process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served on the president of the said corporation.

XVIII. And be it further enacted, that wherever any sluice or canal made by the company hereby incorporated shall cross any public or private laid out road or highway, or shall divide the grounds of any person or persons into two parts so as to require a ford or bridge to cross the same, the appraisers or jury who shall inquire of the damages to be sustained, in the manner directed by the ninth section of this act, shall find and ascertain whether a passage across the same shall be admitted or maintained by a ford or bridge, and on such finding, if in the affirmative, the said company shall cause a ford to be rendered practicable, or a bridge fit for the passage of wagons and carts to be built and forever thereafter to be maintained and kept in repair at all and every place or places so ascertained by the said jury, at the costs and charges of the said company; but nothing herein contained shall prevent any person from erecting and keeping in repair any foot or other bridge across any sluice or canal at his own expense, when the same shall pass through his ground: Provided, that such foot or other bridges so to be erected by the owners of such land shall not interfere with any sluice or lock or other works of the said company.

XIX. And be it further enacted, that the managers of the said company shall keep fair and just accounts of all monies received by them from the commissioners named in the first section of this act, and from the subscribers to the company, on account of their several subscriptions, and the amount of the profits on the shares which may be forfeited, as aforesaid, and also of all monies by them expended in the prosecution of the said works; and shall in every year submit such accounts to the stockholders at their annual meeting to choose officers of the company; and the aggregate amount of such receipts and expenditures shall be ascertained, and if upon such liquidation, or when the capital stock shall be nearly expended, it shall be found that the said capital stock will be insufficient to complete the said navigation and effect the objects designed by this act, according to the true intent and meaning thereof, it shall be lawful for the said managers, with the concurrence of the stockholders, given at a stated or at a special meeting convened for the purpose, to increase the number of shares to such extent as shall be deemed sufficient to accomplish the work, and to receive and demand the monies for shares so subscribed in like manner and under like penalties as are hereinbefore provided for the original subscription, or as shall be provided by their by-laws.

XX. And be it further enacted, that the said managers shall also keep a just and true account of all the monies received by their several and respective collectors of toll, and all other emoluments, and shall make and declare a dividend of the clear profits and income thereof among all the stockholders not in arrear to the company, all contingent costs and charges being first deducted; and shall, on the first Monday in June and the first Monday in December in every year, publish the half-yearly dividends made of the clear profit, and the time when and

where the same will be paid to the stockholders, not exceeding twenty days thereafter, and shall cause the same to be paid accordingly.

XXI. And be it further enacted, that it shall be lawful for the corporation hereby created, or for the commissioners named in the first section of this act, if they shall think proper, to contract, for
41 the use and benefit of said corporation, with Maurice Wurts, of the State of Pennsylvania, for the purchase of all the rights, privileges, and immunities granted to him, his heirs or assigns, by the legislature of said State, by an act entitled "An act to improve the navigation of the river Lackawaxen;" and also for the purchase of any lands containing stone coal that he or any other person may own at or near the head waters of the said river; and after such purchase to receive a conveyance of and hold the same in like manner as the said Maurice Wurts or such other person now does or can do; and it shall also be lawful for the said corporation to apply any part of their capital to the payment and satisfaction of such purchase, and also to the improvement of the said river Lackawaxen, in the same manner as the said Maurice Wurts is authorized to do by the above-mentioned act; and, further, to employ so much capital as they may deem expedient in the business of transporting to market the coal which they may have purchased as aforesaid.

XXII. And be it further enacted, That the said company shall not, by anything in this act contained, be authorized to take possession of, or exercise any control over, any private property, land or water, without the consent of the owner thereof, until ample security shall be given by such company, to be approved of by the clerk of the county wherein the same is situated, to pay the damages to be assessed as aforesaid, as provided by this act.

42 EXHIBIT A2.

New York act, approved Apr. 7, 1824. (Laws of 1824, chap. 174.)

An act to amend the act entitled "An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company," passed April 23, 1823. (Passed April 7, 1824.)

Whereas by the act to which this is amendatory the corporation thereby created is authorized to use any capital that may be necessary to effect the objects contemplated by the act, but the amount of original subscriptions is limited to five hundred thousand dollars: And whereas it appears, from an actual survey and examination of the route that it will require a larger sum to make a canal or slack water navigation from the Hudson to the headwaters of the Lackawaxen, and the proprietors of the coal mines near this river have represented to the legislature that they deem it expedient that the whole line of improvement should be made by one company, to be organized under the act to which this is amendatory.

Therefore,

I. Be it enacted by the people of the State of New York, represented in senate and assembly, That for the purpose of effecting the objects contemplated by the act to which this is amendatory the subscription of five hundred thousand dollars, authorized by the first section thereof, shall be, and the same is hereby, enlarged to the sum of fifteen hundred thousand dollars, anything in the said act to the contrary notwithstanding.

II. And be it further enacted, That for the purpose of making a canal or slack water navigation from or near Carpenter's Point, on the river Delaware, to the mouth of the river Lackawaxen, the said corporation shall have and possess, within the jurisdiction of this State, the same powers, privileges, and authority, subject, however, to the same restrictions and limitations as have been granted and imposed upon it for the purpose of enabling it to make a canal or slack water navigation between the Delaware and Hudson rivers.

43 EXHIBIT A3.

New York act, approved Apr. 20, 1825. (Laws of 1825, chap. 220.)

An act to amend the act entitled " An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company," and the several acts amending the same. (Passed April 20, 1825.)

I. Be it enacted by the people of the State of New York, represented in senate and assembly, That the president, managers, and company of the Delaware and Hudson Canal Company have, and shall have, full power and authority to make any contract or agreement with Maurice Wurts, or his assigns, or with any other person or persons whatsoever, by which the improvement of the navigation of the river Lackawaxen, according to the provisions of the act of the legislature of Pennsylvania, entitled "An act to improve the navigation of the river Lackawaxen," shall be secured, or stipulated to be made, and by which a sufficient supply of coal for the use and benefit of the said corporation may be obtained; and for the fulfilment of any such contract or agreement, may take such security from the person or persons with whom they shall be made, as they may deem necessary or proper and may employ such part of the capital of the said corporation as may be necessary to carry into effect any such contract or agreement on the part of the said corporation, or as may be necessary for the transportation to market of the coal which, under any such contract or agreement, may be obtained. Provided, That nothing in this section contained shall be construed to exonerate the said president, managers, and company from any of the conditions and restrictions imposed by the several acts heretofore passed, in relation to the said company; excepting only so much

thereof as requires the said company to own any lands or tenements out of this State.

II. And be it further enacted, That the seventh section of the act entitled "An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company," shall not
44 be so construed as to prevent any subscriber to the capital stock of the said corporation from including in one certificate of stock the whole number of shares subscribed and held by him, or such portion thereof as he may deem proper; and that it shall be the duty of the managers first chosen to insert in each certificate so many shares as the subscribers entitled thereto shall respectively require; and that the assignee of such certificate, or of any number of the shares mentioned therein, shall be entitled to as many shares as shall be so assigned to him, and to all the estates and emoluments of the company incident thereto, in as full a manner, and subject to the same liabilities, as if a separate certificate had been originally issued for each share.

45 EXHIBIT A4.

New York act, approved Mar. 10, 1827. (Laws of 1827, chap. 62.)

An act to loan the credit of the people of the State of New York to the president, managers, and company of the Delaware and Hudson Canal Company, and for other purposes. (Passed March 10, 1827.)

1. Be it enacted by the people of the State of New York, represented in senate and assembly, That it shall be lawful for the comptroller of the State of New York, and he is hereby directed to issue to the president, managers and Company of the Delaware and Hudson Canal Company, in such manner and under such restrictions as in this act provided, special certificates of stock, to the amount of five hundred thousand dollars, for the redemption of which, and the due payment of interest thereon (as in this act provided), to the owners of such stock, the faith and credit of the people of this State is hereby pledged.

2. And be it further enacted, That the said stock shall be issued by the comptroller in sums not exceeding one thousand dollars, and not more than one hundred thousand dollars at one time; the first one hundred thousand dollars on the delivery of the security by this act provided, to be given to the people of this State for the said loan of five hundred thousand dollars; and before the comptroller shall issue stock beyond the first sum of one hundred thousand dollars, the president, managers, and company of the Delaware and Hudson Canal Company shall deposit with the said comptroller the monthly accounts of the agent of the said company rendered to them and signed by the said agent, and approved and countersigned by the president and treasurer of the said company, showing the expenditure on said canal of the amount of the stock previously

issued by the said comptroller, which accounts so attested shall be a sufficient voucher to the comptroller for a further issue of stock, until the whole sum of five hundred thousand dollars is issued.

46 3. And be it further enacted, That the stock shall be made payable to the said corporation, or their order, and may be transferred by the said corporation, at their pleasure, and shall bear an interest of five per cent, payable quarter-yearly at the office of the said company in the city of New York, and shall be redeemable at the pleasure of the State at any time after the year one thousand eight hundred and forty-seven; which certificates shall be transferable only in person, or by attorney legally constituted, at the office of the said company in the city of New York, in books to be provided for that purpose.

4. And be it further enacted, That the president and treasurer of said company shall cause public notice, for at least ten days, to be given in two of the daily newspapers printed in the city of New York, of the time and place at which the said certificate of stock will be sold, and the said certificates shall be sold at such time and place, at public auction, to the highest bidder, and the amount of any premium received on such sales, or on any sales of the said certificates, shall be paid into the treasury of this State, to be appropriated to the common school fund.

5. And be it further enacted, That whenever any holder of any such certificates shall desire to transfer the same, and to divide any certificate he may hold, or to consolidate any such certificates, he shall be authorized to do so upon surrendering the same to the said company, and thereupon the said company may issue new certificates of stock to the amount of such as shall have been surrendered, under their corporate seal, which shall be countersigned by the recorder of the city of New York, to whom the said original certificate shall be delivered, to be by him returned or transmitted to the comptroller; and for countersigning every such certificate the said recorder may charge and receive the sum of ten cents; the said certificates shall express the authority of the company to issue the same, and the terms, times, and place of the payment of the principal and interest.

6. And be it further enacted, That for the purpose of completely securing the people of the State of New York from any risk or responsibility incurred by the pledge of their credit, as aforesaid, the comptroller of this State, with the advice of the attorney-general thereof, is hereby authorized and directed, before he issues

47 the said stock, or any part thereof, to obtain from the said company a good and sufficient assignment to the people of the State, by way of mortgage, or other collateral security, of the said Delaware and Hudson Canal, already made, or hereafter to be made, with all the lands and tenements, rights, members, and privileges thereunto belonging, or in any wise appertaining, as heretofore granted or hereafter to be granted to the said company, or existing by virtue of the laws of this State and of the State of Pennsylvania,

which said mortgage, or other instrument to be taken, shall be recorded in the office of the secretary of state, in the same manner and for the same purpose that deeds and other securities upon real estate are there recorded; and in case of the nonpayment of the interest on the said special stock, at the time of payment thereof, or in case of the nonredemption of the said special stock at the time appointed therefor, as aforesaid, that then, and in either case, it shall and may be lawful for the said comptroller to proceed, by due course of law, to sell the premises to be pledged, as aforesaid, or such portion thereof as may be necessary, to the highest bidder, due notice being given of such sale; or to purchase the same in for the benefit and security of the State, for such amount as the State shall be then liable for on account of its faith and credit being so pledged, as aforesaid, if it shall be deemed necessary for the better security of the people of this State; and in case the said president, managers, and company shall faithfully comply with the provisions aforesaid, in the redemption of the said special stock aforesaid, and of the punctual payment of the interest thereof, in manner and at the times aforesaid, that then, and in such case, the comptroller shall release, discharge, cancel, and give up to the said company, all and all manner of securities so taken, as aforesaid, from the said company, and the said company shall be fully released and discharged from the same forever.

7. And be it further enacted, That it shall and may be lawful for the president, managers, and company of the Delaware and Hudson Canal Company to raise on the general credit of the said company, by loan, upon such terms as shall be approved of by a majority of the board of managers of said company, a sum of money not exceeding three hundred thousand dollars, by a pledge of all or any portion of the said canal or property connected therewith, and held by the said corporation, if they shall deem such loan necessary to
48 carry into effect more effectually the special objects of their canal incorporation: Provided, That such loan shall not be made or effected until the sum of five hundred thousand dollars raised on the loan of the credit of the people of this State shall have been wholly expended by the said company on their said canal, or works connected therewith, and incident and necessary thereto, and that no part of such loan shall be used for or employed in banking by the said company: And provided further, That every written instrument to be executed by the said company, by way of pledge, mortgage, or other collateral security upon the said canal, or any other property connected therewith, for the purpose of effecting the loan authorized by this section of this act, shall contain within it a recital that such property is already pledged to the State, and the sum for which it is so pledged.

8. And be it further enacted, That until the average annual income of the said corporation, from the time of its commencing business, shall amount to six per centum per annum, on its whole capital, the president, managers, and company of the Delaware and Hudson Canal Company shall not be liable to be taxed or assessed as an incor-

porated company, under any present or future law for the assessment and collection of taxes, on any property held by them on, or near the canal, and necessarily connected therewith, or for the bed of the said canal: Provided, That this exemption shall not extend beyond the period of six years from the passing of this act: Provided, That nothing in this act contained shall be taken to give any person a lien on the premises to be mortgaged or pledged to the State prior to the lien of the State.

9. And be it further enacted, That this act is declared to be a public act, and shall be favorably construed in all courts for every beneficial purpose herein contained.

49 EXHIBIT A5.

New York act, approved May 2, 1829. (Laws of 1829, chap. 346.)

An act to loan the credit of the State to the president, managers, and company of the Delaware and Hudson Canal Company. (Passed May 2, 1829.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. The comptroller is hereby directed to issue to the president, managers, and company of the Delaware and Hudson Canal Company, in such sums as the said company may require, special certificates of stock, to the amount of three hundred thousand dollars, redeemable at any time after the year one thousand eight hundred and forty-nine, at the pleasure of the State, and bearing an interest at the rate of four and a half per cent per annum, payable quarterly, at the office of the said company in the city of New York; for the redemption of which stock, and the due payment of the interest thereon to the owners of such stock, the faith and credit of the people of this State are hereby pledged.

SEC. 2. The said stock shall be so issued by the comptroller, on the delivery of the security hereinafter provided to be given to the people of this State, by the said company, for the said loan of three hundred thousand dollars.

SEC. 3. The said stock shall be made payable to the said corporation, or their order, and may be transferred by the said corporation at their pleasure.

SEC. 4. For the purpose of completely securing the people of this State, for the responsibility incurred by the pledge of their credit, as aforesaid, the comptroller, with the advice of the attorney-general, before he issues the said stock, or any part thereof, shall receive
50 from the said company the like security as is provided in the sixth section of the act entitled "An act to loan the credit of the people of the State of New York to the president, managers, and company of the Delaware and Hudson Canal Company, and for other

purposes," passed March 10th, 1827; together with the bond of the company, under their corporate seal.

SEC. 5. The comptroller, upon the delivery to him by the said company of any portion, not less than ten thousand dollars, of the certificates of said stock, shall cancel the same and credit their amount, in satisfaction of so much of the security by this act directed to be given by the said company to the people of this State for the aforesaid loan.

SEC. 6. Before the certificates of stock created by this act are issued by the comptroller, satisfactory evidence shall be given to the comptroller and the attorney-general that all the estate and property now mortgaged to the State by the said company, including property since acquired, the railroad and its appendages, are included in the mortgage by this act directed to be executed; and that no intermediate lien has been created or exists on said property.

51 EXHIBIT A6.

New York act, approved May 9, 1867. (Laws of 1867, chap. 841.)

An act to amend an act entitled "An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company," passed April 23d, 1823. (Passed May 9, 1867.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. In addition to the powers conferred upon said canal company by an act entitled "An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company," passed April 23d, 1823, and the several acts amendatory thereof, for the purpose of opening and of mining and bringing to market a supply of stone coal, which is found in the interior of the State of Pennsylvania, it shall be lawful for the said canal company, for the purpose of increasing said supply of coal, to construct, own, and maintain railroads within this State, to contract with any railroad corporation now existing or hereafter to be created, for the use of its road, for the transportation of coal; to lease the railroad or any parts thereof, of any incorporated company now or hereafter to be created, upon which said canal company may desire to transport coal, and also to subscribe for and take stock or bonds of and in any railroad company which they may lease, or with which they may contract, now existing or hereafter to be incorporated, subject to the same rights, restrictions, and liabilities as other stockholders or bondholders.

SEC. 2. That in the constructing, owning, and maintaining of railroads within this State, by said canal company, under the authority of this act, said canal company shall have, possess, and
52 enjoy all the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations,

and to regulate the same," passed April 2d, 1850, and the several acts amending the same, and be subject to all the duties, liabilities, and provisions, so far as relates to any powers or privileges by this act upon said company conferred, and hereafter exercised, and not inconsistent with the provisions of said company's charter.

SEC. 3. This act shall take effect immediately.

53 EXHIBIT A7.

New York act, approved June 4, 1881. (Laws of 1881, chap. 452.)

An act to authorize corporations owning canals to construct and operate railroads alongside of or in lieu thereof. (Passed June 4, 1881, three-fifths being present.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. It shall be lawful for any corporation of this State owning and operating a canal to construct and operate along or in lieu of such canal a railroad, and the exercise of the authority hereby conferred shall not be deemed to forfeit or impair its corporate rights under its charter or act of incorporation.

SEC. 2. Such company in the construction and maintenance of any such railroad under the authority of this act shall have, possess, and enjoy all the powers and privileges contained in an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, and the several acts amending the same, and be subject to all the duties, liabilities, and provisions so far as relates to any powers or privileges by this act upon said company conferred and hereafter exercised.

SEC. 3. Nothing in this act contained shall authorize the construction of any railroad except upon or along such canal owned and operated by any such company, and not in any other locality.

SEC. 4. This act shall take effect immediately.

54 EXHIBIT A8.

New York act, approved Apr. 28, 1899. (Laws of 1899, chap. 469.)

An act to amend chapter eight hundred and forty-one of the laws of eighteen hundred and sixty-seven, entitled "An act to amend an act entitled act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company,' passed April twenty-third, eighteen hundred and twenty-three." (Became a law April 28, 1899, with the approval of the governor. Passed, a majority being present.)

The people of the State of New York, represented in senate and assembly, do enact as follows:

SEC. 1. Chapter eight hundred and forty-one of the laws of eighteen hundred and sixty-seven, passed May ninth, eighteen hundred and

sixty-seven, entitled "An act to amend an act entitled 'An act to incorporate the president, managers, and company of the Delaware and Hudson Canal Company,' passed April twenty-third, eighteen hundred and twenty-three," and constituting chapter two hundred and thirty-eight of the laws of eighteen hundred and twenty-three, is hereby amended by inserting therein the following new sections, to be known as sections three, four, five, and six.

SEC. 3. Whenever it shall appear to the managers of said canal company that it is able to fulfill the aforesaid purpose of opening and of mining and bringing to market a supply of stone coal which is found in the interior of the State of Pennsylvania more economically by rail over its own or other lines than by its canal, it shall be lawful for said company, and it is hereby authorized and empowered, by vote of said managers, to lease, sell, or discontinue to use or maintain said canal, or any parts thereof, which in their judgment are no longer necessary for said purpose.

SEC. 4. Whenever the said company shall exercise the power and authority granted in section three of this act to discontinue to use or maintain said canal, or any part thereof, it shall, within a reasonable time thereafter, restore the highway crossings of such part of said canal as is so discontinued to their former state, so far as the same can be done, either by the removal of the bridges thereover and the approaches thereto and filling in the bed of the canal at such crossings, or in such other way as may be found most practicable for that purpose. It shall also be the duty of said company, in the event of such discontinuance of said canal, or any part thereof, to make such provision for the private crossings over that part of said canal so discontinued as will furnish those entitled thereto a suitable crossing thereover, either by the removal of the bridges and approaches now existing at and for such private crossings and filling in the bed of the canal thereat, or in such other way as may be found most practicable for that purpose. It shall also be the duty of said company, in the event of such discontinuance of said canal or any part thereof, to make such provision for the streams now discharging into said canal on that part of it which may be so discontinued as will restore them to their original channels; but where to make such restoration has become, or is now, impossible, such provision shall be made for the discharge of the water of such streams from said canal as the existing situation now permits, and as will avoid injury to other property. It shall also be the duty of said company, its successors or assigns, to take such precautions and make such provisions for the carrying away of water that may flow into the bed of such portion of said canal as may be discontinued as will prevent such stagnant pools of water therein as are liable to become injurious to public health.

SEC. 5. It shall be lawful for said canal company, and it is hereby authorized and empowered, to use any part of its net earnings or surplus for the purchase or purchasing or extinguishing of securities or shares of stock of itself or of any corporation with which it may

have entered into any contract or lease, or upon whose securities or stock it may have become liable to pay interest or dividends. The amount to be so used and the time and manner in which the same shall be so applied shall be fixed by a vote of a majority of the stockholders present at any meeting in person or by proxy. Such action may be subsequently modified or rescinded after notice of the changes contemplated given for the same time and in the same manner as is required regarding notice of the annual meetings of the com-
56 pany and by a vote of the stockholders, such as is above specified, at a regular or special meeting pursuant to such notice.

SEC. 6. The corporate name of said company is hereby changed from "The president, managers, and company of the Delaware and Hudson Canal Company" to "The Delaware and Hudson Company," by which last-mentioned name it shall be hereafter known and designated with the same force and effect as though it had been originally incorporated by that name.

SEC. 2. This act shall take effect immediately.

57 EXHIBIT B1.

Pennsylvania act, approved Mar. 13, 1823. (Laws of 1823, Chap. 61.)

An act to improve the navigation of the river Lackawaxen.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That it shall and may be lawful for Maurice Wurts, of the city of Philadelphia, his heirs and assigns, with his or their surveyors, engineers, superintendents, artists, and workmen to enter upon the river Lackawaxen, and any one of the streams emptying into the same that may appear to the said Maurice Wurts, his heirs or assigns, most suitable for the purposes contemplated by this act, to open, enlarge or deepen the same, in any part or place thereof, in the manner which shall appear to them most convenient for opening, enlarging, changing, making anew, or improving the channel; and also, to cut, break, remove and take away all trees, rocks, stones, earth, gravel, sand, or other material, or any impediments whatsoever within the said river Lackawaxen and the branch thereof, which the said Maurice Wurts, his heirs and assigns, may select, and to use all such timber, rocks, stones, gravel, earth, or other material, in the construction of their necessary works, and to form, make, erect and set up any dams, locks, or any other device whatsoever which the said Maurice Wurts, his heirs or assigns, shall think most fit and convenient to make a good and safe descending navigation, at least once in every six days, except when the same may be obstructed by ice or floods, from or near Wagner's Gap, in the county of Luzerne, or from or near Rix's Gap, in the county of Wayne, to the mouth of the said river Lackawaxen, with a channel not less than twenty feet wide and eighteen inches deep, for arks and

rafts, and of sufficient depth of water to float down boats of the burthen of one hundred barrels, or ten tons: Provided, That no toll shall be demanded for any boat, vessel, or craft in ascending said stream of water, unless the same is converted into a complete slack water navigation, as is authorized by this act.

58 SEC. 2. And be it further enacted by the authority aforesaid, That if any person or persons shall be injured by means of any dam or dams being erected under the provisions of this act, or the land of any person shall be inundated by swelling the water by means of any dam or dams, or any mill or other water works injured by swelling the water into the tail race of any such mill or other water works, which may have been erected in the said river Lackawaxen, or the branch thereof which the said Maurice Wurts, his heirs and assigns, may use for the improvements authorized by this act; and if the said Maurice Wurts, his heirs and assigns, cannot agree with the owner or owners thereof as to the compensation to be paid for such injury, the same proceedings shall be had as is provided in the fourth section of this act; and the persons or jury valuing the damages, having been first sworn or affirmed, justly and impartially to assess the same, shall take into consideration the advantages which may be derived by such owner or owners from the navigation aforesaid, and if the owner of any such land, mill or water works shall be apprehensive that the same will be injured by any dam or dams then about to be erected by the said Maurice Wurts, his heirs or assigns, such owner may require the said Maurice Wurts, his heirs or assigns, to give to him sufficient security for the payment of any damages that may be thereafter awarded to him under the provisions of this act, for or by reason of injury arising to him from such dam or dams; and after such requisition shall have been made in writing, it shall not be lawful for the said Maurice Wurts, his heirs or assigns, to proceed in the erection of such dam or dams, until such security shall have been given; and if the parties can not agree upon the amount and sufficiency of the security, the same shall be judged of by the Court of Common Pleas of the county in which such land, mill or water works may be situated.

And whereas, on examination, and survey, it may appear to the said Maurice Wurts, his heirs or assigns, practicable and expedient to make a slack water navigation between the points aforesaid:

Therefore,

SEC. 3. Be it further enacted by the authority aforesaid, That it shall and may be lawful for the said Maurice Wurts, his heirs and assigns, if they shall think proper, to make a complete slack water navigation from or near Wagner's Gap, aforesaid, or from or near Rix's Gap, aforesaid, to the river Delaware, at or near the

59 mouth of the river Lackawaxen, so as to admit a safe and easy passage for loaded boats, arks and other vessels, up as well as down the said river Lackawaxen, and any one of the streams emptying into the same, which the said Maurice Wurts, his heirs or assigns, may deem most suitable for such navigation, or by means of such col-

lateral sluices and locks as they may devise for the purpose. And for the purpose of making such slack water navigation, the said Maurice Wurts, his heirs and assigns, shall have and possess the same powers, privileges and authority as is given to them by the first section of this act, to enable them to make a descending navigation.

SEC. 4. And be it further enacted by the authority aforesaid, That whenever it shall be necessary for the said Maurice Wurts, his heirs or assigns, to enter in, and upon, and occupy, for the purposes of said navigation, any land which may be suitable and necessary for erecting a lock, sluice, canal, tow-path, or other device; if the owner or owners of such land shall refuse to permit such entry and occupation, and the parties cannot agree upon the compensation to be made for any injury, or supposed injury, that may be done to the same, it shall and may be lawful for the parties to appoint five suitable and judicious persons to estimate such damage, who shall be under oath or affirmation, fairly and impartially to estimate the same, and shall reside within the proper county where the land lies: But if they cannot agree upon such persons, or if the owner of such land shall neglect or refuse to join in such appointment within twenty days after requisition for that purpose upon him made, or if such owner shall be feme covert, under age, non compos mentis, or out of the State; or if the persons, or a majority of the persons, appointed by the parties shall not, within thirty days after receiving notice of their appointment, file a report of their estimate in the prothonotary's office of the Court of Common Pleas of the county where the land lies, then, and in either of these cases, either of the parties may apply to the Court of Common Pleas of the proper county where the land lies, and the said court shall award a venire, directed to the sheriff, requiring him to summon a jury of disinterested men, in order to ascertain and report, under their oaths or affirmation to the said court, what damages, if any, will be sustained by the owner or owners of said ground by reason of such lock, canal, sluice, tow-path, or other device passing through his, her, or their land, which report, on being
60 confirmed by the court, shall be taken as the measure of damage in such case: Provided, That either party may appeal to the court within thirty days after such report may have been filed in the prothonotary's office of the proper county, in the same manner as appeals are allowed in other cases, and the court shall direct an issue to be formed to try the fact. And it shall be the duty of the jury or five appraisers, as the case may be, in valuing any land, or in estimating the damage that may be done to the same, to take into consideration the advantages that will arise to the owner or owners thereof, from the said navigation. And on payment by the said Maurice Wurts, his heirs or assigns, to the owner or owners of such land, of the sum awarded by the five appraisers, or by the report of the jury, or by final judgment on appeal from such report, as the case may be, then it shall be lawful for the said Maurice Wurts, his heirs or assigns, by themselves, their superintendents, engineers, artists, or workmen, to enter in and upon and occupy such land for the purpose of said

navigation, and there to dig, construct, make, and erect such lock, sluice, canal, tow-path, or other device, as they may deem necessary.

SEC. 5. And be it further enacted by the authority aforesaid, That the said Maurice Wurts, his heirs or assigns, by and with their superintendents, engineers, artists, workmen, and laborers, with their tools, instruments, carts, wagons, and other carriages, and beasts of draught and burden, may enter upon the lands contiguous and near to the said river Lackawaxen, and the branch thereof which they may select for their improvements, giving notice to the owners or occupiers of such lands, and from thence take and carry away any stone, timber, gravel, sand, earth, or other material, doing as little damage thereto as possible, and repairing any breach they may make in the enclosures thereof, and making amends for any damages that may be done thereon, and paying for the materials so taken away, the amount whereof, if the parties can not agree, shall be assessed and valued by any three disinterested freeholders residing in the neighborhood, under oath or affirmation, to be appointed by the parties, or if they cannot agree in their appointment, then to be appointed by any disinterested justice of the peace of the proper county. And it shall be the duty of said freeholders, to file a report of their assessment within seven days after they shall have agreed upon the same, with a neighboring justice of the peace, by whom the same shall be entered
61 upon his docket; and the said freeholders shall, also, within the said seven days notify each of the parties, or the agent or attorney of the respective parties, of the name of the justice of the peace with whom their report has been filed, and either party may appeal from said report to the Court of Common Pleas of the proper county, at any time within thirty days after the same shall have been so filed: Provided, however, that the owner of any stone, timber, gravel, sand, or other material which the said Maurice Wurts, his heirs or assigns, may be about to remove as aforesaid, may require the said Maurice Wurts, his heirs or assigns, to give to him sufficient security for the payment of such valuation as may afterwards be put upon the same, or so much of the same as may be removed and appraised under the provisions of this section, and after such requisition shall have been made in writing, it shall not be lawful for the said Maurice Wurts, his heirs or assigns, to remove any of the said materials, until such security shall have been given, the amount and sufficiency whereof, if the parties cannot agree upon the same, shall be judged of by any disinterested justice of the peace of the township in which such materials may be situated.

SEC. 6. And be it further enacted by the authority aforesaid, That the said Maurice Wurts, his heirs and assigns, shall cause the guard walls, locks, gates, and canal to be erected and made at each respective situation, before the dam, intended for such situation, and to which the same are to be appurtenant, shall be extended into the stream so as to interfere with the rafting channel thereof.

SEC. 7 And be it further enacted by the authority aforesaid, That it shall be the duty of the said Maurice Wurts, his heirs and assigns,

to make, construct, and fix suitable and sufficient slopes and aprons, or other devices, at each and every dam which he or they shall or may erect under the provisions of this act, in such place and part of the channel of the stream, and in such manner as shall enable rafts of any description that can now be run in the other parts of the stream, when the same is in good rafting condition, to pass with safety over such dam or dams. And in case the said Maurice Wurts, his heirs or assigns, shall neglect or refuse to make and fix such slope or slopes, apron or aprons, device or devices as aforesaid, at any dam or dams by him or them constructed as aforesaid, or shall for a term of nine months, after notice in writing, neglect or refuse to amend,
62 repair, or reconstruct any slope, apron, or other device of their own construction, which shall or may have become out of repair, he, the said Maurice Wurts, his heirs or assigns, shall be liable to pay a fine not exceeding one hundred dollars, to be recovered before any justice of the peace of the proper county, to the use of such person or persons as shall have sustained damages by such neglect; and in case the said neglect shall be continued until the next court of quarter sessions, after the expiration of the said nine months, then and in such case the said Maurice Wurts, his heirs or assigns, shall be liable to prosecution by indictment for the same, and on conviction thereof it shall be lawful for the court to order the dam or dams, where such neglect shall have occurred, to be pulled down, destroyed, and completely removed out of the rafting channel of the stream, and the expense incidental to the pulling down or removal of such dam or dams shall be paid by the said Maurice Wurts, his heirs or assigns; and the service of process under the provisions of this section, upon the toll gatherer in the proper county, at or nearest to the place where the neglect shall have occurred, shall be as good and as available in law as if served upon the said Maurice Wurts, his heirs or assigns: Provided, however, That this section shall not be construed to extend to or effect any dam or dams erected by the said Maurice Wurts, his heirs or assigns, at or above the highest point or place from which rafts can or do now run in the present natural or unimproved state of the river: And provided further, That this section shall not be so construed as to authorize boats, arks, craft, or other vessels above the burthen of three tons laden with merchandise to evade the payment of the tolls fixed in this act by passing over the slopes or aprons appurtenant to any dam.

SEC. 8. And be it further enacted by the authority aforesaid, That whenever any sluice or canal shall cross any public or private laid out road or highway, or shall divide the grounds of any person or persons into two parts, so as to require a ford or bridge to cross the same, the appraisers or jury who shall inquire of the damages to be sustained in the manner directed by the fourth section of this act shall find and ascertain whether a passage across the same shall be admitted or maintained by a ford or bridge, and on such finding the said Maurice Wurts, his heirs and assigns, shall cause a ford to be

rendered practicable, or a bridge fit for the passage of wagons and carts to be built and forever thereafter to be maintained and
63 kept in repair, at all and every place or places so ascertained by the said appraisers and jury, at the cost and charges of the said Maurice Wurts, his heirs and assigns; but nothing herein contained shall prevent any person from erecting and keeping in repair any foot or other bridge across any sluice or canal at his own expense when the same shall pass through his ground: Provided, That such foot or other bridges so to be erected by the owners of such land shall not interfere with any sluice or lock or other works of the said Maurice Wurts, his heirs and assigns.

SEC. 9. And be it further enacted by the authority aforesaid, that the said Maurice Wurts, his heirs or assigns, shall have the privilege and be entitled to use the water power from the said river Lackawaxen and the branch thereof which they may use for the making of the navigation authorized by this act, and from their sluices or canals to propel such machinery as they may think proper to erect on the land which they may previously have purchased from the owner or owners, or may sell in fee simple, rent, or lease for one or more years, the said water power to any person or persons, to be used in such manner and on such terms as they may think proper: Provided, It be done so that it shall not at any time impede or interrupt the navigation.

SEC. 10. And be it further enacted by the authority aforesaid, that as soon as the said Maurice Wurts, his heirs or assigns, shall have completed ten miles of the descending navigation authorized by this act, and so from time to time as they shall complete other ten miles, they may give notice thereof to the governor of the Commonwealth, who shall thereupon forthwith appoint three skillful, judicious, and disinterested persons, having practical knowledge of river navigation, to view and examine the same, and to report to him in writing, under oath or affirmation, whether the said navigation is completed in the manner aforementioned, according to the true intent and meaning of this act, and if the report of them, or a majority of them, shall be in the affirmative, then the governor shall, by license, under his hand and the lesser seal of the Commonwealth, permit and suffer the said Maurice Wurts, his heirs or assigns, or such person or persons as they shall from time to time appoint as toll collectors, or their deputies, to demand and receive of and from the person or persons having charge of any boat, vessel, ark, craft, or raft passing through
64 any lock in said navigation, such tolls and rates for every ton weight of the ascertained burthen of the said boat, vessel, ark, or craft, and for every one thousand feet, board measure, of boards, timber, plank, or scantling, and for every ton weight of shingles or other material in rafts, as the said Maurice Wurts, his heirs and assigns, may think proper: Provided, That the said toll shall not, in the whole, exceed the toll of three cents per mile for every ton of the ascertained burthen of such boat, vessel, ark, or craft, and one-half that rate for every one thousand feet, board measure, of boards, timber, plank, or scantling, and for every ton weight of shingles or other

material in rafts: And provided also, That where any dam erected by the said Maurice Wurts, his heirs or assigns, at any point or place now passable or used for rafting purposes in the present natural or unimproved state of the stream, shall not be so constructed by means of a slope or other device as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles, when the stream in other respects is in a good rafting condition, such rafts of timber, boards, scantling, or shingles, if they do not carry some article of merchandise, shall be permitted to pass the locks appurtenant to such dam free from toll.

SEC. 11. And be it further enacted by the authority aforesaid, that if, in pursuance of the authority herein given, the said Maurice Wurts, his heirs or assigns, shall determine to make a slack-water navigation, then so soon as they shall have perfected one lock therein, and so from time to time as they shall perfect one additional lock, they may give notice thereof to the governor of the Commonwealth, who shall thereupon appoint three skillful, judicious, and disinterested persons, having practical knowledge of river navigation, to view and examine that part said to be completed, and report to him in writing, under oath or affirmation, whether the said navigation is so far executed in a masterly and workmanlike manner, according to the true intent and meaning of this act; and if at any time their report, or the report of a majority of them, shall be in the affirmative, then the governor shall, by license, under his hand and the lesser seal of this Commonwealth, permit the said Maurice Wurts, his heirs and assigns, or such person or persons as he or they shall from time to time appoint as toll collectors, or their deputies, to demand and receive of and from the person or persons having the charge of any boat, ark, vessel, or other craft passing through any lock erected by them in the completion of said navigation, twelve and one-half cents upon each and every ton of the ascertained burden of such boat, ark, vessel, or other craft, and one-half of the same for every thousand feet, board measure, of boards, timber, plank, or scantling, and for every ton weight of shingles or other material in rafts: Provided, That where any dam, erected by the said Maurice Wurts, his heirs or assigns, at any point or place now passable or used for rafting purposes in the present natural or unimproved state of the stream, shall not be so constructed, by means of a slope or other device, as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles, such rafts of timber, boards, scantling, or shingles, if they do not carry some article of merchandise, shall be permitted to pass the locks appurtenant to such dam free from toll: And provided also, That if, at the expiration of two years after said slack-water navigation shall be completed, the tolls should enable the said Maurice Wurts, his heirs and assigns, after paying all repairs and other necessary expenses, to divide more than nine per centum per annum on the capital sum expended, then and in such case the tolls shall be so reduced that the dividends shall not exceed nine per cent, and shall so continue for five years: and if,

at the expiration of that time, they shall exceed fifteen per cent, they shall be so reduced as not to exceed fifteen per cent, and shall at that period be so regulated from time to time as not to exceed fifteen per cent per annum; and if at any time after the expiration of two years from the completion of the said work the net profits aforesaid shall not amount to nine per cent upon the money expended in the said work, it shall be lawful for the said Maurice Wurts, his heirs or assigns, to raise the said tolls so as to divide nine per cent.

SEC. 12. And be it further enacted by the authority aforesaid, that in order to ascertain whether any dam or dams, erected under the authority of this act, have been constructed in the manner contemplated by the seventh section of this act, and also by the second proviso to the tenth, and the first proviso to the eleventh section of this act, it shall be the duty of the court of common pleas of the county in which any dam may be situated, on complaint of any citizen to said court, setting forth that such dam is not so constructed as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles, to appoint three reputable, judicious, and disinterested persons to view and examine the same, and 66 to report to the said court in writing, under oath or affirmation, whether the dam so complained of, is or is not so constructed as to afford a safe and convenient passage over the same for rafts of timber, boards, scantling, or shingles; and if their report, or a report of a majority of them, shall be in the affirmative, then it shall be lawful for the said Maurice Wurts, his heirs and assigns, to demand and receive from the person or persons having charge of any raft of timber, boards, scantling, or shingles, passing through the lock appurtenant to such dam, toll according to the rate above established; but if their report or the report of a majority of them shall be in the negative, then such rafts of timber, boards, scantling, or shingles, unless they carry some article of merchandise, shall be permitted to pass through the locks appurtenant to such dam, free from toll, until the same be made passable for rafts in the manner contemplated by the provisos above mentioned. And it shall be lawful for the said Maurice Wurts, his heirs or assigns, to apply in like manner, at all times, to the court of common pleas of the proper county, for the appointment of viewers, and upon such application, the like proceedings shall be had as are above directed, upon the application and complaint of any citizen.

SEC. 13. And be it further enacted by the authority aforesaid, that in order to ascertain the size of arks and rafts and the tonnage of boats, using and passing the said navigation, and to prevent disputes between the supercargoes and collectors of tolls concerning the same, upon request of the owner, skipper, or supercargo of such boat, raft, or ark, or of the collector of said tolls, at any lock upon the said navigation, it shall and may be lawful for each of them to choose one skillful person to measure and ascertain the size of said raft or ark, and the tonnage the said boat is capable of carrying, and to mark the said tonnage so ascertained in figures, upon the head and stern of

said boat, in colors mixed with oil or other durable matter, and the said boat or vessel, so measured and marked, shall be permitted to pass through the said locks for the price to which the number of tons, so marked on her, shall amount, agreeably to the rates fixed in the manner aforesaid; and if the owner, skipper, or supercargo of any ark, raft, or boat shall decline choosing a person to ascertain the tonnage thereof, then the amount of such tonnage shall be fixed and ascertained by the person appointed for that purpose by the said Maurice Wurts, his heirs or assigns, or chosen by the said
67 collector of tolls, and the tolls shall be paid according to such measurement, before any such raft, ark, or boat shall be permitted to pass the place where such toll is made payable.

SEC. 14. And be it further enacted by the authority aforesaid, That if any person or persons shall wilfully and knowingly do any act or thing whereby the navigation shall be impeded, or any dam, lock, gate, canal, engine, machine, property, or device whatsoever thereunto belonging, shall be injured or damaged, he, she, or they so offending, shall forfeit and pay to the said Maurice Wurts, his heirs and assigns, four times the amount of the damages by them sustained, together with costs to be recovered by action of debt before a justice of the peace or in any court of competent jurisdiction.

SEC. 15. And be it further enacted by the authority aforesaid, That the locks shall be, in the clear, at least eighteen feet wide and sixty-four feet in length; and it shall be the duty of the master or commander of any boat, ark, or other vessel passing said navigation, when he shall arrive within one-fourth of a mile from any lock so erected, under the penalty of two dollars, to blow a trumpet or horn, whereupon the keeper of such lock shall attend for the purpose of opening the gate or sluice to let the said boat, ark, or other vessel pass without unnecessary delay and in safety; and if any boat, ark, or other vessel shall be prevented from passing up or down any of said locks or sluices by reason of the lock not being raised for more than thirty minutes, the said Maurice Wurts, his heirs and assigns, shall, on conviction thereof, before any justice of the peace of the proper county, forfeit and pay to the person so hindered the sum of one dollar for every thirty minutes beyond the said time that he shall be so prevented, and in the same proportion for any longer or shorter time, and the service of any civil process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served upon the said Maurice Wurts, his heirs and assigns.

SEC. 16. And be it further enacted by the authority aforesaid, That if the said Maurice Wurts, his heirs or assigns, shall neglect or refuse to keep in repair and good order any dam, lock, or sluice of their own construction, or shall neglect to remove any obstacle
68 which may occur, so that boats, arks, rafts, or other vessels may safely use said navigation in the manner provided by this act, the said Maurice Wurts, his heirs and assigns, shall for every

such offence forfeit and pay the sum of one hundred dollars, to be recovered in the manner as debts of equal amount are by law recoverable before a justice of the peace of the proper county where the offence shall be committed, one-half to the use of the informer and the other half to the use of the poor of the township or county where the neglect may occur, and the service of process upon the toll gatherer in the proper county, and next to the place where the offence shall have been committed, shall be held as good and as available in law as if served on the said Maurice Wurts, his heirs or assigns: Provided, That the payment of such penalty shall not be taken to exempt the said Maurice Wurts, his heirs and assigns, from their responsibility to any person who may be injured by such refusal or neglect.

SEC. 17. And be it further enacted by the authority aforesaid, That if any owner, skipper, or supercargo of any boat or ark, craft, or raft, shall pass by any place appointed for receiving tolls without making payment thereof according to the provisions of this act, and with intent to defraud the said Maurice Wurts, his heirs and assigns, out of such toll, he, she, or they so offending shall forfeit and pay for every time they shall so pass by each appointed place, to the said Maurice Wurts, his heirs and assigns, the sum of twenty dollars, to be sued for and recovered by action of debt before any justice of the peace, in like manner and subject to the same rules and regulations as debts under one hundred dollars may be sued for and recovered, together with the costs of suit.

SEC. 18. And be it further enacted by the authority aforesaid, That at the expiration of thirty years from the passage of this act the said Maurice Wurts, his heirs or assigns, shall render, under oath or affirmation, to the legislature an exact account of the amount of money expended by them in making said navigation and in keeping the same in repair, and also of the amount of tolls received by them during that time. And if it shall thereupon appear that the tolls during that time have amounted to so much above six per centum per annum on the amount of moneys so expended in making and keeping in repair said navigation as will be equal to the capital sum so expended, then the legislature may resume all the
69 rights, liberties, and franchises hereby granted; but if it shall appear that the tolls during that time have not amounted to so much above six per centum per annum on the amount of money so expended in making and in keeping in repair said navigation as will be equal to the capital sum so expended, then it shall be lawful for the legislature, on payment to the said Maurice Wurts, his heirs or assigns, of the difference or deficiency, to resume all the rights, liberties, and franchises hereby granted; and in case of such resumption, the legislature shall be bound to fulfill all and singular the obligations enjoined by this act on the said Maurice Wurts, his heirs or assigns. And if neither the descending nor the slack-water navigation authorized by this act shall be completed within ten years from the passage thereof, then the legislature may resume all

the rights, liberties, and franchises hereby granted to the said Maurice Wurts, his heirs or assigns.

JOSEPH LAWRENCE,
Speaker of the House of Representatives.
WILLIAM MARKS, Jr.,
Speaker of the Senate.

Approved the thirteenth day of March, one thousand eight hundred and twenty-three.

JOSEPH HIESTER.

70 EXHIBIT B2.

Pennsylvania act, approved Apr. 1, 1825. (Laws of 1825, chap. 78.)

A supplement to the act entitled "An act to improve the navigation of the river Lackawaxen."

Whereas by an act entitled "An act to improve the navigation of the river Lackawaxen," Maurice Wurts, his heirs or assigns, is authorized to improve the navigation of the said stream: And whereas by an act of the legislature of the State of New York, a company has been incorporated, by the name of "The President, Managers and Company of the Delaware and Hudson Canal Company," to make a canal from the Hudson to the Delaware River, terminating at a point near the mouth of the Lackawaxen; and whereas the stock in the said company having been jointly subscribed by the citizens of the two States, and the improvements authorized by the said acts being essentially connected with each other, the citizens of Wayne and Pike counties have, by petition, represented to the legislature that it is desirable that those engaged in the improvement of the Lackawaxen should be able to avail themselves of the assistance of the Delaware and Hudson Canal Company, and pray the legislature to grant the necessary legislative facilities for that purpose:

Therefore,

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, That, by and with the consent of Maurice Wurts, his heirs or assigns, it shall be lawful for "The President, Managers and Company of the Delaware and Hudson Canal Company" to improve the navigation of the river Lackawaxen, and any one of its branches, in the manner authorized and provided by an act entitled "An act to improve the navigation of the river Lackawaxen," passed the thirteenth day of March, one thousand eight hundred and twenty-three; and, after the making of such navigation, the said company shall and may hold and
71 enjoy the same, as fully and effectually as Maurice Wurts, his heirs or assigns, might or could do, under and subject, however, to all the provisions, conditions, restrictions, duties, and obligations imposed by the said act on the said Maurice Wurts, his heirs or assigns, and under and subject to the conditions, restrictions, and limitations hereinafter provided; and it shall further be lawful for the

said company to purchase and hold any quantity of lands, situate at any place within ten miles of the waters of the Lackawaxen, not exceeding five thousand acres: Provided, however, That in any judicial proceeding instituted against the said company, within the jurisdiction of this State, the service of process upon any toll gatherer, or other known agent of the said company, in the proper county, shall be as good and as available in law as if served upon the president of the company.

SEC. 2. And be it further enacted by the authority aforesaid, That the toll which the said company may exact, under the provisions of the act to which this act is supplementary, shall not, in the whole, exceed the rate of one cent and a half per ton, per mile, on the ascertained burthen or capacity of any ark, boat, or craft laden with or engaged in the transportation of stone coal; and the said company shall not exact any higher toll than is above provided for, on such arks, boats, or craft, laden as aforesaid, on the works erected by them on the Delaware, between the mouth of the Lackawaxen and Carpenter's Point; provided the said arks, boats, or craft laden as aforesaid shall have come down the said river Lackawaxen, and proceed down the said river Delaware, and not through the canal to be made through the State of New York, between the Hudson and Delaware, by the said company.

SEC. 3. And be it further enacted by the authority aforesaid, That the said company shall not erect any works, or make any improvements connected with the Delaware River, unless the same shall be so constructed as to leave the channel of the said river as safe and as convenient for the descent of rafts as it now is; and any boat or craft ascending the natural channel of the Delaware River, from any point or place below Carpenter's Point, or descending the same to Carpenter's Point, from any place above the mouth of the Lackawaxen River, shall be permitted to pass, toll free, through any locks which the said company may erect between Carpenter's Point and the
72 mouth of the Lackawaxen River. And it shall further be the duty of the said company, at each and every place where their works may be connected with the river Delaware, to erect a lock, or locks, and keep lock tenders, so as to provide for the ascent and descent of boats and craft, as aforesaid, and without delay.

SEC. 4. And be it further enacted by the authority aforesaid, That it shall not be lawful for the said company to engage, either directly or indirectly, in the business of banking or of manufacturing within the jurisdiction of this State; nor shall this act, or any part of it, be deemed or construed to recognize or admit an exclusive jurisdiction by the State of New York, over the waters of the Delaware River, between Carpenter's Point and the northern boundary of this State; and if it shall appear to any future legislature of this State, after full examination by competent engineers, to be appointed by the legislature, who shall declare, in their report, the fact that the channel of the river is by any of the said works or improvements rendered less safe and convenient for navigation, as aforesaid, it shall be lawful for

such legislature to repeal this law, and the privileges by this act granted shall be thereby absolutely determined.

SEC. 5. And be it further enacted by the authority aforesaid, That the property of the said company, whether real or personal, within this State, shall, at all times be liable for its debts, and subject to taxation, in like manner as similar property held by an individual or by a corporation, now is or may be; and the said company shall, under oath or affirmation of the president and treasurer, report to the legislature, when required so to do, the amount of capital which it may have invested within this State, under pain of forfeiting the rights and privileges hereby granted for neglecting or refusing so to do; and moreover, the State of Pennsylvania shall, at all times, by its agent or attorney, duly appointed, have a right to examine the books, accounts, and vouchers of the said company in relation to such reports.

SEC. 6. And be it further enacted by the authority aforesaid, That this act shall be of no force or effect unless "the president, managers, and company of the Delaware and Hudson Canal Company" shall under their corporate seal, notify the governor of this
73 State of their acceptance of the same, on or before the first day of July next.

SEC. 7. And be it further enacted by the authority aforesaid, that if the said company shall misuse or abuse the privileges hereby granted, the legislature reserve the right to repeal this act.

JOEL B. SUTHERLAND,
Speaker of the House of Representatives.

THOMAS BURNSIDE,
Speaker of the Senate.

Approved the first day of April, one thousand eight hundred and twenty-five.

J. ANDW. SHULZE.

Extract from the minutes of the proceedings of the governor of the Commonwealth of Pennsylvania. (Tuesday, June 21, 1825.)

An instrument, in writing, under the corporate seal, and signed by Philip Hone, president, and John Bolton, treasurer, of the Delaware and Hudson Canal Company, certifying for themselves and in behalf of the stockholders of the said company their acceptance of the act of the general assembly, passed the first day of April last, entitled "A supplement to the act entitled an act to improve the navigation of the river Lackawaxen," and the privileges thereby granted, upon the terms and conditions therein expressed and contained, was this day received and duly filed in the office of the secretary of the Commonwealth.

A true extract from the minutes.

JAMES TRIMBLE,
Deputy Secretary.

74 EXHIBIT B3.

Pennsylvania act, approved Apr. 5, 1826. (Laws of 1826, Chap. 67.)

A further supplement to the act entitled "An act to improve the navigation of the river Lackawaxen," passed March 13, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, That it shall be lawful for the president, managers, and company of the Delaware and Hudson Canal Company to construct and maintain such railways or other devices as may be found necessary to provide for and facilitate the transportation of coal to the canal by them to be constructed: Provided, That no railway hereby authorized to be made shall be extended further than from the coal beds owned by the said company, to the forks of the Dyberry, on the west branch of the river Lackawaxen; or from the coal beds aforesaid to that point on the Wallenpaupack branch of the river Lackawaxen where it is crossed by the Easton and Belmont turnpike road; and, the better to effect that object, when it shall be necessary for the said company to occupy and use any land or materials, and the parties can not agree in relation thereto, the same course shall be pursued as is authorized and provided by the fourth and fifth sections of the act to which this act is a supplement.

SEC. 2. And be it further enacted by the authority aforesaid, That every such railway or device shall be so constructed by the said company as not to obstruct or impede the free use of any public or private laid out road or highway, which may cross or enter at the same; and in all places where such railroad or device may cross, or in any way interfere with any road as aforesaid, it shall be the duty of the said company to enable all persons travelling such road as aforesaid, to cross or pass such railway or device by a causeway, or some other suitable and convenient means to be provided and maintained by the said company; and if the said company shall neglect or
75 refuse to provide such causeway or other suitable means, or, where provided, to maintain the same in good repair when required by the parties interested, they shall be liable to pay a penalty of ten dollars for every day the same shall be so neglected, or refused to be provided or maintained, to be recovered by the supervisor of the township, or by the turnpike companies, as the case may be, with costs, for the use of the township, or of such companies, as debts of like amount are, by law, recoverable; and shall, moreover, be liable to an action or actions at the suit of any person who may be aggrieved thereby; and the service of process upon any officer or agent of the said company shall be as good and as available in law as if served upon the president thereof.

SEC. 3. And be it further enacted by the authority aforesaid, That for the accommodation of all persons owning or possessing lands through which any such railroad or device may pass, it shall be the duty of the said company, where required by the occupant of such land to make or cause to be made a good and sufficient causeway, or provide other suitable means, whenever the same shall be necessary, to enable the occupant of such land to cross or pass over the same with wagons, carts, and implements of husbandry, as occasion may require: Provided, however, That the said company shall in no case be required to make, or cause to be made, more than one such causeway or passage through each plantation or lot of land, or two, if a second should be found necessary for the accommodation of any one person possessing land through which any such railroad or device may pass; and if the said company shall neglect or refuse to provide such causeway or passage, or to keep the same in good repair, the said company shall be liable to pay any person aggrieved thereby all damages sustained by such person in consequence of such refusal or neglect, to be sued for and recovered before any magistrate or any court having cognizance thereof; and the service of process on any officer or agent of said company shall be as good and as available in law as if served on the president thereof.

SEC. 4. And be it further enacted by the authority aforesaid, That if any person or persons shall wilfully and knowingly break, injure, or destroy any railroad or device, or any part thereof or any work appurtenant thereto, erected under the provisions of this act, he, she, or they so offending, shall forfeit and pay to the said company three times the actual damages sustained, to be sued for and recovered, with costs of suit, by action of debt before a justice of the peace, or any court of competent jurisdiction, in the name and to the use of the said company.

76

SEC. 5. And be it further enacted by the authority aforesaid, That the said railway shall be deemed and taken as a public highway; and it shall and may be lawful for the said company, or such persons as they may from time to time appoint toll collectors, or their deputies, so soon as the railroad shall be perfected, to collect and receive by toll upon the said railroad, a sum not exceeding twelve per centum per annum upon the amount of moneys which shall have been expended in the construction of the said railroads and other devices, and in the support, improvement and continuance of the same; and to prescribe the form and kind of carriages, wagons, and conveyances to be used thereon for the transportation of persons or commodities.

JOSEPH RITNER,
Speaker of the House of Representatives.

ALEXANDER MAHON,
Speaker of the Senate.

Approved the fifth day of April, one thousand eight hundred and twenty-six.

J. ANDW. SHULZE.

77 EXHIBIT B4.

Pennsylvania resolution, approved Mar. 23, 1830.

Relative to the Delaware and Hudson Canal Company.

Resolved by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, That the president, managers, and company of the Delaware and Hudson Canal Company be, and they are hereby excused and exonerated from building the river lock in the dam across the river Delaware for the present, and until they shall be required to do the same by an act or resolution of the legislature of Pennsylvania: Provided, That the said company shall, by their proper officer or officers, within six months from this time, submit to the governor of the State of Pennsylvania their consent that the State of Pennsylvania may, at any time hereafter, connect the Delaware Canal with the canal of the said company, at such point or points, at or near Carpenter's Point, and in such manner and on such terms and conditions as shall be determined on by two competent, disinterested engineers, one to be appointed by the State and one by the company; and, if they can not agree, a third to be chosen by the two, as above appointed, whose decision, or that of any two of them, is to be conclusive.

FREDERICK SMITH,
Speaker of the House of Representatives.
DANIEL STURGEON,
Speaker of the Senate.

Approved the twenty-third day of March, A. D. one thousand eight hundred and thirty.

GEORGE WOLF.

78 DEPARTMENT OF STATE,
Harrisburgh, August 5th, 1830.

By direction of the governor, I have the honor to acknowledge the receipt from you of a resolution of the board of managers of the Hudson and Delaware Canal Company, complying with the provisions of a resolution of the legislature of Pennsylvania, passed the 23d of March last.

Very respectfully, your obedient servant,
(For Samuel M'Kean,)
H. BUCHLER,
Chief Clerk.

S. FLEWWELLING, Esq.,
Treasurer, D. & H. Canal Company.

79 EXHIBIT B5.

Pennsylvania act, approved Apr. 30, 1852. (Laws of 1852, No. 331.)

A further supplement to the act entitled "An act to improve the navigation of the river Lackawaxen."

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, That the eighteenth section of an act entitled "An act to improve the navigation of the river Lackawaxen," passed the thirteenth day of March, one thousand eight hundred and twenty-three, which provides for the resumption by the State of the improvements of the Delaware and Hudson Canal Company, known as the Pennsylvania section of the Delaware and Hudson canal, together with the corresponding stipulations, if any, in the supplements to said act, be, and the same are hereby, repealed. And the Delaware and Hudson Canal Company are hereby authorized to conduct their business as they have heretofore done, according to their charter, and maintain and use their works and appurtenances, as heretofore, without liability to account and surrender, as provided for in said eighteenth section of the aforesaid act, passed on the thirteenth day of March, one thousand eight hundred and twenty-three.

JOHN S. RHEY,
Speaker of the House of Representatives.
JOHN H. WALKER,
Speaker of the Senate.

Approved the thirtieth day of April, A. D. one thousand eight hundred and fifty-two.

WM. BIGLER.

80 EXHIBIT B6.

Pennsylvania act, approved Mar. 12, 1859. (Laws of 1859, No. 123.)

A supplement to an act to improve the navigation of the river Lackawaxen, passed the thirteenth day of March, one thousand eight hundred and twenty-three.

SEC. 1. Be it enacted by the Senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, That the president, managers, and company of the Delaware and Hudson Canal Company be, and they are hereby, authorized to extend their railroads, with the necessary branches and fixtures, from the present terminus in the township of Blakely, Luzerne County, to any part of the adjoining township of Providence, in said county of Luzerne, and to any lands now owned or that may be hereafter purchased by them,

under the provisions of this act, the damages for taking lands in the construction of said roads and branches to be assessed and secured in the manner pointed out in the provisions of an act passed the seventh day of April, one thousand eight hundred and fifty-eight, entitled "A supplement to an act to improve the navigation of the river Lackawaxen, passed the thirteenth day of March, one thousand eight hundred and twenty-three." And they are hereby authorized to purchase and hold an additional quantity of three thousand acres of land in the townships of Fell, Carbondale, Blakely, and Providence, in the county of Luzerne, for the purpose of carrying on their operations.

SEC. 2. That in addition to the power now given to said company by the said act of March thirteenth, one thousand eight hundred and twenty-three, and its supplements, to erect dams on the Lackawaxen and its tributaries, for the purpose of the canal, the said company are hereby authorized to construct dams on the tributaries of the Lackawaxen and the Lackawanna and its tributaries for the purpose of creating water power to propel the cars over and upon
81 the railroads now constructed or hereafter to be constructed by them: Provided, That the navigation of said streams shall not be obstructed, and that the damages thereby occasioned, by taking and flowing land, shall be assesssed, and secured in the manner pointed out in the said act of March thirteenth, one thousand eight hundred and twenty-three, and its several supplements.

W. C. A. LAWRENCE,
Speaker of the House of Representatives.
JNO. CRESSWELL, JR.,
Speaker of the Senate.

Approved the twelfth day of March, A. D. one thousand eight hundred and fifty-nine.

WM. F. PACKER.

82 EXHIBIT B7.

Pennsylvania act, approved Apr. 11, 1861. (Laws of 1861, No. 275.)

A supplement to an act entitled "An act to improve the navigation of the river Lackawaxen," passed the 13th day of March, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, That the president, managers, and company of the Delaware and Hudson Canal Company, be, and they are hereby authorized and empowered to erect, construct, and maintain telegraph lines and communications along the line of the said canal and railroad, commencing in the county of Pike, at or near where said company's canal crosses the river Delaware, and from thence along the line of said canal to the southern boundary line of the borough of Honesdale, and from thence along

the line of the said company's railroad to the terminus thereof, in the county of Luzerne, with the further power and authority of extending the said telegraph lines into the borough of Scranton, Luzerne County, or along the line of any future lawful continuation of said railroad; and the said company, and all such persons as they may authorize and employ, shall have power and authority to enter into and upon, hold, occupy, and enjoy any land necessary for locating, constructing, maintaining, using, and repairing of the said telegraph lines and fixtures, necessary thereto. And the same to be so erected and constructed as not to interfere with the common use of any road, highway, streets, or waters.

SEC. 2. That they are hereby authorized and empowered to construct and maintain, not exceeding two miles in length, branch or lateral roads, or track, from or to connect with their present railroad as the same is now erected and constructed, with the necessary branches and fixtures for the purposes of their coal business. The damages for taking lands in and for the construction of said telegraph lines, and of said branch or lateral railroads, and also for the construction of any other lawful extension of their works, within
83 their chartered limits in this State hereafter made, and of any necessary devices, fixtures, or appurtenances connected therewith, to be assessed and secured in the manner pointed out in the provisions of an act passed the seventh day of April, one thousand eight hundred and fifty-eight, entitled "A supplement to an act to improve the navigation of the river Lackawaxen, passed the thirteenth day of March, one thousand eight hundred and twenty-three."

ELISHA W. DAVIS,
Speaker of the House of Representatives.

JOHN P. PENNEY,
Speaker of the Senate (pro tem.).

Approved the 11th day of April, A. D. 1861.

A. G. CURTAIN.

84 EXHIBIT B8.

Pennsylvania act, approved Apr. 11, 1861. (Laws of 1861, No. 276.)

A further supplement to an act to improve the navigation of the river Lackawaxen, passed the 13th day of March, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, that so far as the branch or lateral railroads and the telegraph lines mentioned in an act passed April 2d, 1861, entitled "A supplement to an act entitled 'An act to improve the navigation of the river Lackawaxen,' passed the thirteenth day of March, one thousand eight hundred and twenty-three," may be constructed in the counties of Wayne and Pike, the filing of bonds and all proceedings for the security and assessment

of damages for taking land in and for the construction thereof shall be had and done in the said counties of Wayne and Pike, respectively, in the manner in all other respects as directed by the second section of said act of April 2d, 1861.

ELISHA W. DAVIS,
Speaker of the House of Representatives.
ROBT. M. PALMER,
Speaker of the Senate.

Approved the 11th day of April, A. D. 1861.

A. G. CURTIN.

85 EXHIBIT B9.

Penna., senate committee report, Apr. 13, 1863.

To the senate of Pennsylvania.

The committee appointed by the senate under the preamble and resolution adopted on the 23d of March, 1863, viz:

Whereas it is alleged by a large number of the citizens of this Commonwealth that the Delaware and Hudson Canal Company have exceeded their rights as an incorporated company and thereby violated their chartered privileges: Therefore, resolved, "That a committee of three be appointed, with power to send for persons and papers to fully investigate the condition of affairs relative to said company," beg leave to report:

That in pursuance of the duty imposed upon them, the attention of your committee was directed to the charter of the company, and the several supplements thereto, and to the procuring of such testimony as would enable them to determine whether the said company had exceeded their powers or failed in the discharge of their duties.

Their inquiries were, therefore, as to the right of the company to hold lands for mining purposes, and the quantity they were authorized to hold, their powers and privileges of mining and transportation, and the tax laws to which they are subject.

The charter of the company, and the supplements thereto, show that the company are authorized to hold such lands as may be appurtenant or convenient to their canal, and such railway or railways, or other devices, as may be necessary to facilitate the transportation of coal to their canal; and the act of April 1st, 1825, empowers them "to purchase and hold any quantity of lands, situate at any place within ten miles of the waters of the Lackawaxen, not exceeding five thousand acres," and the act of March 12th, 1859, further authorizes them to purchase and hold "an additional quantity of three thousand acres of land in the townships of Fell, Carbondale, Blakely, and Providence, in the county of Luzerne, for the purpose of carrying on their operations."

Thus it appears that besides the lands appurtenant or convenient to the use and enjoyment of their canal, and railroads leading thereto, they are authorized to hold eight thousand acres.

86 Their general business, expressed in the several acts referred to, or necessarily implied from the character of the powers conferred upon them, is mining coal and transportation.

Their lands and other property are, of course, subject to taxation for state, county, and local purposes in the townships and counties where they are located, and the company is liable to the stock and corporation taxes imposed by the several acts of assembly upon all corporations.

After ascertaining the powers confer'ed and the duties imposed upon the company by law, your committee proceeded to take such testimony as would enable them to discharge their duties in the premises.

This testimony is embraced in the deposition of E. W. Weston, general surveyor of the company, taken before your committee, with a schedule of the lands held by the company, furnished by him, and the answer of the auditor-general to an inquiry by your committee, which deposition, schedule, and answer they submit with this report and as part thereof.

From the testimony of Mr. Weston it appears that the company hold, in the aggregate, in this Comn onwealth, six thousand five hundred and fifty-five (6,555) acres (exclusive of the appurtenances to their improvements), situate in the counties of Luzerne, Wayne, and Susquehanna.

These embrace all the lands held by them, directly or indirectly, in their own right or in trust for them.

Their general business, and that which their charter and its supplements warrants, is known to be mining coal and transportation, and your committee is not aware that they are engaged in any other.

The testimony of Mr. Weston further shows that the lands of the company are all assessed, and that state, county, and other taxes are paid upon them, in the townships and counties where they are located.

The communication from the auditor-general to your committee shows that, for several years, the company paid into the state treasury, as stock and corporation taxes, what was afterwards determined by the Supreme Court to be in excess of its indebtedness to the Commonwealth, and that the State is, at the present time, its debtor, by reason of such overpayment, in the sum of six thousand one hundred and thirty dollars, thirty-seven cents ($6{,}130\frac{37}{100}$).

87 How this happened will fully appear by the communication of the auditor-general, before referred to.

Your committee, therefore, can find no reason for the allegations that the Delaware and Hudson Canal Company have exceeded their powers as a corporation, and ask to be discharged from the further consideration of the subject.

HEISTAND,
TURRILL,
WALLACE.

Report made to senate, April 13, 1863, read and adopted, and committee discharged.

88 EXHIBIT B10.

Pennsylvania act, approved Sept. 20, 1866. (Laws of 1867, No. 1414.)

A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, That the damages which the president, managers, and company of the Delaware and Hudson Canal Company may be liable for, from the construction of their works as the same now are or hereafter may be altered or extended, shall be secured and assessed in the manner provided by the act of assembly, entitled "An act regulating railroad companies," approved the 19th day of February, A. D. 1849, and the supplements thereto.

SEC. 2. That said company is hereby authorized and empowered to purchase and hold 5,000 additional acres of land in the county of Luzerne.

JAS. R. KELLEY,
Speaker of the House of Representatives.
D. FLEMING,
Speaker of the Senate.

Approved the 20th day of September, A. D. 1866.
A. G. CURTIN.

89 EXHIBIT B11.

Pennsylvania act, approved Apr. 13, 1868. (Laws of 1868, No. 855.)

A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823, and the supplements thereto amending the title of a supplement to said act, approved the 20th day of September, 1866, and reenacting, ratifying, and confirming the provisions thereof, relating to assessment of damages and holding additional lands.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that the title of the act entitled "A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823," and approved the 20th day of September, 1866, be, and the same is hereby, amended so that the same shall read "A supplement to an act to improve the navigation of the river Lackawaxen, approved the 13th day of March, 1823, and the supplements thereto," for the purpose of changing the mode and manner of assessing damages in the construction of the works authorized by said act and the supplements thereto,

and for authorizing the purchasing and holding additional lands in the county of Luzerne; and that the provisions, power, and authority given and provided for in the said act, approved the 20th day of September, 1866, are hereby confirmed and reenacted, and all acts done or that may hereafter be done in pursuance thereof are hereby ratified, authorized, and declared valid.

ELISHA W. DAVIS,
Speaker of the House of Representatives.

JAMES L. GRAHAM,
Speaker of the Senate.

Approved the 13th day of April, A. D. 1868.

JOHN W. GEARY.

90 EXHIBIT B12.

Pennsylvania act, approved Mar. 24, 1870. (Laws of 1870, No. 533.)

An act to authorize the president, managers, and company of the Delaware and Hudson Canal Company to construct a railroad from the terminus of their present locomotive railroad at Olyphant to the city of Carbondale.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that the president, managers, and company of the Delaware and Hudson Canal Company be, and they are hereby, authorized to locate and construct a railroad from the terminus of their present locomotive railroad at Olyphant, in the county of Luzerne, to the city of Carbondale, and to connect the same, when constructed, with the Jefferson Railroad at said city of Carbondale, and with any other railroad now made or that may hereafter be made to the said city.

SEC. 2. That the said the president, managers, and company of the Delaware and Hudson Canal Company in the location and construction of the said railroad shall have all the power, authority, and privileges given in the tenth section of the act entitled "An act regulating railroad companies," approved the 19th day of February, A. D. 1849, and all damages in the location and construction of the said railroad for right of way and land and materials taken, or otherwise, if the parties cannot agree therefor, shall be secured and assessed in the manner provided by the said act of assembly entitled "An act regulating railroad companies," and the several supplements thereto.

B. B. STRANG,
Speaker of the House of Representatives.

CHAS. H. STINSON,
Speaker of the Senate.

Approved the twenty-fourth day of March, A. D. one thousand eight hundred and seventy.

JOHN W. GEARY.

91 EXHIBIT B13.

Pennsylvania act, approved May 12, 1871. (Laws of 1871, No. 701.)

An act to authorize the president, managers, and company of the Delaware and Hudson Canal Company to construct a railroad from the point of intersection of the Lackawanna and Susquehanna Railroad with the line between the States of Pennsylvania and New York to an intersection of the Jefferson Railroad at or near the village of Susquehanna, in Susquehanna County, in the State of Pennsylvania.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and it is hereby enacted by the authority of the same, that the president, managers, and company of the Delaware and Hudson Canal Company be, and they are hereby, authorized to locate and construct a railroad from a point where the Lackawanna and Susquehanna Railroad intersects the State line between the States of Pennsylvania and New York to an intersection of the Jefferson Railroad at or near the village of Susquehanna, in the county of Susquehanna, in the State of Pennsylvania.

SEC. 2. That the said president, managers, and company of the Delaware and Hudson Canal Company in the location and construction of the said railroad shall have all the power, authority, and privileges given in the tenth section of the act entitled "An act regulating railroad companies," approved the nineteenth day of February, anno Domini one thousand eight hundred and forty-nine; and all damages in the location and construction of the said railroad for right of way and land and materials taken or otherwise, if the parties can-
92 not agree therefor, shall be secured and assessed and paid in the manner provided by the said act of assembly entitled "An act regulating railroad companies" and the several supplements thereto.

JAS. H. WEBB,
Speaker of the House of Representatives.
WILLIAM A. WALLACE,
Speaker of the Senate.

Approved the twelfth day of May, anno Domini one thousand eight hundred and seventy-one.

JNO. W. GEARY.

93 EXHIBIT B14.

Pennsylvania act, approved Apr. 15, 1869. (Laws of 1869, No. 33.)

An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania in general assembly met, and

it is hereby enacted by the authority of the same, That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of this Commonwealth, by the purchase of their capital stock and bonds, or either of them, or by the guarantee of or agreement to purchase the principal and interest, or either of such bonds: Provided, That this act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill.

JOHN CLARK,
Speaker of the House of Representatives.
WILMER WORTHINGTON,
Speaker of the Senate.

Approved the fifteenth day of April, anno Domini one thousand eight hundred and sixty-nine.

JNO. W. GEARY.

94 EXHIBIT B15.

Pennsylvania act, approved May 18, 1871. (Laws of 1871, No. 830.)

An act relating to certain railroads, canal, and incorporated companies authorized to construct railroads, and authorizing such companies to purchase and hold stock and bonds; to lease roads and property of and consolidate with each other in the counties of Susquehanna, Wyoming, Wayne, and Luzerne.

SEC. 1. Be it enacted by the senate and house of representatives of the Commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted by the authority of the same, that it shall be lawful for any railroad, canal, or navigation company incorporated by, or exercising within this Commonwealth and under and in pursuance of the laws thereof, corporate privileges within the counties of Susquehanna, Wyoming, Wayne, and Luzerne, to purchase and hold the stock and bonds, and to lease the road and property of or become consolidated and merged with any other incorporated company authorized by the laws of this Commonwealth to construct a railroad, or possessing railroad privileges; and for any such incorporated company, so authorized, to construct a railroad, or possessing railroad privileges to purchase and hold the stock and bonds, and to lease the road, canal, and property of or become consolidated and merged with any such railroad, canal, or navigation company in the same manner as such purchases, leases, consolidation, and merger are now provided or allowed by law, and by and between railroad companies incorporated by this Commonwealth, and all the provisions of existing acts relative to such purchases, leases, consolidation, and merger, by and between railroad companies incorporated by this Commonwealth, are, whenever or so far as applicable, hereby ex-

tended so as to embrace the purchases, leases, consolidations, and mergers hereby authorized, and so that the authority by this act conferred may be effectually and lawfully exercised, and when any merger and consolidation shall be made in accordance with the provisions of this act all the property, rights, franchises, and privileges
95 of the company so merged shall by virtue of such merger be thereby transferred to and vested in the company into which such merger shall be made:

Provided, That any consolidated company formed by the merging of two or more companies under the provisions of this act shall not charge any higher rates for transportation than the rates now allowed by law over the respective roads so merged.

JAMES H. WEBB,
Speaker of the House of Representatives.

WILLIAM A. WALLACE,
Speaker of the Senate.

Approved the eighteenth day of May, A. D. one thousand eight hundred and seventy-one.

JNO. W. GEARY.

96 EXHIBIT C.

Mortgage of the Delaware and Hudson Canal Company to the Union Trust Company of New York, trustee, August 13, 1877. ($10,000,000.)

Agreement.

Whereas the president, managers, and company of the Delaware and Hudson Canal Company, have made, issued, and disposed of five thousand bonds for one thousand dollars each, all dated October 1st, A. D. eighteen hundred and seventy-four, and made payable October 1st, A. D. eighteen hundred and ninety-four, with interest at the rate of seven per centum per annum, payable semiannually, on the first days of April and October, which bonds contain the following provision, to wit: "That if the property of the said company in Pennsylvania (which is now unincumbered) shall hereafter at any time, before the maturity of said bonds, be mortgaged, such mortgage shall include, cover, and secure this and the other bonds in said series and the debt thereby created."

And whereas the said company deem it proper, in order to provide the means required and which from time to time may be required in the presentation of its business, to make, issue, and dispose of another bond or bonds, amounting in the aggregate to not exceeding five millions of dollars, and to secure the payment of the same, with the interest thereon, and also the payment of the above-mentioned bonds due in eighteen hundred and ninety-four, and the interest thereon, by a mortgage upon its railroads, canals, coal and other lands, situate in the State of Pennsylvania, hereinafter mention and referred to.

Now, therefore, this indenture made this the thirteenth day of August, A. D. eighteen hundred and seventy-seven, between the said the president, managers, and company of the Delaware and Hudson Canal Company, a corporation of the State of New York (hereinafter called the "canal company"), party of the first part, and the
97 Union Trust Company of New York, a corporation of the same State (hereinafter called the "trust company"), party of the second part: Witnesseth,

That the said canal company, in order the better to secure the payment of the aforesaid five thousand bonds heretofore issued, which become due in eighteen hundred and ninety-four, with the interest thereon; and also the bond or bonds proposed to be issued by the said canal company to the amount of five millions of dollars, as hereinafter mentioned, with the interest thereon, unto the person and persons, body and bodies politic or corporate who are or may become the holder or holders of the said bonds or of any of them, his, her, or their executors, administrators, successors, or assigns, which bond or bonds to the amount of five millions of dollars are to be made and issued by said canal company in such amount or amounts, and at such time and times, and to bear such rate of interest, and be made payable in such funds and at such times and places as the said canal company may from time to time, by a resolution of its board of managers decide, order, and direct; and the said bond and bonds thus made and issued, and also the aforesaid bonds which become due in eighteen hundred and ninety-four may from time to time, be taken up and cancelled and other bonds of other tenor and character be substituted therefor, without in anywise impairing the security by this indenture afforded; and in consideration of the sum of one dollar by the said trust company to the said canal company paid, at or before the ensealing and delivery hereof, the receipt whereof is hereby acknowledged. Have granted, bargained, sold, aliened, enfeoffed, released, conveyed, assigned, and confirmed, and by these presents do hereby grant, bargain, sell, alien, enfeoff, release, convey, assign, and confirm unto the said trust company, its successors and assigns, all and singular, the railroads, canal, lands, and property of the said canal company, following, to wit, that is to say,

All the locomotive and gravity and other railroads which to the said canal company belong, or which are by the said canal company held, used, or operated under lease, contract, or agreement, situate and being north of the city of Scranton, in the State of Pennsylvania, and all the right, title, and interest of the said canal company to, in, and under the leases, contracts, and agreements under which the said canal company hold, use, or operate the said railroads which do not to said canal company belong; also all and singular all the branch and lateral railroad tracks connected with or pertaining to the said
98 railroads; also all the railroads which the said canal company may hereafter own or acquire the use of, situate in the State of Pennsylvania, which may be in any way whatsoever connected or operated in connection with the above mentioned railroads; also all

that portion of the canal belonging to the said canal company, situate and being in the State of Pennsylvania; also all and singular the right of way and other lands necessary to and connected with the use and operation of the said railroads and canal; also all stationary and locomotive engines, cars, rolling stock, equipments, machine shops, machinery, station houses, water and water stations, buildings, erections, waters, water courses, water rights, wharves, piers, docks, and all structures and superstructures which have been or hereafter may be constructed or acquired by the said canal company, connected with or relating to the said railroads and canal; together with the betterments, improvements, and additions which may be made thereto, with the hereditaments and appurtenances.

Also all and singular the lands to the said canal company now belonging, situate in the county of Luzerne and State of Pennsylvania, which were to the said canal company conveyed by the deeds following, to wit, which are recorded in said county:

Grantors.	Date of deed.	Where recorded.
John Wurts and others	28th July, 1825	Book 23, page 313
John Wurts	1st November, 1825	" 24, " 235
Commissioners of Luzerne County	26th January, 1831	" .. " ...
Commissioners of Luzerne County	26th January, 1831	" .. " ...
William Wurts	8th June, 1837	" 33, " 49
Joseph R. Priestley, attorney	29th August, 1839	" 35, " 319
Harvey Hackley	7th March, 1843	" 39, " 684
Joseph R. Priestly, attorney	22d January, 1844	" 44, " 37
Maurice Wurts	7th February, 1848	" 62, " 400
Harvey Hackley	31st July, 1848	" 47, " 380
John P. Farnham and wife	30th December, 1848	" 48, " 4
James Archbald and wife	23d May, 1849	" 48, " 435
James Archbald and wife	3d December, 1850	" 51, " 202
James Clarkson and others	25th February, 1851	" 51, " 435
99 James Clarkson and wife	12th May, 1851	" 57, " 145
James Clarkson and wife	30th May, 1851	" 55, " 210
James Clarkson and others	9th June, 1851	" 55, " 213
Margaret Vaux and others	20th July, 1852	" 54, " 548
Heirs of Wm. Rusel and others	6th August, 1852	" 54, " 615
James Archbald and wife	24th March, 1855	" 62, " 398
William Maxey and wife	3d September, 1855	" 62, " 396
David J. Jones and others	10th September, 1855	" 62, " 397
Edward Dolph	7th May, 1856	" 66, " 116
Edward Dougherty and wife	23d May, 1856	" 67, " 242
William Wurts	3d July, 1856	" 67, " 282
James Archbald and wife	13th September, 1856	" 67, " 238
James Archbald and wife	13th September, 1856	" 67, " 234
Michael Murphy	15th September, 1856	" 70, " 58
William Wurts and wife	1st January, 1857	" 71, " 111
Peter Loftus and wife	19th March, 1857	" 68, " 328
James W. Johnson and others	6th June, 1857	" 71, " 94
Amzi Wilson and wife	30th June, 1857	" 71, " 288
Thomas Thomas and wife	1st December, 1857	" 72, " 293
William Wurts and wife	1st February, 1858	" 73, " 480
John P. Farnham and wife	25th June, 1858	" 73, " 484
James Dickson and wife	10th September, 1858	" 74, " 196
James S. Ward and wife	9th October, 1858	" 74, " 305
Philip Mead	9th October, 1858	" 74, " 315
Roswell Rice and wife	9th October, 1858	" 74, " 317
Abel Barker and wife	4th November, 1858	" 75, " 40
Henry C. Wademan and wife	13th December, 1858	" 75, " 200
Samuel L. Peck and wife	15th January, 1859	" 75, " 338

	Grantors.	Date of deed.	Where recorded.
	Amos R. Eno and wife	28th February, 1859	Book 78, page 29
	Wm. C. Coates and wife	14th March, 1859	" 75, " 535
	Abel Barker and wife	23d March, 1859	" 77, " 150
	Wm. Ferris and others	24th March, 1859	" 74, " 605
	Peter W. Moore and wife	3d May, 1859	" 77, " 152
	Wm. Silkman and wife	9th May, 1859	" 77, " 188
100	Dr. R. Randall and wife	10th August, 1859	" 77, " 408
	John Decker and wife	17th August, 1859	" 78, " 304
	John P. Farnham and wife	5th March, 1860	" 80, " 198
	Benj. Bowen and others	9th June, 1860	" 80, " 438
	James Vincent and wife	20th October, 1860	" 82, " 300
	Ira Tripp and wife	28th May, 1861	" 84, " 377
	Gordon F. Mason and others	22d June, 1861	" 83, " 560
	Margaret Vaux and others	10th July, 1861	" 83, " 562
	Margaret Vaux and others	18th September, 1861	" 86, " 94
	G. M. Holenback and wife	15th February, 1862	" 86, " 313
	H. M. Hoyt and wife	8th May, 1862	" 86, " 546
	Lyman R. Nicholson	8th May, 1862	" 86, " 559
	Chas. B. Campbell	27th August, 1862	" 101, " 53
	Mary V. Wurts	4th April, 1863	" 91, " 384
	Jane U. Whiting	8th June, 1863	" 93, " 41
	S. S. Clark and wife	18th December, 1863	" 93, " 407
	Edward Jones & Co	12th April, 1864	" 95, " 356
	Zeno Albro and others	18th May, 1864	" 94, " 435
	Caroline Bowen	5th July, 1864	" 96, " 513
	N. Cottrill and wife	29th July, 1864	" 98, " 344
	E. Morrison and wife	19th November, 1864	" 97, " 572
	John C. Hutchins and others	7th December, 1864	" 99, " 413
	John Vincent and wife	10th October, 1865	" 105, " 324
	H. P. Zimmerman and wife	21st December, 1865	" 108, " 246
	Lewis Pugh and wife	16th February, 1867	" 140, " 45
	Edward Jones & Co	16th February, 1867	" 140, " 45
	Edmund Griffin and wife	7th May, 1867	" 11, " 408
	Abner Griffis et al	24th May, 1867	" 117, " 490
	Geo. Sanderson and others	7th June, 1867	" 116, " 551
	The Baltimore Coal Co	15th October, 1867	" 121, " 429
	Austin Jenkins and others	15th October, 1867	" 121, " 426
	Malinda Griffin and others	13th December, 1867	" 122, " 282
	The North Carbondale Coal Co	26th December, 1867	" 123, " 539
	Lucien Birdseye	1st April, 1868	" 126, " 75
101	Lucretia J. Wurtz and others	28th September, 1868	" 130, " 141
	Cornell Birrer and wife	3d October, 1868	" 130, " 144
	Stephen Torrey and wife	14th November, 1868	" 128, " 395
	Thomas Dickson and wife	18th November, 1868	" 130, " 39
	Levi H. Alden and wife	25th May, 1869	" 136, " 2
	Ira Tripp and wife	9th November, 1869	" 136, " 142
	Ira Tripp and wife	15th August, 1870	" 143, " 2
	Eli K. Price *et al*	15th November, 1870	" 145, " 488
	Boston and Lackawanna Coal Co	5th January, 1871	" 147, " 163
	Geo. M. Hull and others	11th January, 1871	" 154, " 491
	Geo. M. Hull and others	13th January, 1871	" 153, " 442
	John C. Birdseye	8th February, 1871	" 148, " 162
	Lucien Birdseye and wife	8th February, 1871	" 148, " 163
	Jos. S. Potter and others	15th February, 1871	" 149, " 133
	Duane P. Truex	10th July, 1871	" 154, " 502
	Lackawanna Iron & Coal Co	11th September, 1871	" 153, " 136
	Theo. Von Storch *et al*	3d November, 1871	" 156, " 137
	Patrick Morrison and wife	30th January, 1872	" 174, " 37
	Edward H. Chase and wife	1st July, 1873	" 167, " 462
	The Thomas Iron Co	30th July, 1873	" 174, " 38
	C. T. Cromwell and wife	24th December, 1873	" 174, " 34
	H. B. Rockwell and others	27th December, 1873	" 185, " 475
	Dickson Manufacturing Co	5th May, 1874	" 177, " 176
	Dickson Manufacturing Co	3d July, 1874	" 179, " 458

Also all and singular the lands to the said canal company now belonging, situate in the county of Wayne and State of Pennsylvania, which were to the said canal company conveyed by the deeds following, to wit, which are recorded in said county:

Grantors.	Date of deed.	Where recorded.
R. L. Kennedy and wife	18th April, 1866	Book 34, page 117
Anna M. Olyphant	28th May, 1874	" 45, " 156

Also all and singular the lands to the said canal company now belonging situate in the county of Susquehanna and State of
102 Pennsylvania, which were to the said canal company conveyed by the deeds following, to wit, which are recorded in said county:

Grantors.	Date of deed.	Where recorded.
Stephen H. Pierson	14th November, 1848	Book 23, page 85
R. L. Kennedy and wife	18th April, 1866	" 37, " 823
Anna M. Olyphant	28th May, 1874	" 50, " 404

Excepting from said above-mentioned lands, all town lots and plots that have been laid out and sold, and are intended to be laid out and sold as such, in the cities of Carbondale, Scranton, and Wilkesbarre, and in the boroughs of Archbald, Olyphant, Blakely, and Dickson City, and in the townships of Fell and Carbondale in said county of Luzerne.

Also all and singular the buildings, breakers, shafts, slopes, engines, tracks, machinery, and structures, superstructures, and improvements of every kind and character, and the ways, water privileges, and advantages upon, belonging to, or connected with the lands hereinbefore particularly referred to or in anywise thereto appertaining, with the hereditaments and appurtenances, subject to the exceptions aforesaid. Also all and singular the chartered rights, rights, liberties, privileges, franchises, easements which now are or hereafter may be vested in or belonging to the said canal company, their successors or assigns, in respect to the property hereinbefore mentioned and referred to.

To have and to hold all and singular the aforesaid railroads, canal, lands, and property, with the hereditaments and appurtenances thereto belonging or in anywise appertaining, unto the said trust company, their successors and assigns, to the only proper use and benefit and behoof of the said trust company, their successors and assigns, forever.

In trust, nevertheless, for the use and benefit of the person and persons, body and bodies, politic or corporate, who are or may become the holder or holders of the said bonds which this indenture is given

to secure the payment of, or of any of them, and subject to the terms, stipulations, and conditions of the said bonds and of the laws of the States of New York and Pennsylvania relating to the said canal company; and subject also to the absolute right of the said canal company, their successors and assigns, to have, possess, manage, use, enjoy, and control the said railroads, canal, lands, property,
103 rights, franchises, and privileges hereinbefore more particularly described, with as full, free, and perfect a right to use, mine, and take away the coal and other minerals from said lands, and enjoy and make profit of the same, and every part and parcel thereof, until the same are taken possession of by the said trust company for the cause and in the manner hereinafter specified, as if this indenture had not been made; and the said trust company shall not have the right to prevent, hinder, molest, or interrupt the said canal company, their successors or assigns, by any means or legal proceedings whatsoever, from having and enjoying the full, free, perfect, and entire control, use, and management of all and every part of the railroads, canal and property, rights and franchises hereinbefore granted and conveyed in any other way than as hereinafter provided:

And this indenture further witnesseth, that the said canal company, for itself, its successors and assigns, covenants and agrees to make, execute, and deliver, in due and legal form, to the said trust company and its successors, all and singular, such further grants, assurances, and conveyances, as the said trust company may, under advice of their counsel learned in the law, require for the better carrying into effect the purposes of this indenture, and to perfect and make more effectual the lien hereby intended to be created.

And this indenture further witnesseth, that in case the said canal company, its successors or assigns, shall fail to pay either the principal of or any installment of the interest upon the said bonds, or any of them, within six months after the same becomes due, the full and entire possession and control of all and singular the aforesaid mortgaged railroads, canal, lands, and property shall be by the said canal company, its successors or assigns, delivered and surrendered to the said trust company, or its successors, and the said trust company, or its successors, shall take the possession thereof and enter into and upon, and use, operate, and manage the same for the use and benefit of the holder and holders of the said bonds; and upon the written request of any bona fide holder or holders of said bonds who hold at least one-tenth part of the whole amount of the bonds the payment whereof is by this indenture secured, shall advertise all and singular the railroads, canal, property, rights, and franchises hereinbefore granted and conveyed, or intended so to be, for sale at public auction at the Coal and Iron Exchange in the city of New York, or at some other suitable place in said city, which advertisement shall contain as full and minute a description of the property and rights to
104 be sold as may be practicable, and of the improvements therewith connected; and shall be inserted and published at least

once a week in two newspapers published in the city and State of New York, and in one newspaper published in the city of Scranton, in the State of Pennsylvania, for three months previous to the day of sale. And, if at the time fixed for said sale there shall remain unpaid any portion of the principal of or interest upon any of the aforesaid bonds (whether upon those held by the parties requesting the sale or upon any other of the said bonds), the said trust company, or its successors, shall, and they are hereby authorized by the said canal company, on the day fixed by such advertisement, or on any subsequent day to which the said trust company, or its successors, shall, as hereinafter provided, adjourn said sale, to sell at public auction all and singular the aforesaid railroads, canal, lands, property, rights, and franchises for the best price that can be obtained; it being hereby understood and stipulated that the said trust company, and its successors, shall, upon a written request of a majority in amount of the holders of all the bonds then unpaid, the payment whereof is secured by this indenture, adjourn the said sale from time to time, in accordance with such request.

And upon the sale being made, shall make, execute, and deliver to the purchaser or purchasers thereof, all proper assurances, deeds, and conveyances, to the end that the title and right thereto may be vested in the purchaser or purchasers, his or their heirs, successors or assigns. And the said canal company do hereby covenant and agree that the assurances, deeds, and conveyances which, as aforesaid, may be executed by the said trust company, or its successors, shall have the same force and effect, and shall vest in the purchaser or purchasers the same rights and title which would be acquired by a purchase made at a judicial sale of said railroads, canal, property, rights, and franchises, pursuant to the order, decree, or judgment of a court having jurisdiction in the premises; and shall be a complete and perpetual bar and estoppel, both in law and equity, against the said canal company, its successors and assigns, and against all persons and parties claiming by, from, or under it or them, in anywise or manner whatsoever.

And this indenture further witnesseth, that the said trust company and its successors shall, so soon as the proceeds arising from said sale may be received, pay the principal of and the interest to that time accrued upon the aforesaid bonds which shall have been issued and are then outstanding, or so much thereof pro rata
105 as the said proceeds, after deducting the commissions to which the said trust company may be entitled, and the counsel and attorney fees, costs, and expenses connected with such sales, will pay; and if, after paying said commissions, fees, costs, and expenses, and the principal and accrued interest upon all said bonds, there shall be a surplus, the same shall be paid to the said canal company.

Provided always, that if the said canal company, their successors or assigns, shall and do well and truly pay or cause to be paid unto

the person and persons, body and bodies politic and corporate, that may be or become the holder or holders of said bonds, the full amount thereof, with the interest thereon, as the same becomes due and payable, according to the tenor and effect, true intent and meaning of the said bonds, then and in that case and from thenceforth as well this indenture and the estate, property, and rights hereby granted as the said bonds shall cease, determine, and become void, anything hereinbefore contained to the contrary thereof in any wise notwithstanding; and the said trust company shall enter full satisfaction of this indenture upon the records of the several counties where the same may be recorded.

And provided further, that whenever and so often as the said canal company, their successors or assigns, shall pay and take up one hundred thousand dollars of the said bonds, the said trust company shall, upon the request of the said canal company, enter satisfaction to that amount and to that extent upon the record of this indenture in the several counties where it is recorded.

And provided further, that nothing hereinbefore contained shall be so construed as to prevent the said canal company from selling, disposing of, or changing any of the rolling stock or personal property, it being intended, however, to have the same kept good in quantity and value; and in case the said canal company should at any time sell and dispose of any of the real estate and rights covered by this indenture, the said trust company shall release the same from the lien of this indenture upon receiving from the said canal company the bonds hereby secured to an amount equal to the purchase money received for such real estate.

And this indenture further witnesseth that the bonds which are hereby issued, the payment whereof is by this indenture secured, shall not become obligatory until the said trust company shall
106 endorse upon each bond their certificate to the effect that that bond is one of the bonds the payment whereof is secured by this indenture.

And this indenture further witnesseth that the said trust company hereby accepts the trust created by the foregoing indenture, but upon the express understanding and condition that they will be responsible only for the exercise of reasonable diligence in the management of the said trust, and that they will not be responsible or liable for the acts of any agent by them appointed in the execution thereof.

In witness whereof this indenture is signed on behalf of the president, managers, and company of the Delaware and Hudson Canal Company, by its president, and its common seal is hereto affixed and attested by its treasurer, pursuant to a resolution of its board of managers.

And this indenture is also signed on behalf of the said Union Trust Company by its president, and its common seal is hereto

affixed and attested by its secretary pursuant to a resolution of its board of trustees, this the thirteenth day of August, A. D. 1877.

THE PRESIDENT, MANAGERS & COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY,

[L. S.] By THOS. DICKSON, *President.*

Attest:

J. C. HARTT, *Treasurer.*

UNION TRUST COMPANY OF NEW YORK,

[L. S.] By EDWD. KING, *President.*

Attest:

JAS. H. OGILVIE, *Secretary.*

STATE, COUNTY, AND CITY OF NEW YORK, *ss:*

Be it remembered that on this the 13th day of August, in the year of our Lord one thousand eight hundred and seventy-seven, before me, a commissioner of the State of Pennsylvania, residing in the city of New York, duly commissioned and authorized to take the acknowledgment and proof of deeds, &c., to be recorded in
107 the State of Pennsylvania, personally appeared Thomas Dickson, who, being by me first duly sworn, did depose and say: That he is the president of the president, managers, and company of the Delaware and Hudson Canal Company, and that as such he signed the foregoing indenture for and on behalf of said company; that the seal to said indenture affixed is the common seal of said company; that J. C. Hartt is the treasurer of said company; that the said seal was affixed and attested by the said treasurer in deponent's presence, and that the said indenture was thus executed and is by this deponent acknowledged and delivered for and on behalf of the said company as and for its act and deed for the purposes therein expressed pursuant to a resolution of the board of managers of said company.

And be it also remembered that on the same day before me personally came Edward King, who, being by me first duly sworn, did depose and say: That he is the president of the Union Trust Company in the foregoing indenture named; that he knows the common seal of said company; that James H. Ogilvie is the secretary of said company; that he knows the common seal of said company; that as president of the said trust company he signed the foregoing indenture for and on its behalf; that the seal thereto affixed is the common seal of said company; that it was affixed, and that the said James H. Ogilvie signed his name in attestation thereof in deponent's presence, and that the said indenture was thus executed and is hereby acknowledged as and for the act and deed of said company for the purposes therein expressed pursuant to a resolution of the board of trustees of said company.

EDWARD KING.
THOMAS DICKSON.

Sworn to and subscribed before me the day and year aforesaid. Witness my hand and official seal.

JAMES W. HALE,
Commissioner for Pennsylvania, in New York,
69 Wall Street.

108 STATE OF PENNSYLVANIA,
County of Luzerne, ss:

Recorded in the office for recording deeds in and for said county, in Mortgage Book No. 35, page .

Witness my hand and seal of office at Wilkesbarre, this 15th day of August, A. D. 1877.

[L. S.] C. E. HUNGERFORD,
Acting Recorder.

STATE OF PENNSYLVANIA,
County of Susquehanna, ss:

Recorded in the office for recording deeds in and for said county, in Mortgage Book No. 9, page 506, on the 16th day of August, A. D. 1877.

Witness my hand and seal of office at Montrose the date aforesaid.

[L. S.] H. F. BEARDSLEY,
Recorder.

STATE OF PENNSYLVANIA,
County of Wayne, ss:

Recorded in the office for the recording of deeds, &c., in and for said county, in Mortgage Book No. 9, page , August 17, 1877.

Witness my hand and official seal.

[L. S.] P. S. BARNES,
Recorder.

PENNSYLVANIA, *Pike County, ss:*

Entered and recorded in the office for recording deeds, mortgages, &c., in and for said county, in Mortgage Book No. 6, page 1, etc., the 17th day of August, A. D. 1877.

Witness my hand and seal of office at Milford the day and year above written.

[L. S.] JNO. C. WESTBROOK,
Recorder.

111 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE DELAWARE AND HUDSON COMPANY, defendant.	April session, 1908. No. 85. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter

instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 85. April session, 1908. Equity. U. S. v. Delaware and Hudson Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, Clerk. L.

112 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* DELAWARE AND HUDSON COMPANY, defendant.	April session, 1908. No. 85. In Equity.

The complainant in this cause hereby joins issue with the defendant, The Delaware and Hudson Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 85. Equity. April session, 1908. U. S. v. Delaware and Hudson Company. Replication. Filed June 16, 1908. Henry B. Robb, Clerk. L.

NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of The United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Delaware, Lackawanna & Western Railroad Company, No. 562 of October term, 1908.

189 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* DELAWARE AND HUDSON COMPANY.	April sessions, 1908. No. 85. In Equity.

Before DALLAS, *C. J.*

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 85. U. S. v. Delaware and Hudson Company. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, Clerk. By L., deputy clerk.

190 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* THE DELAWARE AND HUDSON COMPANY, defendant.	April session, 1908. No. 85. In Equity.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the 6th day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case.

2. That the Circuit Court erred in refusing the injunction prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States.

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
191 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause."

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation

of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions and, therefore, constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law.

192 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C. E. D. of Penna. No. 85. April session, 1908. In Equity. The United States of America vs. The Delaware and Hudson Company. Assignment of errors. Filed Oct. 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

193 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* THE DELAWARE AND HUDSON COMPANY, defendant.	April session, 1908. No. 85. In Equity.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled case, on the 6th day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be

allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

DATED *October 6th, 1908.*

194 (Endorsed:) U. S. C. C. E. D. of Penna. No. 85. April session, 1908. In Equity. United States of America v. The Delaware and Hudson Company. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

195 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* THE DELAWARE AND HUDSON COMPANY, defendant.	April session, 1908. No. 85. In Equity.

Before DALLAS, C. J.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C. E. D. of Penna. No. 85. April session, 1908. In Equity. United States of America vs. The Delaware and Hudson Company. Order of court allowing appeal filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Delaware and Hudson Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree

rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, Judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Appellee.

197 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set.

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America *v.* The Delaware and Hudson Company, No. 85, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.] HENRY B. ROBB, *Clerk of C. C.*

198 File No. 21361. E. Pennsylvania C. C. U. S. Term No. 565. The United States of America, appellant, vs. The Delaware and Hudson Company. Filed October 10th, 1908. File No. 21361.

O

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 566.

THE UNITED STATES OF AMERICA, APPELLANT,

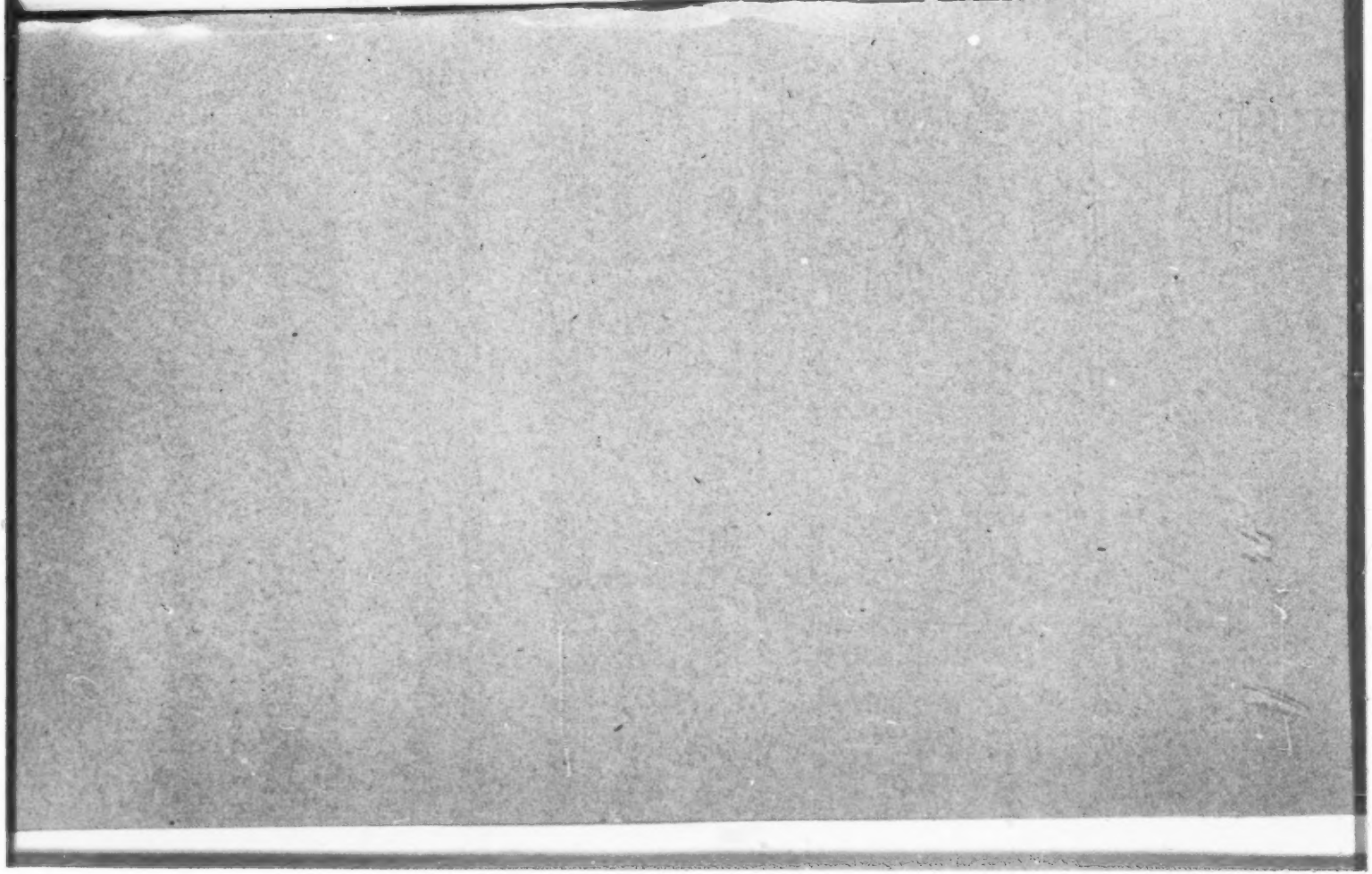
vs.

ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21362)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 566.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

ERIE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Bill of complaint	2	1
Appearance for defendant	14	5
Answer	15	5
First consolidated mortgage deed, December 10, 1895	45	18
Pennsylvania collateral indenture, February 1, 1901	157	84
General mortgage, April 1, 1903	231	127
Stipulation as to submission on bill and answer	353	197
Opinions (omitted in printing)	355	....
Gray, J. (omitted in printing)	356	....
Dallas, J. (omitted in printing)	410	....
Buffington, J. (omitted in printing)	415	....
Decree	431	198
Assignment of errors	432	198
Petition for appeal	435	200
Order allowing appeal	437	200
Citation and service	438	201
Clerk's certificate	439	201

61436—08——1

1 APRIL SESSION, 1908.

Charles J. Bonaparte. United States of America
87 *vs.*
Robert W. de Forest, Erie Railroad Company.
John G. Johnson.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July next.
1908, June 5. Order for the appearance of Robert W. deForest and John G. Johnson, esquires, for defendant.
1908, June 12. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that the defendants file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 87. April sessions, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Bill of Complaint.

Filed June 5, 1908. Henry B. Robb, Clerk. By L., Deputy Clerk.

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* ERIE RAILROAD COMPANY, defendant. | April sessions, 1908. No. 87. In Equity.

To the Honorable, the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against the Erie

Railroad Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "Erie Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New York, having its
5 principal office in the State of New York, at the city of New York, and also an office in the State of Pennsylvania, at the city of Susquehanna, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Hillside Coal and Iron Company and of the Pennsylvania Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and
6 has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Lackawanna, Luzerne, and Susquehanna, in the State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective officers and directors of said coal companies, most of whom are, in the case of each of said coal companies, as they have been for some time past, either officers or directors of the defendant. That, by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(4) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in
7 the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors, one of whom is president, as he has been for a long time past, of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal company by a board of directors one of whom is an officer of the defendant, as hereinbefore stated, the operations of said last-mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(5) That from time to time since the first day of May, in
8 the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(6) That, the defendant being the owner and part owner of the anthracite coal mined and being mined and transported and being transported, as aforesaid, and such coal having been and being
9 mined by the defendant and under its authority, as aforesaid,

and the defendant having an interest in said coal, as aforesaid, the transportation of said coal, as aforesaid, was, has been, and is unlawful, being a failure to comply with and a violation of the fifth paragraph of the first section of said "Act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(7) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars
10 of the defendant, as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(8) And so your orator says that the anthracite coal so, as aforesaid, being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport, as aforesaid, in violation of the law hereinbefore quoted, is and will be "an article or commodity other than timber and the manufactured products thereof, manufactured, mined, or produced by it or under its authority," and also such "article or commodity" owned by it "in whole or in part," and is likewise "an article or commodity other than timber and the manufactured products thereof," in which it has and will have an "interest, direct or indirect," and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity, that the said defendant, "Erie Railroad Company," may make full answer under oath to all the allegations herein, and that an injunction be granted to enjoin and prohibit the said "Erie Railroad Company" from further transporting in interstate commerce the anthracite coal which it is the purpose of said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted, and that your orator may have such
11 further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna, to be directed to the said "Erie Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to perform and abide by such order, direction, and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And you orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY.
} April session, 1908. No. 87.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C. C., E. D. of Penna. No. 87. 1908. U. S. of America v. Erie Railroad Company. Order for appearance. Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 87. Apr. Sess., 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
} In Equity.

Answer of Erie Railroad Company.

GEO. F. BROWNELL,
Solicitor and Counsel for Defendant.
ADELBERT MOOT, *Of Counsel.*

Filed June 12, 1908. Henry B. Robb, clerk. By L., deputy clerk.

17 United States Circuit Court, Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ERIE RAILROAD COMPANY, DEFENDANT. } In Equity, No.

The defendant, Erie Railroad Company, for answer to the bill of complaint herein, respectfully shows:

1. The defendant, Erie Railroad Company, admits and alleges that it is, and since long before the first day of May, 1908, and since long before the passage of the act of Congress, approved June 29, 1906, amending the interstate commerce act, has been, a corporation created, organized, and existing under the laws of the State of New York, and is, and during all such times has been, engaged in the operation of a railroad, with its lines, branches, and connections extend-

18 ing through parts of the States of New York, New Jersey, Pennsylvania, and other States, and engaged in interstate as well as intrastate transportation of passengers and property thereover, including the transportation of the article or commodity known as anthracite coal from mines and mining lands in the State of Pennsylvania to points and markets in other States. The defendant was duly organized under the provisions of the stock corporation law of the State of New York, providing for the reorganization of corporations whose property and franchises have been sold under mortgage foreclosure, with the right to hold and acquire the stocks and bonds of any other corporation, domestic or foreign, and duly succeeded to and lawfully acquired the railroads, stocks, and other property, rights, and franchises theretofore possessed by the New York, Lake Erie and Western Railroad Company, including those formerly possessed by the Erie Railroad Company or by the New York and Erie Railroad Company, the predecessors in interest of said New York, Lake Erie and Western Railroad Company. The New York and Erie Railroad Company was incorporated by a special act of the legislature of the State of New York, passed April 24, 1832, being chapter 224 of the laws of 1832, whereby said New York and Erie Railroad Company was duly authorized to build and operate a railroad to carry passengers and freight from some point in or near New

19 York City to Lake Erie. Thereafter by chapter 199 of the laws of 1846 and chapter 316 of the laws of 1847 of the laws of New York said corporation was given power to build a portion of its railroad in Pennsylvania, in so far as the State of New York could give it such power. To make such grant of power by the State of New York effective, the State of Pennsylvania, by an act of its general assembly entitled "An act to authorize the New York and Erie Railroad Company to construct said road through a portion of Susquehanna County, in the State of Pennsylvania," and acts supplementary thereto passed, respectively, March 26, 1846, and April 1, 1848, granted to the said New York and Erie Railroad Company the right to construct and operate said railroad in said State of Penn-

sylvania and various other powers and rights necessary or convenient for the construction and operation of such railroad, upon condition that it pay annually to the State of Pennsylvania $10,000 for such right or franchise so granted to it.

2. Said corporation, said New York and Erie Railroad Company, and its successors, at great expense, did construct and operate such railroad in the States of New York and Pennsylvania. The $10,000 so required to be paid the State of Pennsylvania for such franchise has been annually paid to the State of Pennsylvania to and including January, 1908, for the right to build and operate such railroad in said State of Pennsylvania. The country through which such
20 railroad was built in New York and Pennsylvania was mountainous, was thinly settled by pioneers, was largely covered with forests, and was greatly in need of railroad transportation, but it was then difficult to get the capital to build a railroad necessarily so expensive to build in so difficult a country, and there was not enough traffic then to make such a railroad pay its operating expenses and fixed charges. The returns from its business were poor, the debt necessarily incurred in building it was large, and said company, to provide the necessary capital therefor and for its corporate purposes, from time to time mortgaged all its property, rights, and franchises to secure the payment of its bonds issued thereunder, viz, first mortgage, dated May 14, 1845, to secure bonds of which $2,482,000 in amount are outstanding, maturing May 1, 1947; second mortgage, dated March 1, 1849, to secure bonds of which $2,149,000 in amount are outstanding, maturing September 1, 1919; third mortgage, dated March 1, 1853, to secure bonds of which $4,617,000 in amount are outstanding, maturing March 1, 1923; fourth mortgage, dated August 15, 1857, to secure bonds of which $2,926,000 in amount are outstanding, maturing October 1, 1920; fifth mortgage, dated June 1, 1858, to secure bonds of which $709,500 in amount are outstanding, maturing June 1, 1928.

Said New York and Erie Railroad Company, in accordance
21 with law, under date of June 1, 1858, mortgaged its property, rights, and franchises to James Brown and John C. Bancroft Davis, trustees for bondholders, which mortgage was afterwards foreclosed, and the said property, rights, and franchises duly sold and conveyed by deed of Philo T. Ruggles, referee in foreclosure proceedings, dated December 28th, 1861, to Dudley S. Gregory and John C. Bancroft Davis, trustees, which sale was duly confirmed by the Supreme Court of the State of New York.

The said trustees and their associates duly organized the Erie Railway Company—a body corporate—under the laws of the State of New York, and particularly chapter 160, laws of 1860, and chapter 119, laws of 1861, and in accordance with an act of the general assembly of the State of Pennsylvania passed March 22, 1860, known as "An act relating to the foreclosure and sale of the New York and Erie Railway Company." Under such foreclosure, and such statutes of New York and Pennsylvania and such reorganizations,

said Erie Railway Company lawfully acquired and became vested with all the rights, franchises, and property formerly held by the New York and Erie Railroad Company, and was authorized to mortgage the same.

3. For the purpose of furnishing an outlet from the anthracite coal region of Pennsylvania, and principally for the transportation of anthracite coal, a railroad was constructed by the Jefferson Railroad Company, prior to 1869, from Carbondale, Pa., to a con-
22 nection with the railroad of the Erie Railway Company at or near Lanesboro, Pa., a distance of about forty miles. Said Jefferson Railroad Company was incorporated and duly organized under the acts of the assembly of Pennsylvania, approved February 19, 1849; April 28, 1851; March 18, 1863, and holds letters patent granted February 15, 1864.

Said Jefferson Railroad Company has since constructed or acquired, principally for the transportation of anthracite coal, a railroad extending from Honesdale, Pa., to Hawley, Pa., a distance of nine miles, and also mine branches and tracks solely for the transportation of anthracite coal and mine supplies, extending from Erie Breaker to Edgerton, near Mayfield, a distance of two and a half miles, to reach Erie Breaker, near Mayfield, Pa., one mile, and to reach Glenwood Breaker, one mile.

The said branch to Edgerton Breaker was constructed and is now used solely for the transportation of anthracite coal from, and mine supplies to, the operations of the Temple Iron Company at Edgerton Colliery.

Said tracks to Erie Breaker and Glenwood Breaker were constructed and are now used solely for the purpose of the transportation of anthracite coal from, and mine supplies to, the said collieries owned and operated by the Hillside Coal and Iron Company.

The railroad of said Jefferson Railroad Company was built
23 at great expense and is constructed almost entirely through a mountainous and sparsely settled country to reach the anthracite coal region.

Over 80 per cent of the total tonnage transported by this defendant over the Jefferson Railroad is anthracite coal tonnage of the Pennsylvania Coal Company and the Hillside Coal and Iron Company, and over 70 per cent of the entire revenue from transportation by defendant over the railroad of Jefferson Railroad Company is derived from the transportation of anthracite coal tonnage of said Pennsylvania Coal Company and Hillside Coal and Iron Company. Substantially all of said coal is transported by defendant from Pennsylvania to other States. Under date of January 1, 1869, the Erie Railway Company leased the railroad of said Jefferson Railroad Company, and ever since that date said Erie Railway Company and its said successors, including this defendant, have leased and operated the same.

If defendant is prohibited from transporting to such other States coal owned, mined, or produced by said Pennsylvania Coal Company,

Hilside Coal & Iron Company, and Temple Iron Company, said railroad branches above referred to reaching said Erie, Edgerton, and Glenwood collieries will become substantially valueless and the value of said Jefferson Railroad and of its capital stock will be greatly impaired.

4. By chapter 66 of the laws of 1862 of the State of New
24 York the organization of said Erie Railway Company was ratified and affirmed, and said company was granted certain other rights, and it was provided:

"And if any corporation duly organized or to be organized in the State of New Jersey or Pennsylvania, shall undertake to construct a coal road to connect the same with the road of the Erie Railway Company between Oxford Station in Orange County and Deposit in the county of Delaware for the transportation of coal, said Erie Railway Company is hereby authorized to lease the said coal road, and to contract for the leasing and operation of the same, and for the transportation of coal over said coal road, and upon any road that may be owned or operated by said Erie Railway Company."

Pursuant to such authority, the Erie Railway Company entered into a contract, dated June 9, 1862, with a Pennsylvania corporation, the Pennsylvania Coal Company, whereby said Pennsylvania Coal Company did undertake to construct a coal road from a connection at Hawley, Pa., with its gravity railroad already constructed, to a connection with the Erie Railway Company's railroad between Oxford Station and Deposit as aforesaid. Under such contract said coal road was to be constructed for the transportation of coal from the mines of said Pennsylvania Coal Company in Pennsyl-
25 vania to the lines of said Erie Railway Company, and thereupon said Erie Railway Company was to lease said coal road and operate the same with its own engines, cars, and men; and the Erie Railway Company thereby undertook, pursuant to such authority, to transport such coal to interstate markets over its own lines of railroad.

Thereupon said Pennsylvania Coal Company constructed such coal road at great expense and the Erie Railway Company did thereupon lease and operate the same, and the coal of the Pennsylvania Coal Company was transported over such railroad to the railroad lines of said Erie Railway Company, and then transported by said Erie Railway Company over its railroad lines to markets in other States. By such contract, and succeeding contracts, the Erie Railway Company and its successors, including this defendant, came into possession of said coal road of the Pennsylvania Coal Company, operated said coal road and have transported the coal of said Pennsylvania Coal Company to interstate markets to this day.

Said Pennsylvania Coal Company and Erie and Wyoming Valley Railroad Company, a corporation organized under the laws of the State of Pennsylvania, at various times built at great expense other lines of railroad and mine branches in part to replace the gravity railroad of the Pennsylvania Coal Company above referred to, which

lines and branches, together with the coal road above referred to, subsequently became vested in and are now owned by said Erie
26 and Wyoming Valley Railroad Company, constituting a railroad with 75 miles of main track, 40 miles of yards and sidings, and 35 miles of mine branches and breaker tracks, owned by said company.

The main line of the railroad now owned by the Erie and Wyoming Valley Railroad Company was built solely for the purpose of transporting to market the coal owned, mined, or produced by the Pennsylvania Coal Company, and nearly all the branches thereof have been built solely for the purpose of reaching and transporting to market coal owned, mined, or produced by the Pennsylvania Coal Company or Hillside Coal and Iron Company.

A portion of the said railroad and its branches, constituting a mileage of 35 miles, was constructed and is now used solely for the purpose of transporting coal from, and mine supplies to, collieries of the Pennsylvania Coal Company and of Hillside Coal and Iron Company, and is so situated that no traffic from any other shipper, either of anthracite coal or otherwise, can be obtained, and if the coal of the Pennsylvania Coal Company and the Hillside Coal and Iron Company can not be carried by it, such portion of said railroad will be substantially valueless.

The Erie and Wyoming Valley Railroad Company has, at great cost, constructed upwards of forty miles of double track, tracks in yards and passing sidings solely for the accommodation and
27 transportation of the anthracite coal tonnage handled by it, which will be unnecessary, useless, and valueless for railroad purposes if it can not transport the tonnage of the Pennsylvania Coal Company and Hillside Coal and Iron Company.

Over 95 per cent of the total tonnage transported over the railroad of the Erie and Wyoming Valley Railroad Company is anthracite coal, and over 95 per cent of such anthracite coal is owned, mined, or produced by the Pennsylvania Coal Company and Hillside Coal and Iron Company, and more than 85 per cent of the total earnings from transportation over the said railroad is derived from the transportation of the anthracite coal of such companies. Practically all of such coal is transported by defendant from Pennsylvania to other States. Said Erie and Wyoming Valley Railroad is so situated that it can reach and transport practically no other coal tonnage than that shipped by the Pennsylvania Coal Company and the Hillside Coal and Iron Company, and that shipped from some of the mines of the Temple Iron Company.

If the railroad of said Erie and Wyoming Valley Railroad Company can not transport the anthracite coal so shipped by the Pennsylvania Coal Company and Hillside Coal and Iron Company, it can not be operated at a profit, and the value of said railroad and of the capital stock of said railroad company will be greatly impaired.

28 5. This defendant is the successor to all the rights, privileges, franchises, immunities, and property of the New York and

Erie Railroad Company through the foreclosure of a mortgage upon it, as aforesaid, and said sale December 28, 1861, and the reorganization into the Erie Railway Company in accordance with said statutes of Pennsylvania and New York in such case made and provided. It is likewise the successor to all the rights, privileges, franchises, immunities, and property of said Erie Railway Company through chapter 66, laws of New York for 1862, chapter 430, laws of New York for 1874, and an amendment thereof, chapter 446, laws of New York for 1876, and a mortgage upon such rights, privileges, franchises, immunities and property executed by said corporation February 4, 1874, the foreclosure of the last-mentioned mortgage, the sale of the property mortgaged April 24, 1878, the purchase of such property by the mortgagee and a reorganization of said railroad company by the formation of a new company designated as the New York, Lake Erie and Western Railroad Company, the mortgage of all the railroads, stocks, and other property, rights, privileges, immunities, and franchises, acquired by it (including the stock of the Hillside Coal and Iron Company and of the Jefferson Railroad Company, which had been acquired by defendant's predecessors many years previously) to the Farmers' Loan & Trust Company, October 5, 1878, the foreclosure of the last mentioned mortgage in the United States Circuit Court for the Southern District of New York, and the sale of its property to duly appointed representatives of its mortgage bondholders, November, 1895, the reorganization of said corporation under the statutes of New York and in accordance with the decrees and orders of said court, November 14, 1895, whereby this defendant obtained good title in and to, and became the lawful owner of the property, rights, privileges, immunities, and franchises, of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by its said predecessor companies, the railroads so owned by it and by its said subsidiary companies having an aggregate mileage of over 2,100 miles, in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois.

6. Said Pennsylvania Coal Company was organized as a corporation of Pennsylvania by act of the general assembly, No. 73, laws of 1838 of the State of Pennsylvania, which act gave such corporation the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mines." For that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to "construct railroads with one or more tracks." Such power to buy and hold coal lands, mine and sell coal, construct, extend, and operate railroads was from time to time enlarged so as to cover more lands for mines, railroads, wharves, and depots by the following acts of the general assembly of the State of Pennsylvania, viz: Act No. 155, laws 1839; act No. 57, laws 1841; act No. 116 and act No. 354, laws 1849; act No. 250, laws 1850 of the laws of Pennsylvania. In particular by act of general assembly No. 140, laws of Pennsylvania

for 1853 said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York and Erie Railroad; also said Pennsylvania Coal Company was authorized to "connect or consolidate with, or lease, some railroad, or canal, in said States of New Jersey or New York, and acquire, hold, and exercise the rights, privileges and franchises of such corporations." The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was further extended by act No. 85, of said general assembly, laws 1857; act No. 366, laws 1864; act No. 634, laws 1867; act No. 1018, laws of Pennsylvania for 1868. In each case said Pennsylvania Coal Company proceeded to exercise the authority so vested in it, and thereupon it issued capital stock and evidences of indebtedness, obtained much capital, acquired coal lands, developed coal mines, produced, transported to markets, and sold, coal; built and operated railroads with depots and terminals, made railway connections so
31 authorized, and did other like acts to promote such business of supplying all persons needing the same with anthracite coal; and said corporation thus obtained, and now enjoys, a large interstate business in mining, producing, and selling anthracite coal.

Because of the location of said mines of said corporation, the railway and connections of said Pennsylvania Coal Company naturally brought the coal of said corporation to the predecessors of this defendant, and still bring such coal to this defendant.

7. The Hillside Coal and Iron Company was organized as a corporation of Pennsylvania by act of its general assembly No. 1279, laws of Pennsylvania for 1869, and given power to "purchase and hold in fee simple, by lease or otherwise coal, iron, mineral, and lumber lands in this Commonwealth, not exceeding at any one time 5,000 acres, with power to connect said lands by railroad not exceeding twenty miles in length with other railroads, canals, or public improvements;" also power to use its capital in "purchasing, mining, vending, and transporting, coal, iron, lumber, and other products of their lands; in manufacturing, vending, and transporting iron and other materials and metals, and in such other objects as may be considered necessary and expedient in the prosecution of said business."

Under an act of the general assembly of the State of Pennsylvania, approved April 18, 1867, and under an agreement of merger
32 adopted December 24, 1873, said Hillside Coal & Iron Company was merged and consolidated with the Keystone Coal Company, Sugar Cabin Coal Company, Standard Coal Company, and North Mountain Coal Company, corporations organized under various special acts of the general assembly of the State of Pennsylvania granting to said companies, respectively, various rights to mine, transport, and sell coal and construct railroads and, in particular, act No. 1030 of said general assembly, laws of 1873, and act No. 532 of said general assembly, laws of 1862, affecting the said Standard Coal Company, which provide, among other things, that any incorporated railroad company shall have the power to subscribe to the capital stock of said company.

By act of said general assembly No. 1309, laws of Pennsylvania for 1869, said corporation was authorized to increase its capital to not to exceed 30,000 shares.

The said corporation, Hillside Coal and Iron Company, proceeded to act upon such authority, and to issue stock and evidences of indebtedness, obtain large capital, buy coal and lumber lands, develop coal mines and railroads, manufacture lumber, and to transport and sell coal. The said corporation thus came to have a large interstate business in supplying the fuel needs of many citizens of many States. The mines of said corporation have been conveniently reached by the railroad lines of this defendant and its predecessor, and they have transported such coal to interstate markets.

33 8. Said corporations, said Pennsylvania Coal Company and said Hillside Coal and Iron Company are still mining, producing, transporting, and selling large quantities of such coal to supply the great demand for fuel among citizens of various States outside of Pennsylvania. Said companies annually mine, produce, and sell several million tons of such coal in said markets, outside of Pennsylvania, more than ninety per cent of such coal being consumed outside of Pennsylvania. Over 70,000.00 tons per annum of anthracite coal is now produced in Pennsylvania, but there is no sufficient market in Pennsylvania therefor, over eighty per cent thereof being necessarily marketed in other States, and in Canada. Over ninety per cent of the anthracite coal traffic of this defendant is furnished by the Pennsylvania Coal Company and the Hillside Coal and Iron Company, substantially all of which is transported by it from Pennsylvania to other States, and the bulk of which is marketed at points on the lines of this defendant in such other States. The anthracite coal tonnage furnished this defendant by said coal corporations for the year ending June 30, 1907, was over twenty-two per cent of its entire freight tonnage, and defendant's revenue therefrom was over 20 per cent of its total revenue from transportation.

9. A large amount of the coal mined or produced by said Pennsylvania Coal Company and Hillside Coal and Iron Company
34 is consumed by this defendant in the operation of its railroad, such consumption of coal in the year ending June 30th, 1907, amounting to nearly 400,000 tons.

On account of the greater cleanliness of anthracite coal as compared with bituminous coal, competitive reasons, police regulations of growing centers of population and other reasons, the consumption of anthracite coal for railroad fuel purposes is increasing and will tend to further increase. Such use of anthracite coal suitable for domestic use would be wasteful and extravagant on account of the higher price and value of such coal. The smaller sizes of anthracite coal suitable for locomotive fuel purposes, are a by-product of the production of the more valuable sizes of coal suitable for domestic purposes. The proportion of the total product of such smaller sizes in the mining of coal is, with the Pennsylvania Coal Company and the Hillside Coal and Iron Company, about 35 per cent at the present

time. The mines of said Pennsylvania Coal Company and Hillside Coal and Iron Company could not be operated solely for the production of railroad fuel coal without wasteful and ruinous extravagance.

It is important for the purposes of the future operation of the railroad of this defendant that it be secured an available supply of anthracite coal for its fuel purposes, for its own protection and the protection of the public against failure or interruption of supply for such use.

35 10. This defendant denies that it owns the anthracite coal lands, or coal, of the Pennsylvania Coal Company, or the Hillside Coal & Iron Company, or the Temple Iron Company, or any other anthracite coal lands, directly or indirectly in whole or in part. It alleges that it has no interest therein direct or indirect, as it is advised by counsel learned in the law, although it admits and alleges that long before the commodity clause was enacted this defendant, or its said predecessors in interest, did lawfully acquire nearly all the capital stock of the Pennsylvania Coal Company and the Hillside Coal & Iron Company, and a small minority of the stock of the Temple Iron Company.

And this defendant admits and alleges that as a stockholder of the Pennsylvania Coal Company and of the Hillside Coal & Iron Company it has voted for directors of said corporations, as it lawfully might do; but this defendant denies that it has managed or is managing those corporations, and alleges that its relations to and with them have not been other than as a stockholder thereof. On the contrary, it admits and alleges that they have been lawfully managed, respectively, by their own directors and by their respective officers lawfully chosen by said directors. And this defendant denies that it has managed the Temple Iron Company or authorized it to do any business whatever, and alleges that its relations to and with said company have not been otherwise than as a stockholder thereof. It denies it has sold the coal of any of said corporations.

36 This defendant admits and alleges that since May 1, 1908, it has been, is now, and for many years has been transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which markets can only be reached over the railroad lines of this defendant; that such coal mines are most economically and naturally reached by lines of this defendant with which they have been so connected for many decades, and most of them are not reached by any other line of railroad, and other lines could not be constructed to reach many of them except at prohibitive cost.

This defendant and its predecessors, long prior to the passage of said amendment of the interstate commerce act acquired substantially all the capital stock of said Pennsylvania Coal Company, Hillside Coal & Iron Company, Jefferson Railroad Company, and Erie and Wyoming Railroad Company, and pledged the same under various of their mortgages, under and pursuant to which there have been issued and are now outstanding bonds for large sums aggregating many millions of dollars, which bonds are held by purchasers in good

faith and for value throughout the world, in reliance upon the property mortgaged and pledged, including the railroad of this defendant and the said stocks which form necessary and substantial portions of the security for said bonds.

It alleges that the business of producing or mining anthracite
37 coal is not a business of such a nature that said commodity clause is a reasonable or lawful regulation of interstate transportation thereof.

11. This defendant denies that the operation, mining or producing of coal by any corporation, or company so called, has been, or now is carried on under the management or authority of this defendant; or that it has been or now is the owner, in whole or in part, of any coal transported by it as a part of interstate commerce; or that it has had, or now has any interest, direct or indirect, in any coal transported to interstate markets by it; or that it has violated, or failed to comply with the so-called commodity clause of the interstate commerce act; or that it is engaged in any unlawful transportation of coal; or that it intends hereafter to violate such clause by unlawfuly transporting any coal to interstate markets. On the contrary, this defendant alleges that as a common carrier it is its duty to continue to transport such coal of the Pennsylvania Coal Company, the Hillside Coal and Iron Company, and the Temple Oron Company to citizens demanding it at interstate and other markets upon the same terms and conditions as those upon which this defendant transports other like coal to citizens of the United States and of the several States at such markets; and that interstate consumers of such coal, citizens of the United States and the several States, have the right

to exercise liberty of contract and those constitutional rights
38 and immunities of citizens of the United States and the several States, secured to them by various provisions of the Constitution of the United States and of the amendments thereto; and that they may buy and burn such coal as fuel as they choose to buy and burn instead of being forced through said commodity clause to buy and burn wood as fuel under the same circumstances and conditions. Defendant alleges that such citizens in the exercise of their rights and immunities as citizens of the United States, and of the several States, have the right to enjoy the just and equal protection of the laws, and liberty of contract, and to continue to buy and burn such particular anthracite coal; and that to enable such citizens to enjoy such constitutional rights, among others, it is the duty of the Government of the United States and of this high court, to protect this defendant in continuing to transport such coal, for otherwise the constitutional rights of said citizens, and of this defendant, and its stockholders and bondholders, will be impaired or destroyed.

12. To acquire title to all its property, rights, and franchises, and to improve and extend the same by purchase and otherwise, this defendant borrowed much capital, and was compelled to mortgage and pledge such property or parcels thereof, from time to time. All its

stock in said coal corporations has long since become collateral security for some one or more of such mortgages held by trustees
39 for bondholders, many thousands in number, and the same contain no provisions for releasing the stock of said coal corporations.

The dates and amounts of some of such mortgages are the following:

December 10, 1895, first consolidated mortgage deed to Farmers' Loan and Trust Company, due January 1st, 1996, securing bonds, of which there are outstanding $80,342,000;

February 1, 1901, Pennsylvania collateral indenture to the Mercantile Trust Company securing $36,000,000 bonds due February 1st, 1951, of which are outstanding $34,000,000;

April 1, 1903, general mortgage to the Standard Trust Company of New York securing $50,000,000 bonds due April 1st, 1953, of which there are outstanding $22,000,000.

Copies of said first consolidated mortgage deed, said Pennsylvania indenture, and said general mortgage, are hereunto annexed, marked Exhibits "A," "B," and "C," respectively, and made a part of this answer.

Said bonds are held by purchasers thereof in good faith for value, in reliance upon the property mortgaged and pledged, including the said stocks which form necessary and substantial portions of the security for said bonds. A great number of said bondholders
40 are citizens of the United States, and of the several States and are entitled to enjoy all their constitutional rights and immunities as such, and to have this defendant enjoy all its, in order that the contracts of this defendant and of said trustees and bondholders may not be impaired or destroyed, and that their securities and property, and those of this defendant, may not be taken, impaired, or destroyed without due process of law, or just compensation, contrary to the Constitution of the United States in such case made and provided. If such commodity clause be construed to apply to this defendant, the rights and property of this defendant, and of its stockholders, and of its trustees and creditors and bondholders will be impaired and destroyed contrary to the Constitution of the United States.

Defendant for greater certainty and in support of its denials and allegations herein contained, prays leave to refer, as a part hereof, to all of the acts of the New York legislature, and of the general assembly of Pennsylvania, and to all of the mortgages, charters, and articles of incorporation herein referred to, as if the same were set forth at large herein.

13. If that part of the interstate commerce act commonly called the commodity clause is so construed as to prohibit this defendant from transporting anthracite coal from Pennsylvania to markets outside the State of Pennsylvania, in cases where this defendant is a
41 stockholder in the corporation owning, mining, or producing the same, then this defendant pleads that such commodity

clause violates the Constitution of the United States, and is null and void in that:

(a) It will, in effect, prohibit commerce between the States, which commerce is not harmful, but beneficial, and it is not in any proper or legal sense a regulation of commerce, whereas, under the United States Constitution, article one, section eight, Congress is granted power only to regulate such interstate commerce.

(b) It will deny full faith and credit to the public acts of the State of New York incorporating this defendant and granting it the right to own and hold stock in corporations of the State of Pennsylvania, and to the public acts of the State of Pennsylvania granting this defendant the right to own stock in mining corporations of Pennsylvania, and to build, lease, and operate railroads, and to transport coal and other commodities therein produced to markets in other States, contrary to article four, section one, of the United States Constitution.

(c) It will deny to this defendant and numerous citizens of the States of Pennsylvania, New York, and other States of the United States, bondholders of, and stockholders in this defendant, the privileges and immunities of citizens of the several States, contrary to article four, section two, subdivision one, of the Constitution of the United States.

42 (d) It will deprive this defendant and numerous persons who are its stockholders, and bondholders, and citizens of the United States and of the several States thereof, of liberty and property without due process of law, and take from them private property without just compensation, contrary to the fifth amendment to the Constitution of the United States.

(e) It will subject this defendant, its directors, officers, lessees, agents, and other persons acting for or employed by it, and its stockholders, to excessive fines, and cruel and unusual punishments, contrary to the eighth amendment to the Constitution of the United States.

(f) It will deny to defendant and its stockholders, and bondholders, and disparage, those certain rights possessed by the people of the several States when the Constitution of the United States and the amendments thereto were adopted and which were retained by the people under the Constitution and especially by the ninth and tenth amendments thereof, among which rights are the liberty to make innocent contracts and do innocent business upon the same terms and conditions permitted to all other persons, the right to use, sell, or enjoy property acquired by lawful contract, the right to have such contracts continue unimpaired, and the right to that justice and the equal protection of the laws which the Constitution was established to make secure to all persons; and it will exceed the limita-

43 tions imposed on the powers of Congress by the nature of the Federal Government, and the fundamental principles thereof.

(g) It will deny to this defendant and its stockholders and bondholders, who are citizens of the United States and of the State of

Pennsylvania, or New York, their certain rights in real estate, and in corporations of said States, and in business in each of said States, and in the United States, contrary to the rights reserved to them, and granted to them by section two of article four, and by the fifth, eighth, ninth, tenth, and fourteenth amendments of the Constitution of the United States.

Wherefore, this defendant having fully answered the bill of complaint herein, or so much thereof as it is material for it to answer, prays this honorable court to enter its decree that this defendant be hence dismissed, and for such other relief in the premises as to this honorable court may seem meet and in accordance with equity.

ERIE RAILROAD COMPANY,
By JOSEPH E. PACKER,
Ass't Secretary.
GEORGE F. BROWNELL,
Solicitor and Counsel for Defendant.

ADELBERT MOOT,
Of Counsel.

44 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Joseph E. Packer, being duly sworn, deposes and says that he is ass't secretary of the Erie Railroad Company, the defendant above named; that he has read the foregoing answer of said defendant, and that the same is true to the best of his knowledge, information, and belief.

JOSEPH E. PACKER.

Sworn to before me this 6th day of June, 1908.
[SEAL.] A. L. TRAVIS,
Notary Public, No. 75, Kings County.

Certificate filed in New York County.

45 *First consolidated mortgage deed.*

Erie Railroad Company to the Farmers' Loan and Trust Company, trustee. Dated December 10, 1895. Stetson, Tracy, Jennings & Russell, general counsel, 15 Broad street, New York.

47 This indenture, made this tenth day of December, in the year one thousand eight hundred and ninety-five, between

Erie Railroad Company, a corporation created by, and existing under, the laws of the State of New York, hereinafter called the "railroad company," party of the first part, and

The Farmers' Loan and Trust Company, of New York, a corporation created by and existing under the laws of the State of New York, hereinafter called the "trustee," party of the second part.

Whereas, the railroad company, party of the first part, owns, possesses, controls, or leases divers lines of railway, together with franchises, rights, privileges, lands, tenements, and hereditaments there-

unto belonging or appertaining, on which lines of railway or various portions thereof and of the equipment thereof, bonds, secured by mortgages, and other liens are now outstanding;

And whereas the railroad company owns various stocks and bonds, including stock and bonds of the Chicago and Erie Railroad Company, a corporation of Indiana;

And whereas all such railroads, properties, leaseholds, stocks, and bonds have been received by the railroad company by, under, or in pursuance of a certain plan of reorganization of the New York, Lake Erie and Western Railroad Company and subordinate companies, and of the transfer to it, or for its benefit, of various stocks, bonds, and other properties so transferred to or for its benefit by Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas,
48 the committee named in the certificate of incorporation of the railroad company, upon the express promise and agreement of the railroad company, among other things, to make, execute, issue, and use its bonds as herein provided, including a limited issue thereof from time to time to be made to the said Coster, Fitzgerald, and Thomas jointly, and not severally, or their survivors or successors, and further issues thereof to be made for the redemption and acquisition of bonds and stocks, and equipment liens and for new acquisitions, construction, and betterments, all as herein provided;

And whereas the board of directors of the railroad company, at a meeting thereof held at New York on the nineteenth day of November, in the year eighteen hundred and ninety-five, adopted a resolution in the following words—that is to say:

"*Resolved*, That the president and the secretary of the Erie Railroad Company be, and they are hereby, authorized and directed, in its behalf and under the corporate seal, when approved by the stockholders, and in form substantially that now submitted to this board, to execute and deliver a mortgage or deed of trust upon the property and franchises of the corporation, to be known as its "First consolidated mortgage deed," to The Farmers' Loan and Trust Company, as trustee, to secure two issues of bonds, one to the aggregate amount of $35,000,000, to be called "Prior lien bonds," and the other and remaining issue of bonds, to the aggregate amount of $140,000,000, to be called "General lien bonds," the principal of both such issues of bond sto be payable in gold coin of the United States, of the present standard of weight and fineness, at the office or agency of this company in the city of New York, on the 1st day of January, 1996, with interest thereon at the rate of four per cent per annum, except that for two years from July 1st, 1896, the general lien bonds shall bear interest at the rate of three per cent per annum; all interest to be payable semiannually in like gold coin at the said office or agency on the first days of January and July in each year; such bonds to be issued and disposed of on the terms and conditions, for the purposes, and in the manner set forth in said form of mortgage."

49 And whereas, it was also resolved by the board of directors of the railroad company at said meeting that the president,

or any vice-president, and the secretary, or any assistant secretary of the railroad company or of any railroad company being lawful and sole successor to the railroad company for the time being, should from time to time, as directed by the board of directors of the railroad company or of its said successor, execute, in the behalf and name of the railroad company, and under its corporate seal, the two issues of bonds, to be secured by the said mortgage to the aggregate amount of one hundred and seventy-five million dollars ($175,000,000), the said two issues to be respectively: "Prior lien bonds," for an aggregate principal amount of $35,000,000, and "general lien bonds," subordinate and subject in lien to the prior lien bonds, for an aggregate principal amount of $140,000,000; such bonds to be substantially of the following tenor, to wit:

(Form of prior lien bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company, prior lien four per cent gold bonds. Secured by first consolidated mortgage deed.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder, one thousand dollars in gold coin of the United States of the present standard of weight and fineness, on the
50 first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, N. Y., with interest at the rate of four per cent per annum from January 1, 1896, payable semiannually at said office or agency in like gold coin on the first days of January and July in each year, but only upon surrender of the annexed coupons therefor as they severally mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom, under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "Prior lien bonds," duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such prior lien bonds at any one time outstanding shall never exceed the total sum of $35,000,000. All of such prior lien bonds are equally secured by a mortgage deed dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mort-

gaged and the nature and extent of the security and the rights of the holders of said bonds under the same.

This bond may be registered as to principal in the owner's name on the company's books, at its office or agency in the city of New York, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again from time to time be registered
51 or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereunto this tenth day of December, 1895.

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of interest coupon, of which the first is to be payable July 1, 1896.)

On the first day of , , Erie Railroad Company will pay the bearer at its agency in the city of New York, N. Y., twenty dollars in gold coin, without deduction for taxes, being six months' interest then due on its prior lien bond No. .

Treasurer.

52 (Form of registered prior lien bond.)

UNITED STATES OF AMERICA.

Erie Railroad Company, prior lien four per cent registered gold bond. Secured by first consolidated mortgage deed.

No. P. R. $——

Know all men by these presents: That Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay or assigns, the sum of

dollars, in gold coin of the United States of the present standard of weight and fineness, on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, and to pay interest thereon from the first day of January or July, as the case may be, next preceding the date hereof, at the rate of four per cent per annum, payable semiannually in like gold coin, at said office or agency, on the first days of January and July in each year, until payment of said principal sum.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom under or by reason of any present or future law; the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as prior lien bonds, duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such prior lien bonds, both coupon and registered, at any
53 one time outstanding, shall never exceed the total sum of $35,000,000. All of such prior lien bonds are equally secured by a mortgage deed, dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the company's books at its office or agency in the city of New York, upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage deed.

After the expiration of the voting trust authorized in the certificate of incorporation, the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary this day of .

ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

54 (Form of general lien bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company, general lien gold bond. Secured by first consolidated mortgage deed.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder, one thousand dollars in gold coin of the United States of the present standard of weight and fineness on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New York, N. Y., with interest from July 1, 1896, at the rate of three per cent per annum for two years and at the rate of four per cent per annum thereafter, payable semi-annually at said office or agency in like gold coin on the first days of January and July in each year, but only upon surrender of the annexed coupons therefor as they severally mature.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be required to pay or to retain therefrom, under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "general lien bonds," duly authorized and approved by the directors and stockholders of the railroad
55 company, issued and to be issued, but so that the aggregate amount of such general lien bonds at any one time outstanding shall never exceed the total sum of $140,000,000.

All of such general lien bonds are equally secured by a mortgage deed dated December 10th, 1895, executed by said railroad company to the Farmers' Loan & Trust Company, of New York, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged and the nature and extent of the security and the rights of the holders of said bonds under the same.

This bond may be registered as to principal in the owner's name on the company's books at its office or agency in the city of New York, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again from time to time be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is

also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust.

After the expiration of the voting trust authorized in the certificate of incorporation the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or assistant secretary, and coupons for said interest
56 with the engraved signature of its treasurer to be attached hereunto, this tenth day of December, 1895.

ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of interest coupon, of which the first is to be payable January 1, 1897.)

On the first day of Erie Railroad Company will pay the bearer at its agency in the city of New York, N. Y., dollars in gold coin, without deduction for taxes, being six months' interest then due on its general lien bond No.

Treasurer.

(Form of registered general lien bond.)

UNITED STATES OF AMERICA.

Erie Railroad Company, general lien registered gold bond. Secured by first consolidated mortgage deed.

No. G. R. $ ——.

Know all men by these presents, that Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay or assigns, the sum of dollars in gold coin of the United States of the present standard of weight and fineness on the first day of January, in the year 1996, at the office or agency of the railroad company in the city of New
57 York, and to pay interest thereon from the first day of January or July, as the case may be, next preceding the date hereof, at the rate of three per cent per annum from July 1st, 1896, to June 30th, 1898, and four per cent per annum thereafter, payable semi-annually in like gold coin, at said office or agency, on the first days of January and July in each year, until payment of said principal sum.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company may be

required to pay, or to retain therefrom under or by reason of any present or future law, the railroad company hereby agreeing to pay all such tax or taxes.

This bond is one of a series of coupon bonds and registered bonds of the railroad company, known as general lien bonds, duly authorized and approved by the directors and stockholders of the railroad company, issued and to be issued, but so that the aggregate amount of such general lien bonds, both coupon and registered, at any one time outstanding, shall never exceed the total sum of $140,000,000. All of said bonds are equally secured by the mortgage deed, dated December 10th, 1895, executed by said railroad company to the Farmers' Loan and Trust Company of New York as trustee of all the property and franchises of the railroad company mentioned in said mortgage deed, to which reference is hereby made for a description of the property and franchises mortgaged, and the nature and extent of the security and the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder thereof, in person or by attorney duly authorized, on the company's books at its office or agency in the city of New York upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage deed.

After the expiration of the voting trust authorized in the
58 certificate of incorporation the holder hereof shall have the right to vote as described in said certificate.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage deed.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presidents, and its corporate seal to be hereunto affixed and to be attested by its secretary or assistant secretary this day of .

ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

And whereas the coupons to be attached to said bonds of both issues are to be authenticated by the engraved signature of the present treasurer or of any future treasurer of the railroad company, or of any successor company, it being intended that the railroad company and any such successor company may adopt and use for that purpose the engraved signature of any such treasurer, notwithstanding the fact that such person may have ceased to be such treasurer at the time when any such bonds shall be actually certified and delivered;

And whereas it was further resolved that there shall be endorsed on each of such bonds of both issues a certificate of the trustee, which certificate shall be the conclusive and only evidence that such bonds

are entitled to the security of the mortgage or deed of trust therein mentioned, and that no bond shall be valid or obligatory for any purpose until such certificate shall have been executed by the trustee, such certificate, in respect of said two issues severally and respectively, to be substantially of the following tenor, viz:

59 I.

(Form of trustee's certificate as to prior lien bonds.)

This bond is one of the series of prior lien bonds described in the within-mentioned mortgage deed, executed by the Erie Railroad Company to the undersigned.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By , *Vice-President.*

II.

(Form of trustee's certificate as to general lien bonds.)

This bond is one of the series of general lien bonds described in the within-mentioned mortgage deed, executed by the Erie Railroad Company to the undersigned.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By , *Vice-President.*

And whereas, subsequently, to wit, on the 19th day of November, 1895, all the stockholders of the railroad company, owning and holding every share of its capital stock, namely, three hundred thousand shares of first preferred stock, one hundred and sixty thousand shares of second preferred stock, and one million shares of the common stock of said corporation, did, in the manner and form provided by and in section 2 of the stock corporation law of the State of New York, consent to the issue of this mortgage, which consent is in writing, and has been filed and recorded in the office of the clerk of the city and county of New York, and also in the office of the register of the city and county of New York, that being the county in which the railroad company has its principal place of business.

And whereas the printed form of mortgage submitted to and approved by the board of directors at their said meeting, and submitted to the stockholders of the corporation at the time of the execution of their consent as aforesaid, was in the form of this indenture.

60 And whereas, in pursuance of said resolutions and consent and of all and every legal power and authority in it vested,

the railroad company proposes to make and execute and from time to time to issue and deliver bonds of both the issues secured hereby.

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and interest of all such bonds at any time outstanding and lawfully issued, as provided in such bonds and in this indenture, and the performance of all the covenants and conditions herein contained,

The railroad company, party of the first part, in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has executed and delivered these presents with all the covenants and conditions thereof, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over unto the trustee, party of the second part, its successors and assigns, forever:

All the estate, right, title, and interest of the railroad company of, in, and to, all and singular, the railway of the railroad company from and including Piermont, on the Hudson River in the State of New York, to and including the terminus of the said railway on Lake Erie at or near Dunkirk in said State, and the railway known as the Newburgh Branch, from Newburgh to the main line, and also all
61 that part of the railway designated as the Buffalo Branch of the Erie Railway extending from Hornellsville to Attica, in the State of New York; also that part of the railway known as the Newburgh and New York Railroad, extending from Turners on the main line to Vail's Gate on the Newburgh Branch; also the railway formerly belonging to the Lockport and Buffalo Railroad Company and extending from Lockport to Black Rock, both in the State of New York; also the railway formerly belonging to the Erie International Railway Company, and extending from a point of connection with Suspension Bridge and Erie Junction Railroad in Niagara County to International Bridge in Erie County, both in the State of New York; and also all other railways now belonging to the railroad company in the States of New York, Pennsylvania, and New Jersey, or any of them; also all the estate, right, title, and interest, terms and remainder of terms, franchises, privileges, and rights of action of whatsoever name or nature in law or in equity conveyed or assigned unto the New York and Erie Railroad Company, or unto the Erie Railway Company, or to the New York, Lake Erie and Western Railroad Company, by the Union Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Buffalo, New York and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the Bergen County Railroad, a corporation existing under the laws of the State of New Jersey; by the Buffalo, Bradford and Pittsburg

Railroad Company, a corporation existing under the laws of the States of New York and Pennsylvania; by the Rochester and Genesee Valley Railroad Company, a corporation existing under the laws of the State of New York; by the Long Dock Company, a corporation existing under the laws of the State of New Jersey; by the Goshen and Deckertown Railroad Company, a corporation existing under the laws of the State of New York; by the Hoboken Land and Improvement Company, a corporation existing under the laws
62 of the State of New Jersey; by the New York and Fort Lee Railroad Company, a corporation existing under the laws of the State of New Jersey, and the New Jersey Junction Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Jefferson Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Montgomery and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Docks and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the Paterson, Newark and New York Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Pennsylvania Coal Company, a corporation existing under the laws of the State of Pennsylvania; by the Newark and Hudson Railroad Company, a corporation existing under the laws of the State of New Jersey; and by the Suspension Bridge and Erie Junction Railroad Company, a corporation existing under the laws of the State of New York.

And also all the railroad formerly of the Buffalo and Southwestern Railroad Company, extending from Jamestown, in Chautauqua County, to Buffalo, in Erie County, both in the State of New York, subject only to two mortgages thereon prior to the lien of this indenture; the first to secure an issue of bonds for $1,500,000, the second, executed November 19th, 1895, by the railroad company to secure an issue of its bonds for $1,000,000.

And also all the estate, right, title, and interest of the railroad company in and to certain real estate situate in Hudson County, in the State of New Jersey, known as the Penhorn property, and to two certain other parcels of real estate situate in the county of Passaic, in the State of New Jersey, and known, respectively, as the Post farm and the Fredericks farm. And also to a certain parcel of land lying west of the Bergen Tunnel, in Hudson County, State of New
63 Jersey, known as the Laundry property. And also all other real estate of the railroad company situate in the State of New Jersey of every kind and description and wherever in the said State the same may be situate. Also a tract of land, being about four acres, situate in the township of Texas, county of Wayne, in the State of Pennsylvania.

And also all the estate, right, title, and interest of the railroad company of, in, and to certain piers, bulkheads, and water fronts in the said city of New York, that is to say: Piers 29, 30, 31, and 32, North

River, with bulkheads between piers 30 and 31, 31 and 32, and half the bulkhead between piers 32 and 33; also the pier at the foot of West Twenty-third street, and the bulkhead between Twenty-second and Twenty-third streets; also the piers 7 and 8, East River, and the bulkhead between them.

And, also, all tracts of land or interest therein of the railroad company lying and being in the following States and counties, namely: counties of Rockland, Orange, Sullivan, Delaware, Broome, Tioga, Chemung, Steuben, Allegany, Livingston, Wyoming, Genesse, Erie, Niagara, Cattaraugus, Chautauqua, and Monroe, in the State of New York; counties of Hudson, Essex, Bergen, and Passaic, in the State of New Jersey; counties of Susquehanna, Jefferson, Pike, and McKean, in the State of Pennsylvania.

Also all the right, title, and interest of every name and nature hereafter acquired by the railroad company in or to the property, railroad, and franchises now of the New York, Pennsylvania and Ohio Railroad Company, or any branch, extension, or leased or operated line thereof or therefrom (except certain lands and interests in lands not immediately appurtenant to said railroad, of which lands and interests the description is on file in the possession of the party of the second part) or in any bonds, stocks, or other security of such railroad company, or of any successor company or companies, subject to the terms upon which any such acquisition may have been
64 made; provided, however, that nothing herein is intended or shall be construed to affect or limit the reserved right of the railroad company at its option to modify from time to time or to elect not to continue the agreement dated November 18th, 1895, under which it is now operating the said New York, Pennsylvania and Ohio Railroad.

Also, all the right, title estate, interest, property, and franchises of the railroad company of, in, and to any and all other lines of railway, extension, and branches now owned, leased, or held by the railroad company or in which it has any interest whatsoever, wherever located, notwithstanding the same may not be particularly set forth or described in this indenture.

Also, all the right, title, estate, interest, and property of the railroad company in and to any and all lines of railway, extensions, and branches, including the franchises appurtenant thereto, and any and all bonds, stocks, and other property of every kind or description (notwithstanding that the same are not now particularly set forth in this indenture), which, from time to time, in the manner hereinafter provided, shall be designated in the verified certificates to be furnished by the railroad company to the trustee whenever it shall make any call for any of the $5,000,000 "prior lien bonds" reserved under the provisions of this indenture for enlargement and improvement of terminal facilities, including elevation of tracks at Jersey City, Buffalo, and elsewhere, additional wharf facilities at New York, reducing grades, constructing double track, and purchasing additional equip-

ment; or whenever it shall make any call for any of the $17,000,000 "general lien bonds" reserved under the provisions of this indenture for construction, equipment, additions to or improvements or purchases of property; and also any and all franchises and rights
65 of any kind relating to any and all lines of railway, extensions, branches, and other property constructed or acquired from the use of any such prior lien bonds or general lien bonds or their proceeds.

Including any and all roadbed, superstructure, rights of way, rails, tracks, sidetracks, bridges, viaducts, buildings, depots, stations, warehouses, carhouses, enginehouses, freighthouses, woodhouses, machine shops and other shops, turntables, waterstations, fences, docks, structures, erections and fixtures, and all other things of whatever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to the lien of this indenture, or to any branch or operated line thereof, or provided for use thereon, or in connection therewith; and any and all lands designed for depots, warehouses, or other structures at any terminus, or on or along such lines of railway, or upon or along any such branch or operated line; and any and all locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels now or hereafter acquired or provided for use upon such lines of railway or branches, or upon any other line or branch, or upon any operated line; and any and all leaseholds, leases, rights under lease, or contract, covenants, and agreements, terms or parts of terms; and any and all property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, such lines of railway, or any such branch, or operated line; and any and all corporate rights, privileges, and franchises which the railroad company now has, or hereafter can or shall acquire, possess, or exercise in, to, upon, or in any respect of such lines of railway or branches or any operated line, or any part thereof, necessary for, or appertaining to, the construction, maintenance, or operation of such lines of railway or any such branch or operated line, or any part thereof; and any and all
66 the rents, issues, profits, tolls, and other income of such lines of railway, and of any and all branches and operated lines; and also any and all the rights, privileges, franchises, properties, real or personal, rights, and things which the railroad company may or shall hereafter possess, or become entitled to possess, for the purposes of, or in connection with, such lines of railway or any such branch or operated line.

Together with all and singular the franchises, rights, and privileges now or hereafter appurtenant to, or used in connection with, the lines of railway above mentioned, or any branch or operated line thereof.

Also the following shares of stock, to be transferred to the trustee as hereinafter provided:

67 Name of company.	Par value per share.	Number of shares.
Buffalo, New York and Erie Railroad Company	$100	8,238
Jefferson Railroad Company	50	41,909
Buffalo, Bradford and Pittsburgh Railroad Company	100	21,899
Bergen County Railroad Company	100	2,000
Middletown and Crawford Railroad Company	50	1,600
Newark and Hudson Railroad Company	100	2,500
Paterson, Newark and New York Railroad Company	50	5,000
Bergen and Dundee Railroad Company	100	400
Long Dock Company	100	8,000
New York, Lake Erie and Western Docks and Improvement Company	100	6,040
Suspension Bridge and Erie Junction Railroad Company	100	4,992
Buffalo Creek Railroad Company	100	1,250
Chicago and Erie Railroad Company	100	1,000
Pavonia Ferry Company	100	1,000
Hillside Coal and Iron Company	100	10,000
Northwestern Mining and Exchange Company	100	5,000
Blossburg Coal Company	100	10,000
Tioga Railroad Company, preferred stock	50	3,794
Tioga Railroad Company, common stock	50	7,818
Elmira State Line Railroad Company	100	610
Arnot and Pine Creek Railroad Company	100	2,550
Union Steamboat Company	100	10,000
Union Dry Dock Company	500	300
Conesus Lake Railroad Company	50	375

Also the following bonds, to be delivered to the trustee as hereinafter provided:

$185,000 bonds of the Buffalo, Bradford and Pittsburgh Railroad Company, secured by its mortgage dated January 1st, 1865, to Dorman B. Eaton, as trustee.

68 $57,200 bonds of the Middletown and Crawford Railroad Company, secured by its mortgage dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford, as trustees.

$250,000 bonds of the Newark and Hudson Railroad Company, secured by its mortgage dated September 20th, 1871, to H. N. Otis, as trustee.

$499,000 bonds of the Paterson and Newark Railroad Company, secured by its mortgage dated January 1st, 1868, to W. C. Rushmore and C. Walsh, as trustees.

$604,000 bonds of the New York, Lake Erie and Western Docks and Improvement Company, secured by its mortgage dated June 1st, 1883, to the Farmers' Loan and Trust Company, as trustee, as modified by the supplemental contract dated

$1,900,000 bonds of the New York, Lake Erie and Western Coal and Railroad Company, secured by its mortgage dated May 15th, 1882, to the Metropolitan Trust Company of the city of New York and J. Lowber Welsh, of the city of Philadelphia, as trustees.

$35,000 bonds of the Suspension Bridge and Erie Junction Railroad Company, secured by its mortgage dated June 1st, 1870, to Horatio N. Otis, as trustee.

$9,776,000 income bonds of the Chicago and Erie Railroad Company, secured by its mortgage dated August 21st, 1890, to New York Security and Trust Company and John B. Elam, as trustees.

Also, all property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned, or transferred by the railroad company or any one in its behalf to the trustee, which is hereby authorized to receive any property, at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted
69 security for the payment of bonds issued or to be issued hereunder, and to hold and apply any and all such property subject to the terms hereof.

It being intended to include within the grant of this indenture all lines of railway, extensions, branches, real estate, and railroad property conveyed to or acquired by, or for the benefit of, the railroad company, party of the first part hereto, under or in pursuance of the decree confirming the sale, and the deeds of the special master and others executed or to be executed pursuant to such decree, in the suit of Trenor Luther Park against the New York, Lake Erie and Western Railroad Company and the Farmers' Loan and Trust Company; the Farmers' Loan and Trust Company against the New York, Lake Erie and Western Railroad Company and Trenor Luther Park; consolidated cause, in equity, in the Circuit Court of the United States for the Eastern District of New York, and in the various decrees ancillary thereto, wherein also foreclosure was had of the second consolidated mortgage made by the New York, Lake Erie and Western Railroad Company, dated October 5th, 1878, to the Farmers' Loan and Trust Company of New York, trustee.

To have and to hold the premises, railroads, properties, real or personal, rights, franchises, estates, appurtenances, stock, and bonds hereby conveyed and assigned, or intended to be conveyed or assigned, unto the trustee, its successor or successors and assigns forever:

But in trust, nevertheless, as to each of the said two issues of bonds, respectively, viz, primarily the $35,000,000 " prior lien bonds " as one issue, and secondarily the $140,000,000 " general lien bonds," as a separate, subordinate, and subject issue, for the equal, proper, and proportionate benefit and security severally and respectively of all and every the present and future holders, first of any and every
70 " prior lien bond," and, second, and subject thereto, of any and every " general lien bond " issued under and secured by this indenture, as well all those now issued as all hereafter issued in addition thereto or by way of substitution or exchange, in accordance with the terms of this indenture, and for enforcing payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture and of the said bonds and interest obligations, respectively, so that the " prior lien bonds," without regard of time of actual issue, shall have priority and preference, as to both principal and interest, over the " general lien bonds," and that the general lien bonds shall all be subject to the prior and superior lien of the prior lien bonds; but without preference, priority, or distinction, as to lien or otherwise, of any one bond of either of such two issues over any other bond of the same issue, by reason of priority in

the execution, delivery, or negotiation thereof, and so that each and every bond of either of such two issues, issued and to be issued as aforesaid, shall have, under and by this indenture, the same right, lien, and privilege as every other bond of that issue, and the principal and interest of every such bond of either issue shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond of that issue, as though all had been made, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture, without regard to the date of actual issue, sale, or disposition thereof; and so that the lien and security of this indenture, and of all bonds issued hereunder, shall take effect from the day of the date hereof as though upon such day actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

71 And it is hereby expressly covenanted that all such bonds and the coupons for interest thereon are to be issued, certified, delivered, received, and negotiated, and that the mortgaged properties and franchises are to be held by the trustee subject to the following further covenants, conditions, and provisions, viz:

ARTICLE ONE.

All bonds hereby secured shall, from time to time, by the railroad company be executed and delivered for certification to the trustee, which shall thereupon certify and deliver the same as provided in this article. Only such bonds as shall bear the trustee's certificate duly endorsed thereon and duly signed shall be secured by this indenture or shall be entitled to any lien or benefit hereunder; and every such certificate of the trustee upon any bond executed in behalf of the railroad company shall be conclusive evidence that the bond so certified has been duly issued hereunder and is entitled to the benefit of the trust hereby created. Such certificates may be made and bonds may be delivered hereunder in advance of registration or record of this indenture.

The bonds and certificates for shares hereby pledged as specifically enumerated in the granting clauses hereof shall, prior to the certification of any bonds hereunder, be assigned and delivered to the Farmers' Loan and Trust Company, trustee under this indenture.

Before certifying or delivering any coupon bond, the trustee shall cut off and cancel all coupons thereof then matured; and the trustee shall not certify or deliver any registered bond bearing interest from any date more than six months prior to such certification or delivery.

72 A.

Of the bonds authorized to be issued under and secured by this indenture thirty-five million dollars ($35,000,000) shall be prior lien bonds.

SECTION 1. Of the prior lien bonds authorized to be issued under and secured by this indenture, bonds to the amount of fifteen million six hundred thousand dollars ($15,600,000) shall be certified by the trustee, and upon a resolution of the board of directors of the railroad company shall be delivered to Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, or their survivors or successors, the committee named in the certificate of incorporation of the railroad company, immediately upon the execution and delivery hereof, or as soon as may be thereafter.

SEC. 2. Out of and from the remainder of such authorized issue of prior lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of fourteen million four hundred thousand dollars ($14,400,000).

Said fourteen million four hundred thousand dollars ($14,400,000) of such prior lien bonds shall be certified by the trustee and delivered to the railroad company, from time to time hereafter, as and when called for by resolution of the board of directors of the railroad company, stating, in effect, that the same are to be used from time to time to acquire railroad and railroad equipment, now of the New York, Pennsylvania and Ohio Railroad Company (substantially as covered by its so-called "first mortgage of May 6, 1880," to the Farmers' Loan and Trust Company, trustee), subject to "prior lien" bonds of said New York, Pennsylvania and Ohio Railroad Company, equipment obligations and rentals now resting thereon, or to acquire securities of the New York, Pennsylvania and Ohio Railroad Company, or of a successor company or companies, in amounts and
73 to an extent which in the opinion of the board of directors of the railroad company shall give to the railroad company, or enable it to acquire, satisfactory control of the operation and management of said railroad.

If said prior lien bonds hereby secured shall be used to acquire securities of the New York, Pennsylvania and Ohio Railroad Company, the trustee shall certify and deliver said $14,400,000 of prior lien bonds hereby secured from time to time only at the rate of one thousand dollars par value of such prior lien bonds for each five thousand dollars par value of said so-called first mortgage bonds, which shall be acquired and pledged hereunder. If securities of a succesor company or companies shall be acquired, then the trustee shall reserve out of said $14,400,000 of prior lien bonds hereby secured, an amount equal at par to the aggregate amount of all the secured and unsecured indebtedness of such successor company or companies that shall not be acquired and pledged hereunder, other than the said New York, Pennsylvania and Ohio prior lien bonds and equipment obligations and liens upon or for the benefit of properties leased or controlled by said New York, Pennsylvania and Ohio Railroad Company and ordinary operating accounts; and the bonds so reserved shall from time to time be certified and delivered by the trustee when and as a like amount of such secured or unsecured in-

debtedness shall be discharged or acquired by the railroad company, and assigned to the trustee hereunder.

As to the existence and amount of any such secured or unsecured indebtedness of a successor corporation, the written opinion of the counsel of the railroad company shall, according to its terms and to any action pursuant thereto, be sufficient evidence and authority to the trustee.

When delivering any bonds under this section the trustee shall require either the immediate subjection of the property acquired to the lien hereof (excepting, however, certain lands and interests
74 in lands of the New York, Pennsylvania, and Ohio Railroad Company hereinbefore mentioned), or, if this be not reasonably practicable, shall deliver the bonds upon such trusts as are, in its judgment, calculated to accomplish such subjection within a reasonable period, but the trustee shall not be liable for any error of judgment in this respect.

SEC. 3. Out of the remainder of such authorized issue of prior lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of five million dollars ($5,000,000).

Said five million dollars of such prior lien bonds shall be certified by the trustee and delivered to the railroad company from time to time hereafter, when and as called for by resolution of the board of directors to the effect that the bonds so called for and their proceeds are to be used, upon lines or property now or hereafter owned by the railroad company, and subject to the lien of this indenture or upon lines or property of any company of which a majority of the capital stock shall be subjected to the lien of this indenture, only for the following purposes, or some one or more of them, viz: (1) Enlargement and improvement of terminal facilities, including elevation of tracks or other improvement of crossings at Jersey City, Buffalo, and elsewhere; (2) additional wharf facilities at New York or Jersey City; (3) purchasing additional equipment; (4) reducing grades and constructing double track, or to reimburse the railroad company for outlays made subsequent to the date hereof for the purposes aforesaid or some one or more of them.

At any time or times, upon any such resolution, and with the written consent of the voting trustees (under the voting trust authorized in the certificate of incorporation of the railroad company), or the greater number of those then acting as such voting trustees, such prior lien bonds shall be so delivered to the amount specified in every such resolution, not in any one instance exceeding $1,000,000,
75 but, in every instance after the first delivery of such bonds, before delivering any additional amount of such bonds, the trustee shall require the railroad company to furnish, in addition to such resolution of the board, the verified certificate or certificates of some person or persons cognizant of the facts, stating

(a) That all such bonds and the proceeds of all such bonds certified and delivered on or subsequent to the rate of the last preceding reso-

lution, or resolution and verified certificate, as the case may be, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided;

(b) The amount of such bonds so certified and delivered, which, or the proceeds of which, on or subsequently to the date of the last preceding resolution, or resolution and verified certificate (as the case may be), shall have been actually used for any such purpose, or to reimburse the railroad company, as above provided, and specifically indicating each and every such acquisition or construction, and also stating in detail the amount of bonds, or proceeds of bonds, used or expended for each and every such purpose.

(c) That the price paid in bonds or their proceeds for such construction or acquisition was not in excess of the fair value of the work done or property acquired, and that the bonds included in such verified certificate were sold, disposed of, or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting.

(d) That of the expenditures for which such certificates shall state that prior lien bonds or their proceeds have been used, no part has been provided by the use of general lien bonds; and that of the expenditures for which reimbursement shall be claimed, no part has been obtained by the railorad company out of the general lien bonds or their proceeds.

Every such verified certificate shall be accompanied by the written statement of the president or one of the vice-presidents, and of
76 the auditor or treasurer of the railroad company that they believe such certificate to be true, and that such bonds have been used and the expenditures therein certified have been made only for purposes properly chargeable to capital account of the railroad company, and that no part thereof has been used for ordinary maintenance of the lines of railway or other property owned or in any way controlled by the railroad company or for replacements or other purposes ordinarily treated by railroad companies as a part of their operating expenses.

Such written consent of voting trustees, resolutions, statements, and verified certificates shall be deemed and taken as plenary authority to the said trustee for its certification of such prior lien bonds or of any one or more of them.

B.

Of the bonds authorized to be issued under and secured by this indenture, one hundred and forty million dollars ($140,000,000) shall bo general lien bonds.

SEC. 4. Of the general lien bonds authorized to be issued under and secured by this indenture, bonds to the amount of thirty million nine hundred and twenty-seven thousand dollars ($30,927,000) shall be certified by the trustee and shall be delivered to Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, or their survivors or successors, the committee named in the certificate of incorporation of the

railroad company, immediately upon the execution and delivery of this indenture, or as soon as may be thereafter.

SEC. 5. Out of and from the remainder of such authorized issue of general lien bonds there shall be reserved, not immediately to be executed or certified by the trustee, bonds to the amount of seventy-nine million nine hundred and eighteen thousand dollars ($79,-
918,000), for the purpose of providing for the purchase, re-
77 demption, and acquisition by the trustee, as hereinafter provided, of bonds secured by the thirty-six following mortgages (such mortgages being stated and described with substantial accuracy and as generally known):

I.

The first mortgage or charge created by an act of the legislature of the State of New York, passed May 14, 1845, entitled "An act in relation to the construction of the New York and Erie Railroad," to secure an issue of bonds of said New York and Erie Railroad Company, bearing interest at the rate of seven per cent per annum and payable on July 1st, 1867, which bonds have been duly extended until May 1, 1897, at interest at the rate of 7 per cent per annum, and of which $2,482,000 are now outstanding and unpaid.

The second mortgage made by said New York and Erie Railroad Company, dated March 1, 1849, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable March 1, 1859; which bonds have been duly extended until September 1, 1919, at interest at the rate of 5 per cent per annum, payable in gold, and of which $2,149,000 are now outstanding and unpaid.

The third mortgage made by said New York and Erie Railroad Company, dated March 1, 1853, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on March 1, 1883, which bonds have been duly extended until March 1, 1923, at interest at the rate of 4½ per cent per annum, payable in gold, and of which $4,617,000 are now outstanding and unpaid.

The fourth mortgage made by said New York and Erie Railroad Company, dated August 15, 1857, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on October 1, 1880, which bonds have been duly extended until October 1, 1920, at interest at the rate of 5 per cent per annum, payable in gold, and of which $2,926,000 are now outstanding and unpaid.

The fifth mortgage made by said New York and Erie Railroad Company, dated June 1, 1858, to secure an issue of bonds of said company bearing interest at the rate of 7 per cent per annum and payable on June 1, 1888, which bonds have been duly extended until June 1, 1928, at interest at the rate of 4 per cent per annum, payable in gold, and of which $709,500 are now outstanding and unpaid.

The mortgage made by the Buffalo branch of the Erie Railway and the Erie Railway Company, dated July 1, 1861, to secure a certain issue of bonds bearing interest at the rate of 7 per cent
78 per annum and payable on July 1, 1891, which bonds have been duly extended until July 1, 1931, at interest at the rate of 4 per cent per annum, payable in gold, and of which $182,600 are now standing and unpaid.

The mortgage made by said Erie Railway Company, dated September 1, 1870, to secure a certain issue of its bonds (commonly called "First consolidated mortgage bonds"), bearing interest at the rate of 7 per cent per annum and payable September 1, 1920, and of which $16,891,000 are now outstanding and unpaid.

Also, $3,705,977.10 first consolidated mortgage funded coupon bonds of the New York, Lake Erie and Western Railroad Company, dated September 1st, 1878, bearing interest at the rate of 7 per cent per annum, payable September 1st, 1920, and secured by a pledge of coupons for interest on the first consolidated mortgage bonds of the Erie Railway Company, all of which are now outstanding and unpaid.

The mortgage made by the Newburgh & New York Railroad Company, dated August 1st, 1868, to Jay Gould, as trustee, to secure an issue of bonds of said company and payable January 1st, 1889, which bonds have been duly extended until January 1, 1929, with interest at the rate of 5 per cent per annum in gold, and of which $250,000 are now outstanding and unpaid.

The mortgage made by the Buffalo and Southwestern Railroad Company, dated December 17, 1877, to Elbridge G. Spaulding, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, payable December 1, 1907, of which $1,500,000 are now outstanding and unpaid.

The mortgage made by the Lockport and Buffalo Railroad Company, dated October 1st, 1877, to Matthias H. Arnot, as trustee, to secure bonds bearing interest at 7% per annum, and due October 1st, 1897, of which $140,000 are now outstanding and unpaid.

II.

The mortgage made by the Long Dock Company, dated November 16, 1885, to Anthony J. Thomas and Charles Edward Tracy, as trustees, to secure an issue of gold bonds of said company, bearing interest at the rate of 6% per annum and payable October 1, 1935, of which $7,500,000 are now outstanding and unpaid.

The mortgage made by the Jefferson Railroad Company, dated January 1st, 1889, to the Fidelity Insurance, Trust and Safe Deposit Company, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 5% per annum and payable January 1, 1909, of which $2,800,000 are now outstanding and unpaid.

79 The mortgage made the Jefferson Railroad Company on its Honesdale Branch, dated July 1st, 1867, to John Torrey, Z. H.

Russell, and Coe F. Young, as trustees, to secure an issue of bonds of said company, payable July 1, 1927, of which $204,000, bearing interest at 4½% per annum, are now outstanding and unpaid.

Th mortgage made by the Jefferson Railroad Company on its Honesdale Branch, dated January 1st, 1869, to John Torrey, Z. H. Russell, and Coe F. Young, as trustees, to secure an issue of bonds of said company, payable July 1st, 1927, and bearing interest at the rate of 6% per annum, of which $96,000 are now outstanding and unpaid.

The mortgage made by the Buffalo, Bradford, and Pittsburgh Railroad Company, dated January 1st., 1865, to Dorman B. Eaton, as trustee, to secure an issue of gold bonds of said company, bearing interest at the rate of 7% per annum, and payable January 1, 1896, which bonds other than those pledged hereunder are now outstanding and unpaid to the amount of $395,000.

The mortgage made by the Bergen County Railroad, dated March 1st, 1881, to the Farmers' Loan and Trust Company, ing interest at the rate of 6% per annum and payable April 1, 1911, of which $200,000 are now outstanding and unpaid.

The mortgage made by the New York, Lake Erie and Western Coal & Railroad Company, dated May 15, 1882, to the Metropolitan Trust Company of New York and John Lowber Welsh, of the city of Philadelphia, as trustees, to secure an issue of gold bonds of said company, bearing interest at the rate of 6% per annum, and payable May 1, 1922, which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $1,100,000.

as trustee, to secure an issue of bonds of said company bear-

The mortgage made by the New York, Lake Erie and Western Docks & Improvement Company, dated June 1, 1883, to the Farmers' Loan & Trust Company, trustee, as modified by the supplemental contract dated February 8th, 1890, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, and payable July 1, 1913, which bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $3,396,000.

The mortgage made by the Suspension Bridge and Erie Junction Railroad Company, dated July 1st, 1870, to Horatio N. Otis, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and payable July 1, 1900, of which bonds, other than those pledged hereunder, $965,000 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated April 24th, 1852, to Theodore Dehon, Alfred S. Fraser, and Watts
80 Sherman, as trustees, to secure an issue of bonds of said company, bearing interest at the rate of 5% per annum, and payable November 1, 1915, of which $239,500 are now outstanding and unpaid.

The mortgage made by the Tioga Railroad Company, dated October 1st, 1875, to George M. Diven, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and

payable October 1, 1905, of which $265,000 are now outstanding and unpaid.

Th mortgage made by the Tioga Railroad Company, dated November 1st, 1876, to Myron P. Bush, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum and payable November 1st, 1896, of which $125,000 are now outstanding and unpaid.

The mortgage made by the Elmira and State Line Railroad Company, dated October 1st, 1875, to Matthias H. Arnot, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 7% per annum, and payable October 1, 1905, of which $160,000 are now outstanding and unpaid.

The mortgage made by the Chicago and Atlantic Railroad Company, dated November 1st, 1888, to Central Trust Company of New York, as trustee, to secure an issue of bonds of said company, known as "terminal bonds," bearing interest at the rate of 5% per annum, and payable July 1, 1918, of which $300,000 are now outstanding and unpaid.

The mortgage made by the Chicago and Erie Railroad Company, dated August 21st 1890, to the Central Trust Company of New York and Edward Daniels, as trustees, to secure an issue of bonds of said company bearing interest at the rate of 5% per annum, and payable May 1, 1982, of which $12,000,000 are now outstanding and unpaid.

The mortgage made by the Blossburg Coal Company, dated January 1st, 1878, to Amaziah S. Kendall, as trustee, to secure an issue of bonds of said company, payable January 1st, 1893, which bonds have been duly extended until November 1, 1915, with interest at the rate of 5% per annum, payable in gold, and of which $400,000 are now outstanding and unpaid.

The mortgage made by the Buffalo, New York and Erie Railroad Company, dated June 1st, 1876, to John A. C. Gray, as trustee, to secure bonds, bearing interest at 7% per annum, due June 1, 1916, of which $2,380,000 are now outstanding and unpaid.

III.

The mortgage made by the Montgomery and Erie Railroad Company, dated May 1st, 1866, to William Murray, Nathan C. Sanford, and Henry Merriam, as trustees, to secure bonds bearing interest at 5% per annum and due May 1st, 1926, of which $130,000 are now outstanding and unpaid.

81 The mortgage made by the Montgomery and Erie Railroad Company, dated October 1st, 1867, to John M. Quackenbos and Bartow Wright, as trustee, to secure bonds bearing interest at 5% per annum, and due October 1st, 1927, of which $40,500 are now outstanding and unpaid.

The mortgage made by the Goshen and Deckertown Railroad Company, dated July 1st, 1868, to Ambrose S. Murray, Robert H. Berdell,

and John Stewart, as trustees, to secure bonds bearing interest at 6% per annum, due July 1, 1928, of which $186,500 are now outstanding and unpaid.

The mortgage made by the Goshen and Deckertown Railroad Company, dated November 1st, 1869, to Ambrose S. Murray and Robert H. Berdell and John Stewart, as trustees, to secure bonds bearing interest at 6% per annum, due November 1, 1929, of which $60,000 are now outstanding and unpaid.

The mortgage made by the Middletown and Crawford Railroad Company, dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray, and Alexander Crawford, as trustees, to secure bonds bearing interest at 4½% per annum, due April 1, 1921, of which, bonds, other than those pledged hereunder, are now outstanding and unpaid to the amount of $8,800.

IV.

The mortgage made by the New York, Pennsylvania and Ohio Railroad Company, dated May 5, 1880, to the Farmers' Loan and Trust Compay, as trustee, to secure an issue of gold bonds of said company, payable March 1st, 1895, which bonds have been duly extended to March 1st, 1935, at 4½% per annum interest, and of which $8,000,000 are now outstanding and unpaid.

V.

The mortgage made by the Cleveland and Mahoning Valley Railroad Company, dated January 1st, 1888, to Central Trust Company of New York, as trustee, to secure an issue of $3,000,000 bonds of said company, bearing interest at the rate of 5% per annum, and payable January 1st, 1938, and now or hereafter outstanding and unpaid.

The mortgage made by the Sharon Railway Company, dated June 1st, 1889, to Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 4½% per annum, payable June 1st, 1919, of which $164,000 are now outstanding and unpaid.

82 The mortgage made by the Newcastle and Shenango Valley Railroad Company, dated July 1st, 1887, to the Farmers' Loan and Trust Company, as trustee, to secure an issue of bonds of said company, bearing interest at the rate of 6% per annum, and payable July 1st, 1917, of which $250,000 are now outstanding and unpaid.

SEC. 6. The said $79,918,000 general lien bonds hereby secured and reserved for the redemption, purchase or acquisition of a like amount of bonds (hereinafter called "old bonds") severally and respectively secured by the mortgages mentioned in the last above section, shall from time to time be issued, certified, and delivered when authorized

by resolution of the board of directors of railroad company only as follows, viz:

(a) Whenever and as often as the railroad company shall tender or cause to be tendered any such old bonds, or bonds issued in exchange therefor under the provisions of article two, section 2 hereof, together, in either case, with all unmatured interest obligations thereunto belonging, the trustee forthwith shall receive the same, and in exchange therefor shall certify and deliver to the railroad company, or upon its order, a like amount at par of the said bonds hereby secured and reserved.

(b) Whenever and as often as the railroad company, on or after the maturity of any such old bonds, or of bonds issued in exchange therefor, as above, or on or after a date eight months prior to the maturity of such old bonds, or of bonds issued in exchange therefor, as above, shall tender or cause to be tendered cash sufficient to purchase or to pay the same at par (and shall also provide to the satisfaction of the trustee for any interest due upon such bonds or accruing before their maturity), the trustee forthwith shall receive such cash, and in consideration thereof shall certify and deliver to the railroad company or upon its order an equivalent amount at par of the said bonds hereby secured and reserved.

83 All cash so received by the trustee shall be by it held and applied to the purchase at par, or, if such purchase be impracticable, to the payment at par of an equivalent amount of the old bonds, or of bonds issued in exchange therefor, as above, for the purchase or payment of which such cash shall have been deposited.

Each and every old bond, or bond issued in exchange therefor, as above, received by the trustee, shall be by it stamped with words "Not negotiable, but held in trust for the purposes declared in the first consolidated mortgage deed of the Erie Railroad Company, dated December 10th, 1895," and shall be by it held without extinguishment, as additional security for the payment of this mortgage debt until at least ninety-nine per cent of all bonds of the issue of which such bond is one, shall either have been paid and canceled, or shall have been received by the trustee hereunder, whereupon in its discretion it may cancel and surrender to the railroad company all bonds of such issue then in its possession.

Provided, however, that no bond of any of the issues enumerated under II, III, IV, and V, of section 5 of this article shall be canceled, unless or until all of the property mortgaged to secure the issue to which such bond belongs, shall have been lawfully vested free from other incumbrance in the railroad company, its successors or assigns, whereupon such property so mortgaged for such issue of old bonds forthwith, ipso facto, and without further conveyance, shall become and be part of the premises hereby mortgaged, and shall be hereby conveyed, as though herein expressly and specifically conveyed, mortgaged and pledged. Nevertheless, the railroad company, its successors and assigns, may, and shall, execute any and all trans-

fers, assignments or conveyances, from time to time, desired by the trustee in order expressly and specifically to subject to the lien of this indenture any property so acquired. Upon every such conveyance of the property mortgaged for any one of such
84 issues, the trustee may cancel and surrender to the railroad company all of the bonds of such issue then held by it, if not more than one per cent of the total issue shall then remain outstanding and unsatisfied.

If at the time of the maturity of any such bonds, the holder thereof shall decline to sell and to deliver the same at par and accrued interest, but shall require the payment and cancellation thereof, then upon such payment and cancellation the trustee shall certify and deliver to the railroad company, or upon its order, a like amount at par of said bonds reserved hereunder as though said matured bonds had been purchased and had been received by the trustee; but in every such case, if such matured bonds shall be of any one of the issues enumerated in II, III, IV, or V, of section 5 of this article, and the railroad company shall not as above provided have acquired the property mortgaged to secure such bonds, the railroad company shall take and execute and shall cause the company owning such property to take and execute such action, proceedings and instruments as in the opinion of the trustee may reasonably be required to subrogate the trustee to all the claim and security of the holder of such bonds, or else the railroad company shall cause to be issued and deposited with the trustee an amount of renewal or other bonds upon the same property at least equivalent thereto at par.

So long as the railroad company shall not be in any default under this indenture in respect of which some request, proceeding or action herein authorized shall have been made or taken by the trustee or by holders of bonds hereby secured, the trustee shall not collect or be entitled to collect, except with the assent of the railroad company, the interest on any old bond at any time held by it hereunder or on any bond now or hereafter pledged with the trustee under any provision of this indenture. Any sums so collected by it with the assent of the railroad company, unless it shall then be in default as afore-
85 said, shall at once be paid over to the railroad company except as hereinafter expressly otherwise provided.

The railroad company shall provide and maintain books wherein it shall register as the property of the trustee all such old bonds received by the trustee; and except as herein expressly provided no such old bond shall be canceled, unless the holder thereof, at time of maturity, shall require cancellation as a condition of surrender.

SEC. 7. Out of the remainder of the authorized issue hereunder, there shall be reserved, to be executed and to be certified by the trustee, not immediately, but from time to time only when and as called for by resolutions of the board of directors to the effect that the bonds so called for and their proceeds are to be used for such purpose, bonds to the amount of eight million and sixty-three thou-

sand dollars ($8,063,000) for the purchase and acquisition by the railroad company and simultaneous pledge hereunder to the trustee, as hereinafter provided, of valid certificates of shares of stock issued by the following companies (other than the shares of some of such companies deliverable to the trustee at the time of execution hereof), viz:

86 Name of company.	Par.	Shares.	Limit of exchange per share.
Buffalo, New York and Erie Railroad Company	$100	700	$150
Montgomery and Erie Railroad Company	10	15,000	7
Goshen and Deckertown Railroad Company	10	9,619	7
Jefferson Railroad Company	50	12	50
Rochester and Genesee Valley Railroad Company	100	4,058	100
Buffalo, Bradford and Pittsburgh Railroad Company	100	965	10
Middletown and Crawford Railroad Company	50	844	10
Suspension Bridge and Erie Junction Railroad Company	100	8	100
Tioga Railroad Company	50	6	10
Elmira State Line Railroad Company	100	292	100
Newcastle and Shenango Valley Railroad Company	50	2,915	5
Sharon Railroad Company	50	9,067	62½
Cleveland and Mahoning Valley Railroad Company	100	30,000	225

From time to time as and when the trustee shall receive from the railroad company any such shares, it shall in exchange therefor and when and as called for by resolution of the board of directors of the railroad company certify and deliver to it bonds reserved under this section in an amount not exceeding the value of such shares then so received at the limit of exchange above stated, which shares shall simultaneously be transferred into the name of the trustee.

Whenever it shall make any delivery of bonds reserved as provided in this section, the trustee shall require and receive from the railroad company in addition to such resolution of the board of directors the affidavit of one of its officers cognizant of the facts, stating the
87 amount in bonds actually requisite for the express purpose of enabling the railroad company to acquire such shares then to be received by the trustee. In no event shall any bonds be delivered by the trustee in excess of the amount so stated; but if such amount be less than that in this section limited as the price of such shares, the surplus so left in possession of the trustee may thereafter be by it certified and delivered to the railroad company when and as necessary to enable it so to acquire other shares above mentioned, at prices exceeding those in this section stated; provided, that such necessity and the reasons therefor shall also be stated in such affidavit of the officer of the railroad company; and that, except as to such surplus bonds, deliveries shall not be made in excess of the limits imposed by this section; and provided further, that the trustee shall not certify or deliver any such bonds in exchange for shares of the Newcastle and Shenango Valley Railroad Company, the Sharon Railroad Company, or the Cleveland and Mahoning Valley Railroad Company, until after the railroad company shall have acquired, as provided in section 2 of this article, the New York, Pennsylvania and Ohio Rail-

road, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 8. Out of the remainder of the authorized issue of general lien bonds hereunder there shall be reserved, to be executed and to be certified by the trustee, not immediately, but from time to time only when and as called for by resolution of the board of directors to the effect that the bonds so called for and their proceeds are to be used for such purpose, bonds to the amount of four million and ninety-two thousand dollars ($4,092,000) for retiring or acquiring, as hereinafter provided, equipment-bonds and equipment-trust certificates, warrants, notes or obligations, which shall mature as hereinafter set forth, and to reimburse the railroad company for such of them as from time to time hereafter it shall acquire.

88 I.

Equipment trust certificates, warrants, notes, and obligations of, or affecting certain equipment formerly of the New York, Lake Erie and Western Railroad Company and now of the Erie Railroad Company, maturing after November 1st, 1898, viz:

Baldwin Locomotive Works	$282,147.72
Car Trust of New York, Series C, D, E, F, and G	1,859,515.00

II.

Equipment trust obligations of and affecting certain equipment of the New York, Pennsylvania and Ohio Railroad Company, viz:

Bonds of the New York, Pennsylvania and Ohio Railroad Company, known as London equipment trust bonds of 1888, of which about £181,400 are now outstanding and unpaid.

Bonds of the New York, Pennsylvania and Ohio Railroad Company, known as equipment trust bonds of 1890, of which about £208,600 are now outstanding and unpaid.

In determining the value of sterling bonds, the trustee shall treat one pound sterling as the equivalent of five dollars.

From time to time, and only when and as the trustee shall receive from the railroad company, in addition to such resolution of the board of directors, the certificate of its president or one of its vice-presidents and of its treasurer or auditor, and also (if the trustee so desire) any additional evidence necessary to satisfy the trustee (1) that such equipment bonds, certificates, warrants, notes or obligations have been paid to the amount specified in such certificate, and (2) that such payment has not been stated or included in any prior certificate hereunder, the trustee shall certify and, upon the written order of the railroad company, shall deliver such reserved bonds at par to an amount equal to the payment of such outstanding obligations shown to have been made, by such certificate or other evidence, if any, required by the trustee; provided, however, that the trustee
89 shall not certify or deliver any such bonds on account of

"London equipment trust bonds of 1888" or "equipment trust bonds of 1890," until after the railroad company shall have acquired, as provided in section 2 of this article, the New York, Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 9. Out of the remainder of the authorized issue hereunder, there shall be reserved, to be executed, and to be certified by the trustee, not immediately but only when and as called for by resolution of the board of directors as next hereinafter provided, bonds to the amount of seventeen million dollars ($17,000,000), which from time to time, on and after January 1st, 1898, the trustee shall certify, upon resolutions of the board of directors of the railroad company, stating that such bonds, to the amount stated in such resolutions, or the proceeds thereof, are to be set aside separate and apart from all other assets and funds of the railroad company, and are to be used only for the construction or acquisition of branch lines or extensions subsequent to December 31st, 1897, or for the acquisition of stocks or bonds thereof subsequent to said date; or for the purchase or construction of rolling stock subsequent to said date; or for construction or betterments subsequent to said date, or for purchase of additional property subsequent to said date, all such construction, betterments, or property purchased to be upon, along, or appurtenant to lines of railway of the railroad company at the time of such use subject to the lien of this indenture, or upon, along, or appurtenant to the lines of railway or the terminal properties of some one or more of the companies mentioned in the schedule of stocks in the granting clauses hereof (other than the Buffalo Creek Railroad Company, the Hillside Coal and Iron Company, the Northwestern Mining and Exchange Company, or the Blossburg Coal Company), or of other companies of
90 whose capital stock, at least a majority in amount at the time of such use shall be pledged hereunder; or to reimburse the railroad company for outlays made subsequent to the thirty-first day of December, eighteen hundred and ninety-seven, for the purposes aforesaid or some one or more of them.

From and out of the $17,000,000 general lien bonds reserved under this section, the trustee shall certify and shall deliver to the railroad company, or upon its order, bonds as follows, viz.:

Upon January 1, 1898, or upon any day thereafter, but prior to December 31st, 1898, upon such resolution or resolutions of the board of directors of the railroad company, such amount of such general lien bonds, not exceeding $1,000,000 bonds par value, as specified in such resolution, shall be so certified and delivered.

In each and every calendar year after December 31, 1898, there shall be so certified and delivered such additional amount of such general lien bonds, not exceeding $1,000,000 par value in any calendar year, as from time to time shall be specified in similar resolutions; but in every instance, before certifying and delivering any of the $17,000,000 general lien bonds reserved under this section (except the $1,000,000 deliverable in the year 1898), the trustee shall require the

railroad company to furnish, in addition to such resolution of the board, the verified certificate or certificates of some person or persons cognizant of the facts, stating

(*a*) that all such general lien bonds and the proceeds of all such general lien bonds certified and delivered on or subsequent to the date of the last preceding resolution, or resolution and verified certificate, in respect of general lien bonds, as the case may be, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided:

(*b*) the amount of such general lien bonds so certified and delivered, which, or the proceeds of which, on or subsequently to
91 the date of such last preceding resolution, or resolution and verified certificate (as the case may be), shall have been actually used for any such purpose, or to reimburse the railroad company, as above provided, and specifically indicating each and every such acquisition or construction of any railroad, track, structure, betterment, rolling stock or other property, and each and every acquisition of the bonds or stock of any company owning or controlling any railroad or other property (which stock shall be acquired only when a majority of the total capital stock of such company can and shall have been or shall be thereby obtained unless such majority shall theretofore have been acquired and pledged hereunder) and also stating in detail the amount of bonds, or proceeds of bonds, and cash used or expended for each and every such purpose;

(c) that the price paid in general lien bonds or their proceeds for such construction or acquisition was not in excess of the fair value of the work done or property acquired, and that the bonds included in such verified certificate were sold, disposed of, or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting;

(d) that of the expenditures for which such certificate shall state that general lien bonds or their proceeds have been used, no part has been provided for by the use of prior lien bonds; and that of the expenditures for which reimbursement shall be claimed no part has been obtained by the railroad company out of prior lien bonds or their proceeds.

No new property shall be acquired by the use of any such general lien bonds or their proceeds in any one calendar year upon which property there shall be any lien or charges prior to this indenture (excepting any of the mortgages specified in sections 5 and 8 of this article which may attach thereto and any undetermined liens or charges incidental to construction and ordinary operating accounts) in excess of one million dollars; and, in case of the acquisition hereunder of any new property, every such verified certificate shall
92 further state whether the property so acquired is known or believed to be subject to any lien or charge prior to this indenture (excepting any of the mortgages specified in sections 5 and 8 of this article, and any undetermined liens of charges incidental to construction and ordinary operating accounts), and shall specify the

amount of any such prior lien or charge (other than as aforesaid) known or believed to exist; and in case any bonds or any shares of the capital stock of any other company shall have been acquired by the use of such bonds or their proceeds, every such verified certificate shall state whether the property of such other company whose bonds or stock shall have been so acquired is known or believed to be subject to any lien or charge prior to that securing such bonds of such company, and whether the company, whose capital stock shall have been so acquired, is known or believed to be indebted (except to the railroad company) in any amount (except for ordinary operating accounts) and whether its property is known or believed to be subject to any lien, charge, or indebtedness, and in each instance specifying the amount of any such debt, lien, or charge known or believed to exist. In every case of any such lien, charge, or indebtedness (except indebtedness to the railroad company or undetermined liens or charges incidental to construction or the lien of any of the mortages for which a reservation of bonds is made in sections 5 and 8 of this article or for ordinary operating accounts), and during the continuance of such lien, charge, or indebtedness, the railroad company shall, by appropriate instrument or instruments, reserve out of the $17,000,000 general lien bonds set apart by this section an amount at par equivalent to all such liens, charges, or indebtedness (except as aforesaid) affecting such property hereafter acquired, and the bonds so reserved shall be taken from the $1,000,000 bonds deliverable under this section in such calendar year, or in the next succeeding calendar year, and shall be executed, certified, delivered, and used only for the retirement or acquisition of such liens, charges, or indebtedness
93 in amounts equivalent at least to the par of the bonds delivered therefor, and all the liens, charges, or indebtedness so retired or acquired shall be canceled or held by the trustee as, in its judgment, shall best protect the holders of the bonds hereby secured.

Every such verified certificate shall be accompanied by the written statement of the president or of one of the vice-presidents, and of the auditor or treasurer, of the railroad company that they believe such certificate to be true, and that such bonds have been used and the expenditures therein certified have been made only for purposes properly chargeable to capital account of the railroad company, and that no part thereof has been used for ordinary maintenance of the lines of railway or other property owned or in any way controlled by the railroad company or for replacements or other purposes ordinarily treated by railroad companies as a part of their operating expenses. Together with such statements and verified certificates, there shall be delivered to the trustee certificates for all shares of stock and all bonds so acquired, and such further instruments and conveyances as may be necessary to vest in the trustee all new property so acquired, and, so far as may be, any and all obligations taken up or acquired with, or by, the said bonds or their proceeds; and also the written opinion of counsel for the railroad company to the effect that such instruments and conveyances are sufficient for that purpose, or

that no additional instrument or conveyance is necessary. The certificates for all shares of stock so acquired shall be duly transferred into the name of the trustee, and any bonds so acquired shall, if practicable, be transferred in like manner, or, if not susceptible of such transfer, they shall be plainly endorsed as the property of the trustee hereunder. Such resolutions, statements, verified certificates, and opinion shall be deemed and taken as plenary authority to the said trustee for its certification of such general lien bonds or of any one or more of them.

Except to retire or acquire liens, charges or indebtedness for
94 which bonds so used shall have been reserved as hereinbefore provided, general lien bonds in excess of an aggregate amount of $1,000,000 shall not be issued or certified under this section in any one calendar year; provided, however, and the appropriation of such $17,000,000 bonds in and by this section 9 is in all respects subject to the condition, and it is hereby expressly declared, that if the beforementioned Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, jointly but not severally, the survivors or survivor of them, from time to time, on or before January 1, 1898, by writing addressed to the railroad company and to the trustee, shall require the delivery to them jointly, or upon their joint order or orders, of the whole or any part of $2,000,000 of said bonds, the railroad company shall execute, and the trustee shall certify and deliver to them jointly, or upon their joint order or orders, bonds to the amount specified in such several requisitions to an aggregate amount not exceeding $2,000,000 of such bonds; but no such delivery shall impair the preceding provision for delivery of the residue of the $17,000,000 of bonds to the railroad company at various dates subsequent to December 31st, 1897, and shall be in addition to any deliveries under the foregoing provisions of this article.

C.

SEC. 10. The railroad company shall not and will not issue, negotiate, sell, or dispose of any bonds hereunder, in any manner other than in accordance with the provisions of this indenture, and the agreements in that behalf herein contained, and in issuing, selling, negotiating, or otherwise disposing of such bonds, from time to time, it shall and will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for purposes herein prescribed, and to and for no other or different purpose.

95 SEC. 11. The railroad company will make all lawful effort to pledge with the trustee hereunder the bonds above specified in section 5, III and V, at the several dates when the same shall respectively mature: provided that it shall not be required to pay more than par for any such bonds.

SEC. 12. Nothing in this indenture expressed or implied is intended, or shall be construed, to confer upon, or to give to, any person or corporation, other than the parties hereto and the holders of bonds issued under and secured by this indenture, any right, remedy, or

claim upon, under, or in respect of this indenture, or any covenant, condition, or stipulation thereof; all its covenants, conditions, and stipulations being intended to be and being for the sole and exclusive benefit of the parties hereto and of the holders of bonds hereby secured.

SEC. 14. Whenever any coupon bond or bonds amounting to $1,000 or to any multiple of $1,000, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds without coupons the railroad company shall issue, and the trustee shall thereupon certify and deliver in exchange for such coupon bond or bonds a like amount of registered bonds (without coupons), which registered bonds shall be for $500 or such convenient multiples thereof as the railroad company from time to time may establish, and shall bear interest at the same rate as the coupon bonds surrendered and from the date of the last matured coupon thereof. In every such case the trustee shall forthwith cancel the bond or bonds and coupons surrendered and deliver the same to the railroad company. The interest on such registered bonds without coupons shall be paid only to the several registered holders of such bonds or upon their written orders.

Whenever any such registered bonds shall be surrendered for
96 transfer, the railroad company shall issue, and the trustee shall certify and deliver to the transferee, a like amount of new registered bonds, upon surrender and cancellation of the bond or bonds transferred. For any such transfer of registered bonds without coupons the railroad company, at its option, may make a charge not exceeding one dollar for each new registered bond issued in exchange for any surrendered bond or bonds.

In case any bond issued hereunder shall become mutilated or shall be destroyed, upon the surrender of any such mutilated bond to the trustee, or upon filing with the trustee satisfactory evidence of such destruction, the railroad company upon receiving indemnity satisfactory to it, may, in its discretion, issue, and the trustee, in its discretion, may certify, a new bond, bearing the same serial number in lieu, substitution, or exchange for, and upon cancellation of, the bond so mutilated or in lieu of the bond destroyed.

SEC. 15. Any act or proceeding required or provided by any term of this indenture or of any bond or resolution herein recited to be done or performed by any board or officer of the railroad company shall and may, in event of any change in its existence, be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time be lawful sole successor of the railroad company.

ARTICLE TWO.

SECTION 1. The railroad company will well and truly pay and discharge, or will acquire and pledge hereunder, all of the old bonds mentioned in article one, section 5, I, II, and IV, and section 8, I

and II, at or before the several dates of maturity thereof, provided it shall then be lawfully authorized to issue bonds hereunder for that purpose as provided in article one hereof, and it will duly, punctually and regularly pay the interest on all such old bonds
97 until the same shall be paid and discharged or acquired and pledged hereunder, excepting, however, that the payment of the bonds of the New York and Erie Railroad Company, secured by the mortgage or charge created by the act of the legislature of the State of New York passed May 14, 1845, and amounting to the principal sum of $2,482,000 may be extended or renewed by the railroad company at or before maturity without impairment of the lien or the security of said bonds, for any period or periods, at not over four per cent per annum interest, principal and interest payable in gold, and that the lien hereof on the property embraced in the mortgage securing such bonds shall be subordinate to the lien of such bonds as so extended; and excepting further that neither the covenants nor restrictions of this section shall apply in respect of any bonds now or hereafter issued by the New York, Pennsylvania and Ohio Railroad Company, or of any corporation (other than the railroad company) successor to said company, unless or until the railroad now of said company, or securities of said company or of a successor company, shall have been acquired and subjected to the lien hereof pursuant to the provisions of article one, section 2, hereof.

SEC. 2. As and when, but no further than, expressly required by the terms of any of the old mortgages, the railroad company will from time to time cause to be issued thereunder bonds for delivery in exchange for other old bonds for which reservation is made in article one, section 5; but no issue shall be made thereunder that shall increase the aggregate old indebtedness of $79,918,000, or that, except for such exchange, shall increase the indebtedness as stated in said article one, section 5, secured by any one or more of said old mortgages; provided, however, that neither the covenants nor the restrictions of this paragraph shall apply in respect of any bonds now or hereafter issued by any of the companies enumerated in article one, section 5, III and V, unless all the stock of any
98 such company shall have been duly pledged hereunder, and then only in respect of the company of which all the capital stock shall have been so pledged.

SEC. 3. Having possession of the railroad now of the New York, Pennsylvania and Ohio Railroad as aforesaid, or securities therefor acquired and subjected to the lien hereof pursuant to the provisions of article one, section 2, hereof, the railroad company shall not and will not suffer or permit any default permitting any of the several lessors to terminate any of the existing leases of the Cleveland and Mahoning Valley Railroad, the Sharon Railroad, the Westerman Railroad, or the Newcastle and Shenango Valley Railroad, or any lease hereafter made to it, or for its benefit, of any franchises or property now or hereafter belonging to any of the said railroad companies.

In case and whenever it shall make default in paying any sum stipulated to be paid in any such present or future lease of any of the said railroads, the trustee, without affecting any of its rights hereunder, from time to time, in its discretion, may itself pay any sum so in default, and thereupon shall have and forthwith may assert a lien for such advances upon the premises hereby mortgaged and the proceeds thereof, which lien shall be entitled to priority in rank and payment from the income and profits of the mortgaged premises over any bonds hereby secured.

SEC. 4. The railroad company will (excepting as otherwise provided in its Buffalo and Southwestern second lien mortgage in respect of that railroad) duly and punctually pay all lawful claims and demands not hereinbefore enumerated, which, if unpaid, might take precedence over this indenture, and each and every company (except the Buffalo Creek Railroad Company) of whose capital stock the greater part is now pledged hereunder or hereafter shall be acquired and pledged hereunder as provided in section 9 of article one, at all times during the continuance of such pledge will duly and
99 punctually pay all lawful claims and demands, which, if unpaid, might take precedence of any mortgage securing bonds of such company, or which might, in any wise, impair the value of such capital stock of such company if pledged hereunder; and the railroad company will enforce any and all of its claims and demands against any such company only in such manner as not to prejudice or affect the bonds secured by this indenture.

The railroad company will also at all times take all such action as from time to time may be proper to preserve the corporate existence and corporate rights of every company of whose capital stock the greater part shall be pledged hereunder.

SEC. 5. The railroad company shall and will, from time to time pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the lines of railroad and other premises hereby mortgaged, or upon any part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this indenture shall be fully preserved; and if any company of whose capital stock the greater part is now pledged hereunder or hereafter shall be acquired and pledged hereunder as provided in section 9 of article one (excepting the Buffalo Creek Railroad Company or any coal company in respect of lands upon which mining shall have been abandoned) shall, at any time during the continuance of any such pledge, fail to pay all such taxes, assessments and charges lawfully imposed upon the property of such company or upon the income and profits thereof, it will itself pay and discharge the same.

SEC. 6. Except as herein otherwise expressly provided, the railroad company will not sell any bond or share of stock now or hereafter pledged by it under this indenture nor pledge or agree to pledge or hypothecate the same, except subject to the prior lien hereof; it will not by any voluntary act part with the ownership and title of such

bonds or stock, or of any part of such bonds or stock, or its
100 equity of redemption therein or the voting power thereof; it will, subject to the lien hereof, hold all and singular such stock (other than the shares of the Buffalo Creek Railroad Company) of any company of whose capital it may control the major part, and exercise its voting power thereon in such manner that it shall retain in itself the rights and powers of a majority shareholder in the capital stock of every such company; and as such holder of such stock it will not by affirmative vote, or by abstaining from voting, sanction or permit any increase of the capital stock of any such company or the creation of any mortgage or other lien upon the railroad or property of any such company, unless effective provision be made that all bonds secured by any such additional mortgage and all additional shares of such stock (which shares shall be fully paid and nonassessable) shall, at the time of their issue, be delivered and pledged to the trustee, to be by it held, subject to all the trusts of this indenture, with the same effect as if such bonds and shares had been delivered and pledged to it herein and at the time of the making hereof. This provision, however, shall not apply to any increase of stock or to the creation of mortgages or other liens by the Buffalo Creek Railroad Company. But nothing herein contained shall prevent the extension at maturity of any bonds now or hereafter pledged to or held by the trustee under this indenture, and at the time of such pledge secured by any mortgage of any company, or prevent the issue and substitution therefor of other bonds for equivalent amount, adequately secured by similar mortgage; it being distinctly understood that the time for the payment of the principal of any bonds so pledged hereunder may, at or before their maturity, be extended by the railroad company (not then being in default hereunder), with the consent of the company which, at the time of such consent, shall own or control the property upon which such bonds so to be extended may be a lien, and also that other bonds for an
101 equivalent amount, adequately secured by similar mortgages, may be issued in substitution therefor, and that in every such case such new bonds shall forthwith ipso facto come under the lien and grant of this indenture, and shall forthwith be delivered to the trustee.

ARTICLE THREE.

SECTION 1. The railroad company shall and will well, duly and punctually pay, or cause to be paid, to every holder of any bond issued hereunder and secured hereby, the principal and interest accruing thereon, at the dates and rates and in the manner mentioned therein, or in the coupons thereto belonging, according to the true intent and meaning thereof; without deduction from either principal or interest for any tax or taxes which it may be required to pay or retain therefrom under or by reason of any present or future law; and it shall and will pay every such tax. All coupons when paid shall forthwith be cancelled.

SEC. 2. All lines of railway and property of every kind, and all interest therein, when and as and to the extent hereafter acquired, as above provided, out of, or from bonds, or the proceeds of bonds, secured by this indenture, or otherwise pursuant to the provisions hereof, shall, without any further conveyance or assignment, immediately upon such acquisition, and subject to the terms and conditions of such acquisition, become and be subject to the lien of this indenture as fully and completely as though now owned by the railroad company, and expressly and specifically conveyed by, and embraced in, the granting clauses of this indenture; and the railroad company at all times will execute and deliver any and all such further assurances or conveyances as the trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

102 SEC. 3. Upon demand of the trustee from time to time the railroad company will grant, convey, confirm, assign, transfer, and set over unto the trustee all real and personal estate, corporate rights and franchises which in any way or manner it shall acquire as appurtenant to, or in, or for use upon, or for the business of, any railroad hereby mortgaged, or as appurtenant to, or in, or for use upon, or for the business of, any leasehold estate hereby mortgaged (including all railroads and leasehold estates which shall hereafter become subject to the lien of this mortgage), or of any railroad of which any stocks or bonds are or shall be pledged hereunder; and it shall and will also make, do, seal, execute, acknowledge, and deliver, or cause to be made, done, sealed, executed, acknowledged, and delivered all and every such further acts, matters, things, deeds, conveyances, bills of sales and transfers, and assurances in the law, for the better assuring, conveying, and confirming unto the trustee all and singular the hereditaments and premises, estates, and property hereby conveyed, or intended so to be, or which are hereby covenanted and agreed hereafter to be conveyed to the trustee, as it, or its counsel learned in the law, shall reasonably require for better effectuating and carrying out the provisions, objects, and purposes of this indenture, and for securing payment of the principal and interest of the bonds intended to be hereby secured; all which estates shall be held by the trustee in, under and upon the trusts, and for the uses and purposes, and subject to the powers herein mentioned, declared, given, implied, or expressed; and, it will endeavor to procure from all companies, of which the capital stock or bonds or any part of either is, or shall be, pledged hereunder, all conveyances or assurances in law necessary to bring under the lien of this indenture any and all property connected with or appurtenant to the property of any such company, that shall have been constructed or acquired with the proceeds of any of the bonds set apart by article one, section 3 and section 9.

103 But nothing expressed or implied in this indenture is intended, or shall be construed, to limit the right or power of the railroad company, hereby distinctly reserved, by the use of its credit or in any manner other than by the use of such reserved

bonds, to construct or acquire, other lines of railway, branches or extensions, or interests therein, free from the lien hereof.

SEC. 4. The railroad company shall and will, at its office or agency in the city of New York, keep a sufficient register or registers of bonds issued hereunder, which registers at all reasonable times shall be open to the inspection of the trustee; and, upon presentation for such purpose, it will register therein any coupon bonds issued under the provisions hereof; and it shall and will register therein all bonds without coupons issued under the provisions hereof. As to all bonds so registered, the person in whose name the same shall be registered shall for all purposes be deemed and regarded as the owner thereof, and thereafter payment of or on account of the principal sum in such bond mentioned shall be made only to such registered holder or upon his order, but such registration may be changed as hereinafter provided. All such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

Upon presentation of any coupon bond which shall have been registered as aforesaid, with the order or assignment of the registered holder, the same shall be transferred upon such register to the person named in such written order or assignment, and thereafter such transferee or transferees of such bond shall be held to be the owner or owners thereof with all incidental rights and powers, and from time to time such transfers may be made as the registered holder of any such bond for the time being may direct as aforesaid. The registered holder of any such coupon bond shall also have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter
104 the principal thereof shall be payable to any person presenting the same. Any holder of a coupon bond registered to bearer may cause such bond to be registered in the name of such holder with the same effect as a first registration thereof; and successive registrations as aforesaid may be made from time to time as desired. Such registration of any coupon bond shall not restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any interest obligation in respect of any registered bond which in any way on or after maturity shall be transferred or pledged separate and apart from its bond, shall be entitled to any benefit of or from this indenture, except after the prior full payment of the principal of all bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. Until default shall have been made in the due and punctual payment of any interest, or in the due and punctual payment of any principal sum, of any bond hereby secured, or in the due and punc-

tual performance and observance of any covenant or condition hereof obligatory upon the railroad company, and, until any such default continuing beyond the period of grace, if any, herein provided in respect thereof, shall have become the subject of some action hereunder by the trustee or by the bondholders as hereinafter authorized, or until a receiver shall have been appointed, or until the railroad company voluntarily shall have surrendered possession to the trustee as hereinafter permitted, the railroad company, its successors and assigns, shall be suffered and permitted in any manner,
105 and to any extent, not affecting the lien of this indenture, to retain actual possession of all and every the premises hereby mortgaged (other than bonds and certificates of stock) and the same and every part thereof, with the rights and franchises appertaining thereto, and the tolls, income, rents, issues and profits thereof, to manage, operate, collect, receive, use and enjoy in the same manner and to the same extent as if this indenture had not been made.

SEC. 3. In case default shall be made in the payment of any interest on any prior lien bond or on any general lien bond at any time issued under and secured by this indenture, or on any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8, and such default shall continue for a period of six months; or in case default shall be made in the due and punctual payment of the principal of any prior lien bond or of any general lien bond secured hereby, or when and as the same shall be demanded in the due and punctual payment of the principal of any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8; or in case default shall be made by the railroad company in the payment of any tax, assessment or other governmental charge lawfully imposed or levied upon any part of the mortgaged property and premises, or the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured; or in case the railroad company shall make default in the due observance and performance of its covenant of further assurance, or any other covenant, promise or condition herein contained, and any such default shall continue for a period of six months after written notice thereof from the trustee or from the holders of five per cent in amount of the bonds hereby secured; then, and in
106 each and every such case of default (provided, however, in respect of each of the three cases so indicated that it shall have continued for six months as aforesaid), the trustee personally, or by its agent or agents, attorney or attorneys, may enter into and upon all or any part of the railways, property and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and may exclude the railroad company, its agents and servants, wholly therefrom, and having and holding the same may use, operate, manage, and control said railways and other premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either

personally or by its superintendents, managers, receivers, agents, and servants or attorneys, to the best advantage, as well of the public as of the holders of the bonds hereby secured in accordance with law and with any statute relating to said railways and other premises or any part thereof, or to the operation thereof; and, upon every such entry, the trustee, at the expense of the trust estate, from time to time, by either purchase, repairs, or construction, may maintain and restore, and insure or keep insured, the rolling stock, tools and machinery and other property, buildings, bridges, and structures erected or provided for use in connection with said railways and other premises, and whereof it shall become possessed, as aforesaid, in the same manner and to the same extent as is usual with railway companies, and likewise from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals and replacements and useful alterations, additions, betterments and improvements thereto and thereon, as well in respect of the rolling stock or equipments as in respect of the railways and appurtenances and other subject matters as to it may seem judicious; and it may collect and receive all tolls,
freights, incomes, rents, issues, and profits of the same and
107 every part thereof, and also the income from stocks and bonds
pledged hereunder, and after deducting the expenses of operating said railways, and other premises and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the prior lien bonds hereby secured shall not have become due, to the payment of the interest remaining in default in the order of the maturity of the installments of such interest, first, upon any and all "prior lien bonds," and, after satisfaction thereof, then upon any and all "general lien bonds," and next, if the principal of the general lien bonds shall have become due by declaration or otherwise, to the payment of the principal of all general lien bonds; such payments in every instance to be made ratably to the persons or parties entitled thereto without discrimination or preference; but,

In case the principal of the prior lien bonds shall have become due by declaration or otherwise, first, to the payment of the accrued interest in the order of the maturity of the installments thereof, upon any and all prior lien bonds, and next to the payment of the principal of all prior lien bonds, and, after satisfaction thereof, to the payment in like manner of the interest accrued upon any and all general lien bonds, and finally to the payment of the principal of all general lien bonds; in every instance such payments to be made ratably to the persons or parties entitled to such payment, without any discrimination or preference;

108 These provisions, however, not being intended in any wise to modify the provisions of section 1 of this article.

Upon and during such continuance of any such default, either with or without entry, the trustee shall have, exercise, and enjoy the right to vote on all shares of stock pledged or agreed to be pledged hereunder, and for the benefit of the holders of bonds hereby secured to receive and collect all interest moneys and dividends maturing or payable upon all pledged bonds and stocks, and as holders of such shares of stock and of such bonds pledged or agreed to be pledged in this indenture, to perform any and all acts, or to make or execute any and all requests, requisitions, or other instruments.

SEC. 4. In case default shall be made by the railroad company in the payment of any interest on any prior lien bond, and such default shall continue for a period of six months, then and in every such case of continuing default, upon the written request of the holders of twenty-five per cent in amount of the prior lien bonds hereby secured then outstanding, the trustee shall, by notice in writing delivered to the railroad company, declare the principal of all prior lien bonds hereby secured then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in any wise notwithstanding.

In case default shall be made by the railroad company in the payment of any interest on any prior lien bond or any general lien bond hereby secured at any time issued and outstanding, and such default shall continue for a period of six months, then and in every such case of continuing default, upon the written request of the holders of twenty-five per cent in amount of the general lien bonds
109 hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all general lien bonds hereby secured, then outstanding, to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in any wise notwithstanding.

Each and every provision of this section is, however, subject to the condition (as to each of said two issues of bonds respectively), that if at any time after the principal of either of said two issues shall have been so declared due and payable, all arrears of interest upon all bonds of such issue shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds of such issue hereby secured then outstanding, by like written notice to the railroad company and to the trustee, may waive such default and its consequences as to such issue; but no such waiver shall extend to or affect any bonds of the other issue or any subsequent default as to either issue, or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other lawful reason, or shall have been determined adversely to the trustee, then and in every such case, the railroad company shall be restored to its former position and rights in respect of the mortgaged premises and the shares of stock and bonds, and other property, herein pledged or agreed to be pledged; and, upon the written request of the railroad company, the trustee shall do, make, execute, acknowledge and deliver such acts, deeds, instruments, and assurances in the law as may be required to effectuate such
110 purpose; but, nevertheless, all rights, remedies, and powers of the trustee shall survive and continue as though no such proceedings had been taken.

SEC. 5. In case default shall be made by the railroad company in the payment of any interest on any prior lien bond or on any general lien bond secured by this indenture, or on any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8, and such default shall continue for a period of six months; or in case default shall be made by the railroad company in the due and punctual payment of the principal of any prior lien bond or of any general lien bond secured hereby, or when and as the same shall be demanded in the due and punctual payment of the principal of any bond secured by any mortgage recited in article one, section 5, I, II, and IV, or in section 8; or in case default shall be made by the railroad company in the payment of any tax, assessment or other governmental charge lawfully imposed or levied upon any part of the mortgaged property and premises or the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured; or in case the railroad company shall make default in the due observance and performance of its covenant of further assurance, or any other covenant, promise or condition herein contained, and any such default shall continue for a period of six months after written notice thereof from the trustee or from the holders of five per cent in amount of the bonds hereby secured, then, and in each and every such case of default (provided, however, in respect of each of the three cases so indicated, that it shall have continued for six months as aforesaid), the trustee, with or without entry, personally or by attorney, in its discretion (a) may sell to the highest and best bidder, in one lot and as an entirety, all and singular the mortgaged property and premises, bonds, and
111 stocks, rights, franchises and interests, lands and appurtenances, and all right, title and interest, claim and demand therein, and right of redemption thereof; which sale shall be made at public auction at such place in the city of Elmira, in the State of New York, or at such other place on the railroad hereby mortgaged, at such time and upon such terms as may be specified in the notice of sale to be given as herein provided; or (b) may proceed to protect and enforce

the rights of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and to enforce any of its rights or duties hereunder.

Upon either (c) the written request of the holders of twenty-five per cent in amount of the general lien bonds, in case of any such continuing default, or (d) the written request of the holders of twenty-five per cent in amount of the prior lien bonds at the time outstanding, in case of any such continuing default other than in the payment of the principal or interest of the general lien bonds, it shall be the duty of the trustee upon being indemnified as hereinafter provided to take all needful steps for the protection and enforcement of its rights and the rights of the bondholders secured hereby, and to exercise the powers of entry and sale herein conferred, or both, or to take appropriate judicial proceedings according to such request, or in default of specific instructions by such bondholders to proceed by action, suit, or otherwise, as the trustee being advised by counsel learned in the law shall deem most expedient in the interest of the holders of the bonds hereby secured.

Provided, nevertheless, that no foreclosure of this mortgage
112 or sale of the mortgaged premises pursuant to judicial proceedings or under the powers of sale conferred upon the trustee hereunder, shall affect any right or lien of the holders of the prior lien bonds or accelerate or precipitate the maturity thereof, unless such foreclosure or sale be had upon the written request of the holders of twenty-five per cent in amount of the prior lien bonds then outstanding; it being the intention that the lien and rights of such prior lien bonds shall continue unaffected by any sale or foreclosure hereunder unless made upon such request of holders of prior lien bonds; but that in case of any default the trustee, in its discretion, may make, and such holders of twenty-five per cent in amount of general lien bonds may require, a sale or foreclosure subject to the prior lien bonds, and not otherwise, unless a sale or foreclosure shall have been requested by the holders of twenty-five per cent in amount of the prior lien bonds as above authorized.

Notice of any sale pursuant to any provision of this indenture shall state the time and place, when, and where, and the terms upon which the same is to be made, and shall contain a brief description of the property to be sold, and shall be sufficiently given if published once in each week for six successive weeks prior to such sale in one newspaper at that time published in each of the cities of New York, N. Y.; Buffalo, N. Y.; Newark, N. J.; Susquehanna, Pa.; Cleveland, O.; Indianapolis, Ind.; and Chicago, Ill.

Upon the completion of any sale or sales under this indenture the trustee shall make, execute, and deliver to the accepted purchaser or

purchasers a good and sufficient deed, or good and sufficient deeds, of conveyance, for the property and franchises sold.

In case the mortgaged and pledged premises shall be sold upon a default hereunder and such sale shall be made not subject to the lien of the prior lien bonds, hereby secured, the whole of the principal sum of all the bonds of both issues hereby secured, if not previ-
113 ously declared due, shall at once become due and payable, anything in said bond or bonds or herein contained to the contrary notwithstanding.

In case of any sale or sales made subject to the lien of the prior lien bonds, the whole of the principal of all the general lien bonds, if not previously declared due, shall at once become due and payable, anything in said bond or bonds or herein contained to the contrary notwithstanding; but no such sale made subject to the lien of the prior lien bonds, shall in anywise affect the maturity or lien of the prior lien bonds or any right or remedy in respect thereof.

SEC. 6. None of the remedies provided in the preceding sections 3 and 5, shall apply, nor shall they be enforced, by reason of any default, in respect of any of the old bonds or obligations specified in article one, section 5, IV, and section 8, II, until after the railroad company shall have acquired, as provided in section 2 of article one, the New York, Pennsylvania and Ohio Railroad, or the control thereof, and shall have subjected the same to the lien of this indenture.

SEC. 7. For all purposes and within the meaning of the preceding sections 3, 4 and 5, and also sections 13 and 16 of this article, any default in payment of principal or interest of any prior lien bonds shall constitute a default entitling the holders of general lien bonds to all rights and remedies hereunder as though such default were in respect of general lien bonds.

SEC. 8. Any sale or sales completed under or by virtue of this indenture, shall operate to divest all right, title, interest, claim and demand whatsoever, either at law or in equity, of the railroad company of, in and to the premises hereby mortgaged, and shall be a perpetual bar both at law and in equity against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the mortgaged premises, or any part or parcel
114 thereof, by, from, through or under the railroad company, its successors and assigns, or any of them: provided, however, that in case of a foreclosure or sale hereunder made subject to the lien of the prior lien bonds, then and in such event the lien of the prior lien bonds shall continue unimpaired, and the holders thereof through the trustee, or otherwise as in this indenture provided, shall have and may thereafter assert all their rights and remedies to the same extent as though there had been no foreclosure or sale hereunder.

Any sale pursuant to any provision hereof, because of any default of the railroad company, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or some judgment or decree of foreclosure and sale made by any court of competent jurisdiction, shall be made subject to the lien

of any mortgage or mortgages prior to this indenture upon any property hereby conveyed to the extent of such lien or liens respectively.

SEC. 9. The trustee may, from time to time adjourn any sale to be made by it under the provisions of this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and, so adjourning such sale, it may without further notice or publication make sale of the mortgaged premises at the time and place to which the same shall be so adjourned.

SEC. 10. The receipt of the trustee shall be sufficient discharge to the purchaser or purchasers of the property, sold as aforesaid, for the purchase money, and no such purchaser or purchasers, or his, their or its representatives, vendees, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication or non-application of
115 any such purchase money, or any part thereof, or be bound to inquire as to the authorization, necessity, expediency or regularity of any such sale.

SEC. 11. The proceeds or avails of any sale under any provision of this indenture, and the purchase money paid thereon shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustees, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances made and incurred by the trustee in managing and maintaining the property hereby conveyed or so intended to be, and of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens to which such sales shall have been made subject.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of section 1 of this article; provided, that the prior lien bonds shall be first paid in full as to both principal and interest, before any payment shall be made on the general lien bonds, unless such sale shall have been made subject to the continuing lien and rights of the prior lien bonds, in which event and arrears of interest in default on the prior lien bonds shall first be paid under this second paragraph, and with this exception the entire payment under this second paragraph shall go to the holders of the "general lien bonds" or the coupons thereof, as above provided.

116 Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 12. The railroad company shall not and will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force in any locality where the mortgaged premises, or any part thereof, may or shall be situate, nor will it claim, take or insist on, any benefit or advantage from any law now or hereafter in force, providing for the valuation or appraisement of the mortgaged premises, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by the Congress of the United States or by the legislature of any State to redeem the property so sold, or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws; and it agrees that it will not hinder, delay or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SEC. 13. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture or for the execution of any trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, without first giving to the trustee written notice of the fact that default has occurred and continued as hereinbefore provided, nor unless also the holders of twenty-five per cent in amount of the issue of bonds hereby secured and affected by such default and then outstanding in respect of which such holder requests action,
117 shall have made written request of the trustee, and shall have afforded to it reasonable opportunity either itself to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name, nor unless also they shall have offered to the trustee adequate security and indemnity against the cost, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared in every such case at the option of the trustee to be conditions precedent to the execution of the powers and trusts of this indenture and to any action, or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, but that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons according to the tenor and terms of the two issues of bonds hereunder issued and hereby secured. A default in the payment of interest upon general lien bonds only shall not be deemed a default affecting prior lien bonds.

SEC. 14. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee or to the holders of bonds secured hereby is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or existing at law or in equity or by statute.

SEC. 15. The personal property and chattels hereby conveyed,
118 or intended so to be, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the said railroads and part thereof, and are to be used and sold therewith and not separate therefrom.

SEC. 16. Upon proper indemnity to the trustee, the holders of a majority in amount of each of the two issues of bonds hereby secured and then outstanding (the holders of each issue being considered and counted as a separate class) in case of any subsisting default other than in the payment of the interest on or principal of the general lien bonds, or the holders of a majority in amount of general lien bonds if such default be only as to interest upon, or principal of, those bonds, anything in this indenture contained to the contrary notwithstanding, from time to time, shall have the right to direct and control any and all proceedings theretofore instituted for any sale of the premises hereby conveyed and pledged, or agreed or intended so to be, or for the foreclosure of this indenture, or for the appointment of a receiver, or any other proceedings hereunder, and for that purpose to instruct the trustee to continue or to discontinue any such proceedings hereunder; and no such action by the trustee or by such majority shall extend to, or be taken to affect, any subsequent default or to impair any right resulting therefrom. But nothing herein is intended to limit any power of the trustee to exercise any right or to apply or enforce any remedy under any of the provisions of this indenture, unless the trustee be otherwise expressly directed, as in this section provided, by the requisite number and class of holders of bonds hereby secured.

SEC. 17. In case of any sale hereunder, any and all purchasers in making settlement or payment, shall be entitled to turn in any bonds and any matured and unpaid coupons hereby secured, estimating the value of such bonds and coupons for that purpose at the sum
119 payable out of the net proceeds of such sale to the holder or holders of such bonds and coupons as his or their ratable share of such net proceeds, after allowing for the proportion of the total payment required to be made in cash for the cost and expenses of the sale or otherwise; and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, such purchaser or purchasers may make such settlement by receipting on each bond the amount to be credited thereupon; and at any and every such sale any or all of the bondholders may bid for and purchase such property, and upon compliance with the terms of sale may hold and retain and dispose of such property without further accountability therefor.

SEC. 18. Any request in writing or other instrument required by this indenture to be signed and executed by bondholders may be in

any number of concurrent instruments of similar tenor and date, and may be signed or executed by such bondholders in person or by attorney in fact. Proof of the execution of any such request or other instrument, and of the holding by any person of any of said coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, if made in the following manner:

The fact and date of the execution by any person of any such request or other instrument may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as the holder of bonds, and the amounts and issue numbers of the bonds held by such person, and the date of his holding the same, may be proved by a certificate in writing executed by any trust company, bank, bankers, or other depositary (wherever situated), whose cer-
120 tificate shall be deemed by the trustee to be satisfactory, showing that such person had on deposit with such depositary the bonds described in such certificate at the date therein mentioned. Such proof shall be conclusive in favor of the trustee with regard to any action taken by it under such request or other instrument.

SEC. 19. Upon filing a bill in equity, or upon commencement of any other judicial proceedings to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein and hereby conferred and provided to be exercised by the trustee upon the occurrence and continuance of default as hereinbefore provided, and as matter of right the trustee shall be entitled to the appointment of a receiver or receivers of the premises hereby mortgaged and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer.

SEC. 20. No delay or omission of the trustee or of any holder of bonds hereby secured to exercise any right or power arising from any default continuing as aforesaid shall exhaust or impair any such right or power, or be construed to be a waiver of any such default, or an acquiescence therein.

SEC. 21. The railroad company, at any time hereafter before full payment of the bonds secured hereby, and whenever it shall deem expedient for the better security of such bonds, although there be then no default entitling the trustee to enter into possession, may surrender and deliver to the trustee full possession of the whole or any part of the property, premises, and interests hereby conveyed, or intended so to be, for any period, fixed or indefinite. Upon such surrender and delivery the trustee, at its option, may enter into and upon the premises so surrendered and delivered, and may take and receive possession thereof, for such period, fixed or indefinite,

121 as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon and to maintain such possession, though beyond the expiration of any prescribed period. Upon any such voluntary surrender and delivery of said property and premises, or of any part thereof, the trustee, from the time of its entry, shall and will work, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall and will receive and apply the income and revenues thereof as provided in section 3 of this article. Upon application of the trustee, and with consent of the railroad company, if there be then no subsisting default hereunder, and without such consent, if there shall then be a subsisting default, a receiver or receivers may be appointed to take possession of and to operate and manage the whole or any part of said property, with all the rights, powers, and duties by this section conferred upon the trustee, and in every case when a receiver of the whole or any part of the said property shall be appointed under this section or otherwise the trustee shall be entitled to receive all the income and profits of such property for the benefit of the holders of bonds hereby secured.

SEC. 22. In the event of any sale, pursuant to any provision hereof, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale made by any court of competent jurisdiction, the whole of the property hereby mortgaged and pledged shall be sold in one parcel and as an entirety, including all the rights, titles, estates, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature; and this provision shall bind the parties hereto and each and every of the holders of the bonds and coupons hereby secured or intended so to be. And the trustee and its successors are hereby appointed the true and lawful attorney or
122 attorneys, irrevocable, of the railroad company, in its name and stead to make all necessary deeds and conveyances of property and all necessary transfers of the shares of stock or bonds or other obligations thus sold, and for that purpose it and they may execute all necessary acts of assignment and transfer, and may substitute one or more persons with like power, the railroad company hereby ratifying and confirming all that its said attorney or attorneys, or such substitute or substitutes, shall lawfully do by virtue hereof.

SEC. 23. Until default shall be made by the railroad company in the payment of either the principal or interest of the bonds hereby secured, or otherwise, as set forth in sections 3 and 5 of this article or either of them, and until the trustee, as herein authorized, shall have taken some proceeding in respect thereof, or until a receiver shall have been appointed as hereinbefore permitted, the railroad company shall be entitled to receive all interest payable, and dividends declared, in respect of any bonds or stocks by or pursuant to

this indenture pledged or transferred to the trustee as collateral security for the payment of the bonds issued hereunder, the coupons for such interest from time to time to be delivered by the trustee to the railroad company for such purpose, and immediately upon such delivery to be collected and canceled to the satisfaction of the trustee; suitable orders, in favor of the railroad company, or its nominee, for the payment of such dividends from time to time to be executed and delivered by the trustee to the railroad company.

SEC. 24. Until default be made as aforesaid, and some action in respect thereof shall have been taken by the trustee, or by bondholders, as herein authorized, the railroad company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions or purposes of this indenture and with the same force and effect as though such pledge had not
123 been made. From time to time the trustee shall give to the railroad company, or its nominee, suitable proxies for such purposes.

SEC. 25. The trustee may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any and all companies whose shares are pledged hereunder, and for such purposes from time to time it may sell or assign, transfer and deliver so many shares of the stocks of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; provided, however, that no transfer under this provision shall be made which shall impair the trustee's control of any corporation whose shares shall be so transferred; and subject to this limitation the trustee may make such other arrangements as it shall deem necessary for the protection of the trust hereunder.

SEC. 26. If at any time the obligors in any of the bonds at any time pledged hereunder shall fail to make payment of either the principal or interest thereof, according to the tenor of such bonds, then, unless the trustee shall hold hereunder more than a majority of the stock of such obligor, (1) in any case where the trustee holds more than eighty-five per cent in amount of any one or more issues of the bonds of such obligor, and (2) in other cases according to its discretion, the trustee, upon the written request of the railroad company, and not otherwise, shall cause proper and apt proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose the mortgage, or mortgages, by which such bonds shall be secured, and if the property covered by such mortgage, or mortgages, shall be sold under foreclosure, it shall, if it hold more than eighty-five per cent in amount of the bonds thereby secured cause such property to be purchased for and in the name or in behalf of the railroad company, if the amount bid at such sale shall not exceed the full
124 amount due on the entire issue of such bonds, and the cost and expenses of such suit and sale, and the railroad company shall furnish the necessary cash to pay such cost and expenses, any claims having priority of lien or in equity over the mortgage foreclosed

and the dividends accruing from such sale on any bonds not held by the trustee. If such property shall not be bought by the trustee, the trustee shall receive out of the proceeds of such sale the dividend accruing on the bonds held by it, and shall apply the same as herein provided. When any railroad or railroad property shall be purchased by the trustee, for and in the name of the railroad company, as above provided, the lien of this indenture immediately and ipso facto shall attach to and bind the property so purchased.

If at any time the obligors in any of the bonds at any time pledged hereunder shall fail to make payment of either the principal or interest thereof, according to the tenor of such bonds, and by reason thereof foreclosure or other proceedings shall be taken, otherwise than at the instance of the trustee, the trustee shall take such steps as in its discretion shall be best calculated to protect its interests hereunder in respect of such bonds, and for this purpose it may join in any plan or agreement of reorganization, and may accept its share of new securities under such plan.

No such action of the trustee shall relieve the railroad company from any liability hereunder by reason of such default, nor from any of the consequences thereof.

When the trustee shall receive moneys arising from the foreclosure of any mortgage executed to secure the payment of bonds pledged hereunder, or from any sale of any railroad mortgaged to secure any such bonds, it shall apply such moneys, whether principal or interest, in the manner provided in section 29 hereof, for the application of money arising from the release of real property mortgaged hereunder.

In the event of the dissolution of any corporation of whose capital stock the greater part shall be held hereunder by the trustee, such action may be taken and such power be exercised with reference thereto as the trustee in its discretion shall deem most expedient for the conservation of the interest of the trust estate in such property, either through the agency of a successor corporation or otherwise.

SEC. 27. No assignment or pledge hereunder of any shares of stock of any company or companies now or hereafter deposited hereunder, shall prevent the consolidation or merger of any one or more of said companies with, or its sale to, the railroad company, but such consolidation, merger, or sale may be made under any laws to which such companies may then be subject, anything in this indenture contained to the contrary notwithstanding: Provided, however, that such consolidation, merger, or sale shall be made only upon such terms as shall be approved by the trustee, or by the holders of a majority in interest of the bonds secured by this indenture. In the event of consolidation or merger of any one or more of the said companies with, or its sale to, the railroad company, this indenture immediately shall become and be a lien upon the property of the company so consolidated or merged with, or sold to, the railroad company, with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured shall always have as full and complete a lien

upon such property as that herein created by the pledge of the stock and bonds of such constituent companies, to the trustee hereunder.

Neither shall the assignment or pledge hereunder of any capital stock of any company or companies prevent the consolidation or merger of any such companies with each other; but such consolidation or merger may be made under any laws to which such companies may then be subject, anything in this indenture contained to the contrary notwithstanding: Provided, however, that such consolidation or merger shall be made only upon such terms as shall be approved by the holders of a majority in amount of the bonds secured
126 by this indenture; and that the portion of the capital stock of any such consolidated or merging company (but never less than a majority thereof), issued for and in lieu of any stock previously pledged hereunder, shall always bear to the total capital stock a proportionate relation at least as high as that borne by such previously pledged stock to the total capital stock of such constituent companies. Such portion of such stock of such consolidated or merging company shall be assigned to and deposited with the trustee, and shall become and be subject to the lien of this indenture with the same force and effect as if expressly pledged by this indenture; and the holders of the bonds hereby secured shall always have a lien upon such portion of such stock of such consolidated or merging company as full and complete as upon the stock and bonds of such constituent companies, by reason of the pledge thereof hereunder.

The trustee may do any and all things proper to carry into effect the purposes of this section, and in order to facilitate the merger in whole or in part, as authorized by law, of any railroad the trustee may transfer into the name of the railroad company, under such restrictions as it may deem sufficient for the protection of the holders of the bonds secured hereby, the shares of any company about to be so merged, but the certificates in the name of the railroad company shall be forthwith delivered to and held by the trustee hereunder, and the railroad company shall simultaneously execute such irrevocable instruments as the trustee shall deem necessary in order to enable it to transfer such shares back into its own name if at any time it shall deem such a course expedient for the protection of the holders of the bonds hereby secured.

SEC. 28. In case of any default hereunder, if in order to preserve the franchises of the railroad company and to avoid foreclosure and sale involving the organization of a successor company, any plan of reorganization shall be proposed with provisions for the modifica-
127 tion of this mortgage, so far as to authorize and require the creation of new liens upon the mortgaged premises prior and superior to the lien hereof; then and in every such case registered holders of four-fifths in amount of all outstanding bonds hereby secured, by writing may direct the trustee in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan; which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders

of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition, that no bond hereby secured, and then outstanding, shall be changed as to amount or date of payment of principal or rate or dates of payment of interest. Thereupon, but not otherwise, the trustee shall by writing acquiesce in such provisions of such plan, and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured, shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in New York County, New York; Passaic County, New Jersey; Susquehanna County, Pennsylvania; Marion County, Ohio; Huntington County, Indiana; Cook County, Illinois, and thenceforth shall be deemed to be part of this indenture, and thereafter the lien of this indenture, and of the bonds hereby secured, shall be deemed to be and shall be subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement; provided, that the consent of the holders of four-fifths of the prior lien bonds shall be requisite to the creation of any new lien or charge in priority to the prior lien bond.

128 Registration for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 14 of article one of this indenture.

SEC. 29. Provided there shall then be no continuing default in respect of which the trustee shall have taken some proceedings herein authorized, the trustee, upon request of the railroad company, at any time or times, in its discretion, may release from the lien and operation of this indenture and of the bonds hereby secured, any premises acquired, held, or used by the railroad company for the purpose of stations, depots, shops, or other buildings or erections, or for other uses not connected with the maintenance or operation of some part of the lines of railway then subject to the lien of this indenture, or any premises which may have been acquired or held for the supply of gravel, fuel, and other materials for the purposes of such lines of railway; provided that in the judgment of the trustee, at the time of such release such premises shall no longer be requisite for the purposes for which the same shall have been so acquired or used, or necessary or expedient to be retained for use in connection with such lines of railway, and likewise it may release any parts of the line of track or roadway, or of the depot grounds, buildings, or accommodations connected therewith, which at the time of such release may have been thrown out of use and have ceased to form part of such lines of railway by reason of the straightening, alteration, or abandonment of such part of the lines of railway; but the power of release given by this article is to be exercised only in case the railroad company shall sell or contract to sell the property so to be

released, because no longer required for the uses or purposes of such railways, and shall require the same to be released, in order to give good title to the purchaser or purchasers thereof. The proceeds of any and all such sales shall, unless some other disposition thereof be required by some prior mortgage, be invested in the purchase
129 of other property, real or personal, which shall be conveyed in trust by the railroad company to the trustee, subject to all the trusts hereby declared, or in the purchase of bonds hereby secured (which bonds shall forthwith be canceled and delivered to the trustee); or in betterments or improvements, on in some other way, to the benefit of the mortgaged premises, and satisfaction of the trustee. When such released premises shall have been thrown out of use or shall have ceased to be required, by reason of changes of the line of the road, on or along the routes aforesaid, or any of them or change of depot grounds, buildings or other accommodations, the substitutes therefor acquired by the railroad company, ipso facto, shall become and be subject to the lien of this indenture, the same as though specifically mortgaged hereby, and as a condition of such release they shall be conveyed to the trustee by appropriate deeds upon the trusts and for the purposes of this indenture. The railroad company, from time to time, shall also have full power, according to its discretion, to dispose of such portion of the machinery, equipments and implements, at any time held or acquired for the use of any lines of railway, as may have become unfit for such use, replacing the same by new machinery, equipment or implements, which shall become subject to the operation of this indenture.

In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article of this indenture be required to see to the application of the purchase money.

SEC. 30. In case at any time it shall become necessary, or in the judgment of the trustee be for the interest of the bondholders hereby secured, or for the benefit of the mortgaged property, that the railroad company shall make changes or alterations in, or substitutions of, any leases, contracts or trackage rights by which the railroad company now secures access to any point or points, the railroad
130 company, with the written consent of the trustee, may make any such changes, alterations or substitutions.

The railroad company, with the written consent of the trustee, may make, or to cause to be made, executed and delivered, all such instruments in writing as may be proper and necessary to carry out and perfect any and all changes, alterations or substitutions authorized in this section when and as the same may be made.

At the same time, ample provision shall be made by apt and sufficient instruments in writing, so that such modified, altered or substituted leases, contracts or trackage rights shall be, and forthwith become bound by, and subject to, the terms of this indenture in the same manner as the then existing leases, contracts and trackage rights.

SEC. 31. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney be selected with reasonable care; or for anything whatever, in connection with this trust, except misconduct or gross negligence; the trustee shall not be personally liable for any debts contracted by it or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. The trustee shall not be under any obligation to take any action towards the execution or enforcement of the trust hereby created, which in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder or to take any action in respcet thereof except after written notice of such default from one or more of the holders of the bonds hereby secured, together with
131 tender of the indemnity aforesaid, anything herein contained to the contrary notwithstanding; neither shall the trustee in any event be responsible for the proper recording of this indenture or for the filing of the same as a chattel mortgage.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

SEC. 32. The terms or words "the trustee," "said trustee," and "the said trustee," or any other equivalent term, as used in this indenture (except when otherwise clearly indicated), shall be held and construed to mean the trustee or trustees for the time being, whether original or successor, and the words "trustee," "bond," "bondholder," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," whether or not so expressed.

SEC. 33. The trustee, or any trustee hereafter appointed, may resign and be discharged of the trusts created by this indenture by giving notice thereof to the railroad company and to the bondholders, by publication, at least twice a week, for six successive weeks, in one of the newspapers at that time published in each of the cities of New York, N. Y., and London, England, and by due execution of the conveyance herein required.

The trustee may be removed at any time by an instrument in writing under the hands and seals of three-quarters in amount of the holders of the bonds secured hereby and then outstanding.

SEC. 34. In case a trustee shall die, or shall resign or be removed as herein provided, a majority in amount of holders of the bonds then outstanding hereunder shall have the right and power by instrument in writing under their hands and seals to appoint a new trustee to fill such vacancy, and, until such appointment be so made by a majority of the bondholders, the board of directors of the railroad com-
132 pany may appoint a new trustee to fill such vacancy for the

time being, and in every such case the new trustee so appointed, while he or it continues as such, shall have and possess and be subject to the like rights, powers, estates, and duties as though originally trustee hereunder. Should any vacancy be filled by the railroad company under the foregoing provision in that behalf, it shall be competent for any judge of the United States in and for the Second Circuit, or for any court of competent jurisdiction in the premises, upon the application of a majority in amount of the bondholders, to annul such appointment, and to appoint as trustee the nominee of such majority.

SEC. 35. If at any time or times in order to conform to any law of any State in which the railroad company now holds or at any time hereafter shall hold any property, the railroad company shall so request, the trustee shall unite with the railroad company in the execution, delivery, and performance of all instruments and agreements necessary or proper to constitute an additional trustee or trustees to have, enjoy, and exercise in association and equally with the trustee originally named herein or its successor appointed as hereinbefore provided, any and all powers, rights, and estates hereunder, excepting only those specified in article one and in article four, sections 23, 24, 25, and 27, and the custody of the securities therein mentioned, which powers, duties, and estates shall be possessed and exercised, and such custody retained by said original trustee or such successor, notwithstanding the appointment under this section of any co-trustee or co-trustees.

SEC. 36. Should any deed, conveyance, or instrument in writing, from the railroad company or from any resigning or removed trustee, be required by any new trustee, for more fully and certainly vesting in and confirming to him or it such estate, rights, powers, and duties, any and all such deeds, conveyances, and instruments in writing
133 shall, on request, be made, executed, acknowledged, and delivered by the party from whom they may be required.

ARTICLE FIVE.

No recourse under any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly or through the railroad company, by the enforcement of any assessment, or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this mortgage and the obligations hereby secured are solely corporate obligations and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, or directors of the Railroad Company, or of any successor corporation or any or either of them, under or by reason of any or either of the obligations, covenants, or agreements in this indenture, or in any of the bonds or coupons hereby secured, expressed, and contained or implied therefrom, and that any and all personal liability of every name and nature, either at common law or in equity, or by statute, of every such

incorporator, stockholder, officer, or director, is hereby expressly waived as a condition of, and consideration for, the execution and issue of this mortgage and such obligations.

ARTICLE SIX.

If the said railroad company shall well and truly pay, or cause to be paid, the principal and interest of all bonds hereby secured at the times and in the manner therein specified, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case all property, rights, and interests hereby conveyed or pledged shall revert to the railroad company, and the estate, right, title, and interest of the trustee shall thereupon
134 cease, determine, and become void; otherwise, the same shall be, continue, and remain in full force and virtue.

ARTICLE SEVEN.

All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the railroad company, shall bind and be binding upon its successors and assigns, whether so expressed or not.

Nothing contained in this indenture, or in any bond hereby secured, shall prevent the consolidation or merger of the railroad company with any other corporation; provided, however, that such consolidation or merger shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that, upon any such consolidation or merger, the due and punctual payment of the principal and interest of all of said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the company formed by such consolidation or merger. In case the railroad company shall be consolidated or merged with any other corporation, the successor corporation formed by such consolidation or into which the railroad company shall have been merged, shall succeed to and be substituted for the railroad company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part, and such successor corporation may cause to be signed and may issue in the name of the Erie Railroad Company any or all of such bonds as shall not theretofore have been signed by the Erie Railroad Company and delivered to the trustee, and the trustee shall certify and deliver, upon the order of said successor corporation and subject to all the terms, conditions, and restrictions herein prescribed, any of such bonds which shall have been previously signed by the officers
135 of the railroad company and delivered to the trustee for certification, and any of such bonds as such successor corporation shall thereafter cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall in all respects have the lien or general lien, as the case may be, theretofore or thereafter issued same legal rank and security as the bonds of like issue, viz: Prior

in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

And it is also expressly understood and agreed that for every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the terms "railroad company" and "Erie Railroad Company" include and mean not only the New York corporation, but also any sole successor railroad corporation, formed by consolidation or otherwise under the laws of New York or of any State or States; and every such successor railroad corporation shall possess and from time to time may exercise each and every right and power hereunder of the Erie Railroad Company, in its name or otherwise.

ARTICLE EIGHT.

The Farmers' Loan and Trust Company, trustee, the party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

ARTICLE NINE.

In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

In witness whereof, The Erie Railroad Company, the party
136 hereto of the first part, has caused this indenture to be signed and acknowledged or proved by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Farmers' Loan and Trust Company, the party of the second part, has caused its corporate seal to be hereunto affixed and attested by its secretary, and these presents to be signed and acknowledged or proved by its vice-president the day and year first above written.

ERIE RAILROAD COMPANY.

[L. S.] By E. B. THOMAS, *President.*

Attest:

J. A. MIDDLETON, *Secretary.*

THE FARMERS' LOAN AND TRUST COMPANY,

[L. S.] By R. G. ROLSTON, *President.*

Attest:

E. S. MARSTON, *Secretary.*

Signed, sealed, and delivered in the presence of—

As to Erie Railroad Company—

EDWARD R. GREEN.

GEO. H. COREY.

Signed, sealed, and delivered in the presence of—

As to the Farmers' Loan and Trust Company—

EDWARD R. GREEN.

GEO. H. COREY.

137 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, and I do certify, that on this 16th day of December, in the year one thousand eight hundred and ninety-five, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the city and county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Eben B. Thomas and James A. Middleton, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the tenth day of December, 1895, as president and secretary, respectively, of Erie Railroad Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of Erie Railroad Company, the within-named grantor, and one of the corporations described in and which executed the said mortgage deed at my office, and in the said city and county of New York, for themselves and on behalf of said Erie Railroad Company, and being by me informed of the contents of said mortgage deed they, on this day, severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged that they voluntarily executed, signed,
138 sealed, and delivered the said mortgage deed as their free and voluntary act and deed individually and as such president and secretary, respectively, and as the free and voluntary act and deed of the said Erie Railroad Company for the uses and purposes therein contained and set forth; and the said Eben B. Thomas and James A Middleton, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Eben B. Thomas in the city of New York, and the said James A. Middleton in the city of New York, both in the State of New York; that the said Eben B. Thomas is the president and the said James A. Middleton is the secretary of the said Erie Railroad Company; that their names, respectively signed in attestation of the foregoing mortgage deed, are in the said deponents' own proper handwriting, respectively; that they know the corporate seal of the said Erie Railroad Company, the grantor in the foregoing mortgage deed named; that the seal affixed to the foregoing instrument is the common or corporate seal of the said Erie Railroad Company, and was thereto affixed by authority of the board of directors, and by order of said Erie Railroad Company, as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, of said company, and the said James A.

Middleton did further depose and say that he was personally present and saw said Eben B. Thomas, as such president, sign the said mortgage deed and affix the common or corporate seal of the said Erie Railroad Company thereto, and heard him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Erie Railroad Company by order of the said board of directors, and that thereupon he, the said James A. Middleton, signed his name thereto at the same time as a subscribing witness.

139 In witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, City and County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

140 STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court for said city and county, the same being a court of record do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 16th day of December, 1895.

[L. S.] HENRY D. PURROY, *Clerk.*

141 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered and I do certify that on this 16th day of December, in the year one thousand eight hundred and ninety-five, in said city and county aforesaid, before me, the undersigned, George H.

Corey, a notary public in and for the city and county of New York, *in the State of New York, and a commissioner of deeds* in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana, and Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Roswell G. Rolston and Edwin S. Marston, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the tenth day of December, 1895, as president and secretary, respectively, of The Farmers' Loan and Trust Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of The Farmers' Loan and Trust Company, the within-named grantee, and one of the corporations described in and which executed the said mortgage deed at my office and in the said city and county of New York, for themselves and on behalf of said The Farmers' Loan and Trust Company, and being by me informed of the contents of said mortgage deed they on this day severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged
142 that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed, individually and as such president and secretary, respectively, and as the free and voluntary act and deed of said The Farmers' Loan and Trust Company, for the uses and purposes therein contained and set forth, and the said Roswell G. Rolston and Edwin S. Marston, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Roswell G. Rolston in the town of Babylon and the said Edwin S. Marston in the city of Brooklyn, both in the State of New York; that the said Roswell G. Rolston is the president and the said Edwin S. Marston is the secretary of said The Farmers' Loan and Trust Company; that their names respectively signed in attestation of the foregoing mortgage deed are in the said deponent's own proper handwriting, respectively; that they know the grantee in the foregoing mortgage deed named; that the corporate seal of said The Farmers' Loan and Trust Company, seal affixed to the foregoing instrument, is the common or corporate seal of said The Farmers' Loan and Trust Company, and was thereto affixed by authority of the board of directors and by order of said The Farmers' Loan and Trust Company as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, as said company; and the said Edwin S. Marston did further depose and say that he was personally present and saw said Roswell G. Rolston as such president sign the said mortgage deed and affix the common or corporate seal of said The Farmers' Loan and Trust Company thereto, and heard him

declare that he signed, sealed, and delivered the same as the voluntary act and deed of said The Farmers' Loan and Trust Company by order of the said board of directors, and that thereupon he, the said Edwin S. Marston, signed his name thereto at the same time as a subscribing witness.

143 In witness whereof I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, City and County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

144 STATE OF NEW YORK,
City and County of New York, ss:

I, Henry D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court for said city and county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 16th day of December, 1895.

[L. S.] HENRY D. PURROY, *Clerk.*

145 NEW YORK.

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 1, Liber 33, page 50, and indexed under blocks number 2, 36, 130, on the land map of the city of New York.

Witness my hand and official seal

[L. S.] FERDINAND LEVY, *Register.*

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 3, Liber 45, page 1, and indexed under blocks number 663, 668, 685, 694, 695, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.]

FERDINAND LEVY, *Register.*

Recorded in the office of the register of the city and county of New York on the 19th day of December, A. D. 1895, at 12 o'clock noon, in block series (mortgages), section 4, Liber 62, page 1, and indexed under blocks number 1088 and 1108 on the land map of the city of New York.

Witness my hand and official seal.

[L. S.]

FERDINAND LEVY, *Register.*

146 Recorded in the office of the clerk of the county of Allegany, on the 21st day of December, 1895, in Liber 78 of mortgages, p. 89.

Witness my hand and official seal.

[L. S.]

GEORGE A. GREEN,
Clerk of Allegany County.

Recorded in the office of the clerk of the county of Broome on the 21st day of December, 1895, in Liber 102 of mortgages, p. 82.

Witness my hand and official seal.

[L. S.]

F. B. NEWELL,
Clerk of Broome County.

Recorded in the office of the clerk of the county of Cattaraugus, on the 21st day of December, 1895, in Liber 130 of mortages, p. 19.

Witness my hand and official seal.

[L. S.]

H. S. MERRILL,
Clerk of Cattaraugus County.

147 Recorded in the office of the clerk of the county of Chautauqua, on the 20th day of December, 1895, in Liber 153 of mortgages, p. 299.

Witness my hand and official seal.

[L. S.]

V. A. ALBRO,
Clerk of Chautauqua County.

Recorded in the office of the clerk of the county of Chemung, on the 20th day of December, 1895, in Liber 94 of mortgages, p. 464.

Witness my hand and official seal.

[L. S.]

DAVID N. HELLER,
Clerk of Chemung County.

Recorded in the office of the clerk of the county of Erie, on the 19th day of December, 1895, in Liber 773 of mortgages, p. 484.
Witness my hand and official seal.
[L. S.]
R. L. KIRTLAND,
Deputy Clerk of Erie County.

148 Recorded in the office of the clerk of the county of Delaware on the 20th day of December, 1895, in Liber 76 of mortgages, p. 127.
Witness my hand and official seal.
[L. S.]
J. K. HOOD,
Clerk of Delaware County.

Recorded in the office of the clerk of the county of Genesee on the 19th day of December, 1895, in Liber 102 of mortgages, p. 403.
Witness my hand and official seal.
[L. S.]
CARLOS A. HULL,
Clerk of Genesee County.

Recorded in the office of the clerk of the county of Livingston, on the 23rd day of December, 1895, in Liber 111 of mortgages, p. 23.
Witness my hand and official seal.
[L. S.]
WM. E. HUMPHREY,
Clerk of Livingston County.

149 Recorded in the office of the clerk of the county of Monroe on the 20th day of December, 1895, in Liber 394 of mortgages, p. 264.
Witness my hand and official seal.
[L. S.]
K. P. SHEDD,
Clerk of Monroe County.

Recorded in the office of the clerk of the county of Niagara on the 20th day of December, 1895, in Liber 243 of mortgages, p. 446.
Witness my hand and official seal.
[L. S.]
JAMES COMPTON,
Clerk of Niagara County.

Recorded in the office of the clerk of the county of Orange on the 24th day of December, 1895, in Liber 358 of Mortgages, p. 293.
Witness my hand and official seal.
[L. S.]
W. G. TAGGERT,
Clerk of Orange County.

150 Recorded in the office of the clerk of the county of Rockland on the 20th day of December, 1895, in Liber 142 of mortgages, p. 370.
Witness my hand and official seal.
[L. S.]
CYRUS M. CRUM,
Clerk of Rockland County.

Recorded in the office of the clerk of the county of Steuben on the 26th day of December, 1895, in Liber 76 of mortgages, p. 425.
Witness my hand and official seal.
[L. S.]
J. H. GIFFIN,
Clerk of Steuben County.

Recorded in the office of the clerk of the county of Sullivan, on the 26th day of December, 1895, in Liber 76 of mortgages, p. 425.
Witness my hand and official seal.
[L. S.]
GEORGE O. FRASER,
Clerk of Sullivan County.

151 Recorded in the office of the clerk of the county of Tioga on the 21st day of December, 1895, in Liber 70 of mortgages, p. 15.
Witness my hand and official seal.
[L. S.]
F. W. RICHARDSON,
Clerk of Tioga County.

Recorded in the office of the clerk of the county of Wyoming on the 19th day of December, 1895, in Liber 67 of mortgages, p. 21.
Witness my hand and official seal.
[L. S.]
E. M. JENNINGS,
Clerk of Wyoming County.

NEW JERSEY.

Recorded in the office of the clerk of the county of Bergen on the 19th day of December, 1895, in Liber 94 of mortgages, p. 74.
Witness my hand and official seal.
[L. S.]
JOHN R. RAMSAY,
Clerk of Bergen County.

152 Recorded in the office of the register of the county of Essex on the 18th day of December, 1895, in Liber P 12 of mortgages, p. 364.
Witness my hand and official seal.
[L. S.]
WM. RIKER, JR.,
Register of Essex County.

Recorded in the office of the register of the county of Hudson on the 18th day of December, 1895, in Liber 341 of mortgages, p. 510.
Witness my hand and official seal.
[L. S.]
GEO. B. FIELDER,
Register of Hudson County.

Recorded in the office of the clerk of the county of Passaic, on the 19th day of December, 1895, in Liber X 4 of mortgages, p. 126.
Witness my hand and official seal.
[L. S.]
H. D. WINFIELD,
Clerk of Passaic County.

Recorded in the office of the secretary of the State of New Jersey on the 21st day of December, 1895, in Liber K of corporations, p. 61.

Witness my hand and official seal.

[L. S.] HENRY C. KELSEY,
Secretary of State.

153 PENNSYLVANIA.

Recorded in the office of the recorder of deeds of the county of Jefferson, on the 24th day of December, 1895, in Mortgage Book L, p. 9.

Witness my hand and official seal.

[L. S.] JOHN S. BARR,
Recorder of Jefferson County.

Recorded in the office of the recorder of deeds of the county of McKean, on the 21st day of December, 1895, in Liber 34 of mortgages, p. 201.

Witness my hand and official seal.

[L. S.] GEORGE W. MITCHELL,
Recorder of McKean County.

Recorded in the office of the recorder of deeds of the county of Pike, on the 19th day of December, 1895, in Liber 12 of mortgages, p. 26.

Witness my hand and official seal.

[L. S.] JNO. C. WESTBROOK,
Recorder of Deeds of Pike County.

154 Recorded in the office of the recorder of deeds of the county of Susquehanna, on the 30th day of December, 1895, in Liber 21 of mortgages, p. 411.

Witness my hand and official seal.

[L. S.] SAML. S. WRIGHT,
Recorder of Susquehanna County.

Recorded in the office of the recorder of deeds of the county of Wayne, on the 23d day of December, 1895, in Liber 15 of mortgages, p. 535.

Witness my hand and official seal.

[L. S.] STUART O. LINCOLN,
Recorder of Wayne County.

157 *Erie Railroad Company to The Mercantile Trust Company.*

Pennsylvania collateral indenture, dated February 1, 1901, securing $36,000,000 fifty-year 4% Pennsylvania collateral gold bonds. Interest payable February and August.

159 TABLE OF CONTENTS.

	Page.
Recitals:	
Coupon bonds, form	2
Registered bonds, form	4
Coupons, form	6
Trustee's certificate, form	7
Granting clauses	7–10
Specification of stocks pledged	8
ARTICLE ONE.	
Issue and appropriations of bonds:	
Sec. 1. Total authorized issue—$36,000,000	11
Certification by trustee	11
2. Issue for stock pledged, $32,000,000	11
3. Reserve for improvements, &c., $4,000,000	12
4. Reserved bonds issuable at market price	18
5. Registered bonds—exchanges	19
6. Replacement of bonds mutilated or destroyed	20
7. Rights limited to parties and bondholders	20
ARTICLE TWO.	
Covenants of railroad company:	
Sec. 1. To pay interest and principal, free from tax, &c	21
To maintain agency in New York City	21
2. To execute further assurances	22
3. To provide for registration	22
4. To create no prior liens upon pledged shares	23
5. To pay taxes and assessments	24
6. To permit no increase of capital, &c., by companies whose stocks are pledged	25
7. To assign to trustee claims against such companies	26
8. To issue and use bonds only as authorized	26
9. To provide for sinking fund	27
160 ARTICLE THREE.	
Concerning pledged securities:	
Sec. 1. Powers and duties of trustee	31
To register in its name pledged bonds	31
To transfer into its name pledged stock	31
To maintain corporate existence of companies	31
2. Collection of dividends and interest	31
3. Application of payments	34
4. Railroad company votes on pledged stocks	34
5. Foreclosure of mortgages	35
Purchase of property at judicial sales	36
Reorganization in respect of pledged securities	37
6. Merger of companies	38
7. Extension or renewal of pledged obligations	39
ARTICLE FOUR.	
Remedies of trustee and bondholders:	
Sec. 1. Detached coupons—lien subordinated	39
2. After default trustee may collect interest and dividends and may vote on pledged stock	39
3. Principal of bonds may be declared payable	41

Remedies of trustees and bondholders—Continued. Page.
Sec. 4. Power of sale 42
5. Bondholders may direct trustee 43
6. Property to be sold as entirety 44
7. Notice of sale 44
8. Adjournments of sale 45
9. Assignments to purchaser 45
10. Receipt to purchaser, a discharge 46
11. Maturity of principal in case of sale 46
12. Distribution of proceeds of sale 46
13. Purchaser may pay in bonds 47
14. Trustee may recover judgment on default 48
15. Waiver of redemption, etc 49
16. Trustee entitled to appointment of receiver 50
17. Railroad company may surrender right to collect dividend, &c 50
18. Bondholders not entitled to sue 51
19. Remedies cumulative 52
20. Trustee's delay or omission no waiver 52

161 ARTICLE FIVE.

Immunity of officers, directors, and stockholders 52

ARTICLE SIX.

Sec. 1. Authentication of bondholders' instruments 53
2. Apparent title to bonds 54

ARTICLE SEVEN.

Releases of property 55

ARTICLE EIGHT.

Concerning the trustee:
Sec. 1. Immunities and compensation 56
2. Resignation or removal 57
3. Appointment of successor trustee 58

ARTICLE NINE.

Sec. 1. Possession until default 59
2. Possession to revert to railroad company on payment of bonds &c 60

ARTICLE TEN.

Sundry provisions:
Sec. 1. Covenants to bind successors and assigns 61
2. Railroad company may consolidate 61
3. Successor may issue bonds 61
4. Rights and powers of successor 63
5. Authority of officers of successor 63
6. Railway company may surrender powers 63
Trustee's acceptance of trust 63
Definition of certain terms 63
Stamp tax 63
Acknowledgments 65

163 An indenture dated as of the first day of February, one thousand nine hundred and one, between

Erie Railroad Company (hereinafter termed the "railroad company"), a corporation organized and existing under the laws of the State of New York, party of the first part, and

The Mercantile Trust Company, of New York (hereinafter termed the "trustee"), a corporation organized and existing under the laws of the State of New York, party of the second part.

Whereas, for the purpose of making payment for shares of the capital stock of the following companies acquired or to be acquired by the railroad company, namely: Pennsylvania Coal Company, a corporation organized under the laws of the State of Pennsylvania; Erie and Wyoming Valley Railroad Company, a corporation organized under the laws of the State of Pennsylvania; and Delaware Valley and Kingston Railroad Company, a corporation organized under the laws of the State of New York; and for the purpose of providing means for its other corporate purposes and business, the railroad company desires to make and issue a series of fifty-year four per cent Pennsylvania collateral gold bonds, limited in amount so that the aggregate principal sum of such bonds outstanding at any one time shall never exceed $36,000,000, all of which bonds at any time outstanding shall be equally secured as hereinafter provided; and

Whereas, such bonds of the railroad company to be issued under and secured by this indenture are to be coupon bonds, each for the principal sum of $1,000, numbered consecutively from 1 upwards, and registered bonds, each bearing a distinctive number or designation, of the denomination of $1,000 or such multiples of $1,000 as from time to time the railroad company, by resolution of its board of directors, may authorize; and all such coupon bonds and registered bonds, from time to time, as directed by the board of directors of the railroad company, are to be executed in the name and on
164 behalf of the railroad company under its corporate seal by the president or a vice-president and the secretary or an assistant secretary of the railroad company, and are to be substantially of the following tenor:

(Form of coupon four per cent gold bond.)

No. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company Pennsylvania collateral 4% coupon gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder of this bond, one thousand dollars, in gold coin of the United States of America, on the first day of February, 1951, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon at the rate of four per cent per annum from February 1, 1901, payable semi-annually, at the said office or agency in like gold coin on the first day of February and the first day of August, in each and every year, until the payment of said principal sum, but only upon presentation and surrender, as severally they shall mature, of the coupons therefor annexed hereto;

such United States gold coin in every case to be of the standard of weight and fineness as it existed February 1, 1901.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom under any present or future law of the United States or of any State or county or municipality therein.

This bond is one of a series of four per cent gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding thirty-six million dollars at any one time outstanding, under and in pursuance of, and all equally secured by a collateral indenture, dated February 1, 1901, executed by the railroad company to the Mercantile Trust Company, of New York, as trustee, pledging all of the shares of the capital stock of the Pennsylvania Coal Company and of the Erie and Wyoming Valley Railroad Company and of the Delaware Valley and Kingston Railroad Company, now owned or hereafter ac-
165 quired by the railroad company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company, the certificates for which have been or shall be delivered to the trustee pursuant to said collateral indenture, to which reference hereby is made for a statement of the property pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and of the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

As additonal security for the retirement of every bond of this issue, at or before the stated maturity thereof, the Erie Railroad Company annually will appropriate and will pay to a sinking fund, the sum of ten cents for every ton of coal sold and delivered during the preceding year from the mines of the Pennsylvania Coal Company; and for the purposes of said sinking fund, this bond may be called in during the month of February or the month of August, in any year, at par, together with a premium of five per cent thereof and all interest then accrued; all as is more fully stated in said collateral indenture.

This bond shall pass by delivery, unless registered in the owner's name on the books of the railroad company, at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the railroad company. After such registration, no transfer shall be valid unless made on the railroad company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored, but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not

affect the negotiability of the coupons, which shall continue to be transferable by delivery merely.

The holder also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon, in exchange for a registered bond without coupons, as provided in said indenture.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate hereon endorsed, of the trustee under said indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, and coupons for such interest, with the engraved signature of its treasurer, to be attached hereto, this first day of February, 1901.

166

[L. S.] ERIE RAILROAD COMPANY,
Attest: By , *President.*
, *Secretary.*

(Form of registered bond without coupons.)

No. ——. $ ——.

UNITED STATES OF AMERICA.

Erie Railroad Company Pennsylvania collateral 4% registered gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation hereinafter called the "railroad company," for value received, promises to pay to or assigns, dollars, in the gold coin of the United States of America, on the first day of February, in the year 1951, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon from the first day of February, or the first day of August, as the case may be, next preceding the date hereof, at the rate of four per cent. per annum, payable semiannually at said office or agency, in like gold coin, on the first day of February and the first day of August in each year, until the payment of said principal sum; such United States gold coin in every case to be of the standard of weight and fineness as it existed February 1, 1901.

Both the principal and interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

This bond is one of a series of four per cent gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding thirty-six million dollars at any one time outstanding, under and in

167

pursuance of, and all equally secured by, a collateral indenture, dated February 1, 1901, executed by the railroad company to the Mercantile Trust Company, of New York, as trustee, pledging all of the shares of the capital stock of the Pennsylvania Coal Company, and of the Erie & Wyoming Valley Railroad Company, and of the Delaware Valley and Kingston Railroad Company, now owned or hereafter acquired by the railroad company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company, the certificates for which have been or shall be delivered to the trustee pursuant to said collateral indenture, to which reference is hereby made for a statement of the property pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and of the terms and conditions upon which said bonds are secured, and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

As additional security for the retirement of every bond of this issue, at or before the stated maturity thereof, the Erie Railroad Company annually will appropriate and will pay to a sinking fund the sum of ten cents for every ton of coal sold and delivered during the preceding year from the mines of the Pennsylvania Coal Company; and for the purposes of said sinking fund this bond may be called in during the month of February or the month of August, in any year, at par, together with a premium of five per cent thereof, and all interest then accrued; all as is more fully stated in said collateral indenture.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company, at its office or agency in the city of New York, upon surrender and cancellation of this bond; and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said indenture, and on payment, if the railroad company shall so require, of the charge therein provided for. This bond also, in the manner prescribed in said indenture and upon payment of the charge therein provided for, is exchangeable for coupon bonds for the same aggregate principal sum.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said indenture.

In witness whereof the Erie Railroad Company has caused these presents to be signed by its president, or one of its vice-presi-
168 dents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, this day of .

[L. S.] ERIE RAILROAD COMPANY,
By , *President.*

Attest:

, *Secretary.*

And whereas there are to be attached to the said coupon bonds, at the time of the issue thereof, coupons representing the semi-annual instalments of interest which shall become due thereon to and including the first day of February, 1951, each of which coupons is to be substantially of the following tenor, viz:

(Form of interest coupons, of which the first is to be payable August 1, 1901.)

No. $20.00.

On the first day of Erie Railroad Company will pay to bearer, at its office or agency in the city of New York N. Y., twenty dollars gold coin of the standard existing February 1, 1901, without deduction for taxes, being six months' interest then due on its collateral four per cent gold bond No.

Treasurer.

And whereas there is to be endorsed on each of said coupon bonds and registered bonds without coupons a certificate of the trustee that it is one of the bonds issued hereunder, and no bond shall be secured by this indenture or be obligatory for any purpose unless such certificate shall have been executed by the trustee, such trustee's certificate to be substantially of the following tenor, viz:

169 [Form of Trustee's certificate.]

This bond is one of a series of bonds described in the within-mentioned indenture, executed by Erie Railroad Company to the undersigned as trustee.

THE MERCANTILE TRUST COMPANY,

By

And whereas each of the coupons to be attached to such coupon bonds is to be authenticated by the engraved fac-simile of the signature of the present treasurer, or of any future treasurer, of the railroad company, and the railroad company may adopt and use for that purpose the engraved signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer at the time when such bonds shall actually be certified and delivered; and

Whereas the execution and delivery of this indenture, and the execution and issue of said bonds, have been duly and unanimously authorized by all the stockholders and by the board of directors of the railroad company, and in pursuance of such authority and of all and every legal power and authority in it vested the railroad company proposes to make and execute, and from time to time to issue, the bonds secured hereby:

Now, therefore, this indenture witnesseth:

That in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this

indenture and the performance of all the covenants and conditions herein contained, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to it duly paid by the trustee at the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged.

The railroad company, party of the first part, has sold, assigned, and transferred, and by these presents does sell, assign, and transfer unto the trustee, party of the second part, its successors and
170 assigns forever, the following shares of stock, the certificates for which in the name of the Erie Railroad Company, but by it endorsed in blank, have been delivered to the trustee, namely:

98,212 shares, of the aggregate par value of $4,910,600 of the capital stock of the Pennsylvania Coal Company, out of the total outstanding capital stock of said company, consisting of 100,000 shares of the par value of $50 each;

30,000 shares, of the aggregate par value of $1,500,000 of the capital stock of the Erie and Wyoming Valley Railroad Company, being all the outstanding capital stock of said corporation;

2,500 shares, of the aggregate par value of $250,000 of the capital stock of the Delaware Valley and Kingston Railroad Company, being all the outstanding capital stock of said corporation;

66,300 shares of the preferred stock, and 66,300 shares of the common stock of the New York, Susquehanna and Western Railroad Company (a corporation existing under the laws of the State of New Jersey), such shares being of the par value of $100 each, and together constituting fifty-one per cent of the outstanding capital stock of said company.

The railway company covenants and agrees that any and all additional shares of the capital stock of the said Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company, or of the Delaware Valley and Kingston Railroad Company, and other property of any kind or description whatsoever, which hereafter shall be acquired by the railway company or by the trustee, and which by any covenant or provision of this indenture the railway company has subjected or has agreed to subject to the lien hereof, immediately upon such acquisition, but subject to the terms and conditions of such acquisition thereof, and without any further assignment, transfer, or conveyance, shall become and be subject to the lien of this indenture as fully and completely as though expressly and specifically assigned, transferred, and conveyed to the trustee under this indenture; but the railroad company covenants and agrees that at any and all times it will execute and will deliver to the trustee any and all further assignments, transfers, or conveyances and instruments of further
171 assurance, as the trustee may reasonably direct or require for the purpose of expressly and specifically subjecting such additional shares, bonds, certificates of indebtedness, and other property to the lien of this indenture, and will deliver to the trustee the certifi-

cates for any such shares of stock, and such bonds or certificates of indebtedness.

It is further covenanted and declared, that any other or additional property of any kind, including bonds and other securities, claims, and stocks, from time to time hereafter, may be conveyed, assigned, transferred, or delivered by the railroad company, or by anyone in behalf of the railroad company, with its written consent or approval, to the trustee hereunder, as and for additional security for the bonds issued and to be issued hereunder, and the trustee shall receive, hold, and apply any and all such property subject to the trusts of this indenture; but any such conveyance, assignment, transfer, or delivery, pursuant to the provisions of this clause, as and for additional security, may be made subject to any reservations, limitations, conditions, and provisions which shall be set forth in an instrument in writing, then executed by the trustee and by the railroad company, pursuant to the provisions of this clause, as and for additional property and the proceeds thereof.

But it is hereby expressly declared that there is reserved to and by the railroad company the right to acquire any properties (including stocks, bonds and other securities), and to hold and to dispose of the same free from the lien of this indenture, provided that neither any bonds hereby secured and reserved under section 3 of article one hereof nor the proceeds of any such bonds so reserved, and no bonds, stocks, or other property or moneys held by the trustee hereunder shall be used for such acquisition, or to reimburse the railroad company in respect thereof.

172 To have and to hold the said shares of stock hereby assigned and transferred, and also all additional property of any kind, including shares of stock, bonds and other securities, certificates of indebtedness and claims, which hereafter shall become subject to this indenture, unto the trustee, its successors and assigns forever:

But in trust, nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and interest obligations, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture, without any preference, priority, or distinction, as to lien or otherwise, of any one bond over any other bond by reason of priority in the issue or negotiation thereof; so that each and every bond, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under this indenture, and that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby as if all had been made, issued, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof, without regard to the date of actual issue, sale, or disposition of said bonds, as

though, upon such day, all of said bonds were actually issued, sold, and delivered to holders for value:

And it is hereby covenanted and declared, that the property subject to this indenture is to be held by the trustee, and that all such bonds, with the coupons for interest thereon, are to be issued and received, subject to the further covenants, conditions, and trusts hereinafter set forth, to wit:

173 ARTICLE ONE.

SECTION 1. From time to time the bonds to be secured hereby shall be executed by the railroad company, and by it shall be delivered for certification to the trustee, and thereupon, as provided in this article, and not otherwise, the trustee shall certify and shall deliver the same at the option of the railroad company from time to time.

Any of such bonds may be executed, certified, and delivered originally either as coupon bonds or as registered bonds.

The amount of bonds hereby secured which may be executed by the railroad company and which may be certified by the trustee is limited so that never at any time shall there be outstanding bonds hereby secured for an aggregate principal sum exceeding thirty-six million dollars ($36,000,000).

Before certifying or delivering any coupon bond hereby secured the trustee shall detach and shall cancel all coupons thereof then matured; and every registered bond shall be dated on the day of the actual certification thereof.

Only such bonds as shall bear thereon a certificate, substantially in the form hereinbefore recited, duly executed by the trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. Every such certificate of the trustee upon any bond executed by the railroad company shall be the conclusive and the only evidence that the bond so certified was duly issued hereunder and is entitled to the benefit of the trust hereby created.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture, bonds for the aggregate principal sum of $32,000,000 shall be certified by the trustee and returned to the railroad company, or upon the order of its president, immediately upon the execution of this indenture, or as soon thereafter as may be. The railroad company hereby covenanting that it will use and issue such $32,000,000 bonds only in payment on account of the acquisition of shares
174 of stock of the Pennsylvania Coal Company or of the Erie and Wyoming Valley Railroad Company or the Delaware Valley and Kingston Railroad Company, all of which shares as and when acquired shall be pledged hereunder, and the certificates therefor delivered hereunder to the trustee, which, however, shall not be bound to see to such application or use of such bonds.

SEC. 3. Four million dollars ($4,000,000), par value of the bonds authorized to be issued under and secured by this indenture, shall be reserved to be executed by the railroad company, and to be certified

and delivered by the trustee, from time to time, for some one or more of the following purposes, but only as hereinafter provided and subject to the restrictions hereinafter stated:

I. The purposes for which such $4,000,000 of bonds shall be executed, certified, and delivered and for which such bonds or their proceeds may be used, are:

(a) To make betterments or improvements of or upon any property which at the time of issuing the bonds reserved under this section 3 shall be subject to the lien of this indenture, and to construct or acquire additional mines, collieries, coal lands, or coal leases, and additional lines of railway, extensions, branches, bridges, shops, depots, terminal properties, power houses, electrical plant, rolling stock, or other additional property connected with or for use in connection with any of the mines or collieries or lines of railway, extensions, branches, shops, depots, terminal properties, power houses, electrical plant, rolling stock, bridges, or other properties which at the time of such construction or acquisition either shall be subject to the lien of this indenture or shall belong to any company of whose capital stock at least ninety per cent shall be held by the trustee under this indenture; and to provide the railroad company with funds for expenditures by it made or incurred for any of the foregoing purposes;

175 (b) To furnish moneys, or to reimburse the railroad company for moneys furnished, to any other such company or companies of whose capital stock not less than ninety per cent in amounts shall then be held hereunder by the trustee, to an amount not exceeding expenditures by such company or companies made or incurred for the construction or acquisition of betterments or improvements of, or additional, mines, collieries, coal lands or coal leases, or additional lines of railway, extensions, branches, bridges, shops, depots, terminal properties, power houses, electrical plant, rolling stock or other additional property connected with, or for use in connection with mines, collieries, coal lands or coal leases or any of the lines of railway, extensions, branches, shops, depots, terminal properties, power houses, electrical plant, rolling stock, bridges, or other property which at the time of such construction or acquisition shall belong to such other company or companies; provided, that in every such case the railroad company shall *f*require such other company or companies to issue, and shall pledge or shall cause to be pledged with the trustee hereunder, bonds or certificates of indebtedness or paid-up shares of the capital stock of such other company or companies of a par amount at least equal to the amount of the moneys so furnished; and,

(c) To acquire, or to reimburse the railroad company for the acquisition of, the shares of the capital stock, bonds and indebtedness of any company which at the time of such acquisition shall own any mine or colliery, coal lands or coal leases, or any line of railway, extension, branch, bridge, terminal property, power house, electrical plant, connected with, or available for use in connection with, any mine or colliery, coal lands or coal leaseholds, or any line of railway owned by any company of whose capital stock the greater

part shall then be held by the trustee hereunder; provided, that thereby not less than ninety per cent of all the shares of the
176 capital stock of such company shall be obtained, or previously shall have been obtained and pledged hereunder; and provided further, that no shares or bonds or indebtedness issued or created by any such company after a majority in amount of the outstanding shares of the capital stock of such company shall have been pledged hereunder shall be acquired under this clause (c), but the same may be acquired under clause (b) of this section.

II. The restrictions subject to which such $1,000,000 of reserved bonds from time to time shall be certified and delivered are as follows:

(1) Before certifying and delivering bonds under this section, there shall be delivered to the trustee a copy of a resolution of the board of directors of the railroad company, certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and directing the officers of the railroad company to set aside such bonds and their proceeds separate and apart from any other assets and funds of the railroad company, and to use the same only as authorized by this section.

(2) From time to time, when and as requested by the president of the railroad company, upon the presentation to the trustee of the copy of any such resolution as above provided, there shall be so certified and delivered such amount of the bonds reserved under this section, not in any one delivery exceeding, in the aggregate, $1,000,000 par value, as from time to time shall be called for in such resolutions. But, in every instance before certifying and delivering any of the bonds reserved under this section (except the $1,000,000 thereof first deliverable hereunder), the trustee shall require the railroad company to furnish, in addition to such resolution of its board of directors, the certificate or certificates of some one or more officers of the railroad company, stating:

177 (a) That all bonds, theretofore certified and delivered under this section in respect of which no such certificate previously shall have been furnished, and the proceeds of all such bonds, have been actually used for the said purposes, or for some one or more of them, or to reimburse the railroad company as aforesaid—indicating the particular mines, collieries, coal lands and coal leaseholds and the lines of railway, extensions, branches, bridges, shops, depots, terminal properties, rolling stock or other additional property, and the kind or class of betterments or improvements constructed, acquired or made, and the stocks, bonds or indebtedness acquired, and the sums furnished to any such other company or companies, and the amount and description of the shares of capital stock, bonds or certificates of indebtedness of such other company or companies received by the railroad company on account thereof;

(b) That the price paid for such construction or for such acquisition, betterments or improvements was not in excess of the fair value

95

of the property acquired or work done, and that the bonds included in such certificate were sold, disposed of or otherwise accounted for at not less than their fair value at the time of such sale, disposition or accounting;

(c) That no part of such expenditures so certified was included in any previous certificate furnished hereunder, or was made or reimbursed out of any bonds or moneys received by the railroad company under any other provision of this indenture;

(d) That no part of the expenditures in such certificate so certified was included in the operating or maintenance expenses reported in any annual report theretofore issued by the railroad company;

(e) In case such certificate shall show the acquisition of new
178 property, then such certificate also shall state whether such new property is known or is believed to be subject to any lien or charge prior to this indenture, except undetermined liens or charges incident to construction; and such certificate shall specify the amount of any such prior lien or charge (other than as aforesaid) known or believed to exist. In case the certificate shall show the acquisition of any shares of the capital stock, bonds or other indebtedness of any other company, such certificate shall state whether the property of such other company is known or is believed to be subject to any lien or charge, and whether such company is known or is believed to have any indebtedness except ordinary operating accounts and undetermined claims, liens and charges incidental to construction, and except also indebtedness to the railroad company and liens, charges and indebtedness transferred to the trustee or in respect of which bonds shall have been set apart under the following clause (3), and such certificate in each case shall specify the amount of any such lien, charge or indebtedness known or believed to exist;

(f) Any such certificate under this section may state any other facts pertaining to the right to certify and deliver bonds hereunder. The same officer or officers of the railroad company need not certify to all the facts required to be certified under the provisions of this section, but different officers may certify to different facts respectively.

(3) After delivery of the $1,000,000 of bonds first deliverable hereunder, no bonds shall be certified and delivered under this section, for or in respect of the construction or acquisition of property subject to any such certified lien or charge, or for or in respect of the acquisition of shares of capital stock, bonds or indebtedness of a com-
179 pany subject to indebtedness so certified, or whose property is subject to a lien or charge so certified, unless or until the railroad company shall have deposited with the trustee an amount of the bonds hereby secured of a par amount equal to the aggregate amount of such certified indebtedness, liens and charges. Whenever thereafter any of such certified indebtedness, liens and charges shall be paid or satisfied, or shall be acquired and be subjected to the lien hereof, then an equal amount at par of the bonds hereby secured so deposited with the trustee under this clause shall be redelivered by the trustee to the railroad company or upon its order, so that the amount of such bonds

held by the trustee under this clause at all times shall be equal to the amount of such indebt'ness, liens and charges remaining unsatisfied or not subjected to the lien hereof.

(4) The railroad company covenants that whenever all the bonds reserved under this section shall have been certified and delivered to and used by the railroad company, it will execute and deliver to the trustee a similar certificate indicating the particular application of all bonds or proceeds of bonds, in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

(5) Every such certificate furnished under this section, unless signed, first, by the president or a vice-president or the general manager or the chief engineer, and, secondly, by the comptroller or auditor or treasurer of the railroad company, shall have endorsed thereon, or shall be accompanied by a written statement of one of the officers first above designated, and one of the officers secondly above designated, that they believe that such certificate is true, and that such bonds have been used and the expenditures certified have been made only for purposes authorized by this section. A certificate signed by one of the officers first above designated and one of the offi-
180 cers secondly above designated or having endorsed thereon, or being accompanied by a written statement of said officers as above provided may be received by the trustee as conclusive evidence of any facts pertaining to the right to certify and deliver bonds pursuant to this section.

Together with such statements and certificates there shall be delivered to the trustee any such bonds so acquired, and the certificates endorsed for transfer in blank for any such shares of stock so acquired, and any conveyances or instruments of further assurance that may be necessary for the purpose of effectually subjecting to the lien and operation of this indenture any new property so acquired by the railroad company, and, so far as may be, any indebtedness, liens, or charges so taken up or acquired by use of said bonds, and also the written opinion of counsel for the railroad company to the effect that such conveyances or other instruments are sufficient for that purpose or that no conveyance or instrument of further assurance is necessary for the purpose aforesaid. Such resolutions, statements, certificates, and opinion shall be deemed, and shall be taken to be, full authority and protection to the trustee for its certification of such bonds under the foregoing provisions of this section.

The railroad company covenants that when all the bonds reserved under this section 3 shall have been certified and delivered to and used by the railroad company it will execute and deliver to the trustee a similar certificate indicating the purposes for which the railroad company shall have used all bonds or the proceeds of all the bonds in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

SEC. 4. Whenever under section 3 of this article the railroad company shall be entitled to bonds hereby secured, or their proceeds, the

railroad company may take and accept such bonds at a price not less than their average market price during the previous cal-
181 endar month. Any bonds so taken and accepted by the railroad company in reimbursement for expenses theretofore actually made by the railroad company shall be held and may be used by the railroad company for its general corporate purposes freed and discharged from all restrictions and provisions of said section 3 as though such bonds had been sold at such price and the proceeds paid over to the railroad company.

SEC. 5. Whenever any coupon bond or bonds, issued under and secured by this indenture, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for registered bonds without coupons, the railroad company shall execute, and the trustee shall certify, and in exchange for such coupon bond or bonds shall deliver registered bonds, or one registered bond, without coupons, for the like aggregate principal sum. Such registered bonds shall bear interest at the same rate as the surrendered coupon bonds, and from the date of the last-matured coupon thereof. In every case of such exchange the trustee forthwith shall cancel the surrendered bond or bonds and coupons, and shall deliver the same to the railroad company.

Whenever any registered bond without coupons shall be surrendered, transferred, and cancelled, the railroad company shall issue, and the trustee shall certify and deliver, to the transferee, registered bonds, or one registered bond, without coupons, for a like aggregate principal sum.

Whenever any registered bond without coupons shall be surrendered for exchange for a coupon bond or bonds, then upon cancellation of such surrendered bond and payment of the charges therefor, the railroad company shall issue, and the trustee shall certify and deliver, in exchange therefor, coupon bonds for the like aggregate principal sum, having attached thereto the coupons maturing on and after the date when the next semiannual instalment of interest would have matured on such surrendered registered bond without coupons.

182 For any exchange of coupon bonds for registered bonds, and (2) for any transfer of registered bonds without coupons, and (3) for any exchange of registered bonds without coupons for coupon bonds, the railroad company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge required to be paid, and also of the further sum of one dollar for each new coupon bond or registered bond without coupons issued upon any such exchange or transfer.

SEC. 6. In case any coupon bond issued hereunder with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may execute, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond) bearing the same serial number, in exchange and

substitution for and upon cancellation of the mutilated coupon bond and its coupons, or the mutilated registered bond, or in lieu of, and substitution for, the coupon bond and its coupons, or the registered bond so destroyed, upon receipt of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond, and upon receipt also of satisfactory indemnity.

SEC. 7. Nothing in this article, or in any other article of this indenture, or in the bonds issued hereunder, expressed or implied, is intended, or shall be construed to give to any person or corporation, other than the parties hereto and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or under any covenant, condition, or provision herein contained; all its covenants, conditions, and provisions being intended to be, and being, for the sole and exclusive benefit of the parties hereto and of the holders of the bonds hereby secured.

183 ARTICLE TWO.

The railroad company covenants as follows:

SECTION 1. Duly and punctually it will pay the principal and interest of every bond issued and secured hereunder at the dates and the place and in the manner mentioned in such bond, or in the coupons thereto belonging, without deduction from either principal or interest, for any taxes imposed by the United States or any State or county or municipality thereof, which the railroad company may be required to pay or to retain therefrom under or by reason of any present or future law. The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and when paid such coupons shall forthwith be canceled. The principal of each coupon bond shall be payable only upon presentation and surrender of the bond. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof. The principal of each registered bond without coupons shall be payable to the person registered as holder of such bond at the time of payment, but only upon presentation and surrender of such bond.

At all times, until the payment of the principal of the bonds secured by this indenture, the railroad company will keep an office or agency in the city of New York where bonds and coupons may be presented for payment, and where notices or demands in respect of said bonds and coupons may be served, and from time to time the railroad company will give written notice to the trustee of the place of such office or agency. In case the railroad company shall fail to do so, presentation and demand may be made and notices served at the office of the trustee in the city of New York.

184 SEC. 2. Whenever demanded by the trustee, the railroad company will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all such further

acts, deeds, transfers, and assurances for the better assuring, conveying and confirming unto the trustee all and singular the premises and property hereby assigned, pledged, or mortgaged, or intended so to be, or which the railroad company herein has covenanted and agreed hereafter to assign, pledge, or mortgage, as the trustee shall reasonably require for better accomplishing the provisions and purposes of this indenture and for securing the payment of the principal and interest of the bonds intended to be secured hereby.

SEC. 3. The railroad company, at an office or agency to be maintained by it in the city of New York, will keep a register or registers for the registration and transfer of bonds issued hereunder, in which it will register, subject to such reasonable regulations as it may prescribe, bonds without coupons, and upon presentation thereof for such purpose any coupon bonds issued hereunder. Such register, at all reasonable times, shall be open to the inspection of the trustee.

Upon presentation to the railroad company, at the place where such register shall be kept, of any such registered coupon bond, accompanied by delivery of a written instrument of transfer in a form approved by the railroad company, executed by the registered holder, such bond shall be transferred upon such register, and such transfer shall be noted by the railroad company upon such bond. The registered holder of any such registered coupon bond also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person
185 presenting the bond; but any such coupon bond registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired; and each registration of a coupon bond shall be noted by the railroad company on the bond.

Registration of any coupon bond, however, shall not restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely, and shall remain payable to bearer.

Any registered bond without coupons may be transferred at said office or agency by surrender of such bond to the railroad company for cancellation, accompanied by the delivery of a written instrument of transfer in a form approved by the railroad company, duly executed by the registered holder for the time being, and by payment of any charge imposed under section 5 of article one hereof; and thereupon a new registered bond or new registered bonds for an equivalent aggregate principal sum shall be issued to the transferee or transferees, as provided in said section 4 of article one.

SEC. 4. The railroad company will not voluntarily create or suffer to be created any debt, lien, or charge which would be prior to the lien of these presents upon any property which shall have become subject to this indenture, or any part thereof, or upon the income thereof, and, within three months after the same shall accrue, it will

pay, or will cause to be discharged, or will make adequate provision to satisfy and discharge, all lawful claims and demands of mechanics, laborers, or others which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon such property or any
186 part thereof, or the income thereof; and if any company (other than the New York, Susquehanna and Western Railroad Company), of whose capital stock the greater part shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder, shall voluntarily create, or shall suffer to be created (except as in this indenture expressly permitted), any new lien or charge upon its property or income, or shall create, or shall suffer to be created, any new indebtedness other than indebtedness to the railroad company, or indebtedness for the current expenses of such company during a period not exceeding three months, then it (the railroad company) will acquire such lien, charge, or indebtedness and cause the same to be vested in the trustee, or will cause the same to be paid or discharged, or will make adequate provision for the satisfaction or discharge thereof; provided that nothing in this section contained shall require the railroad company to acquire, or cause to be paid or discharged or make provision for, any such debt, lien, or charge so long as the validity thereof in good faith shall be contested.

SEC. 5. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges (the lien of which would be prior to the lien hereof) lawfully imposed upon the stocks, bonds, and other property pledged or mortgaged hereunder, or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments, and governmental charges lawfully imposed upon the lien or interest under this indenture of the trustee or of the holders of the bonds hereby secured in respect of such stocks, bonds, and other property, so that the lien and priority of this indenture shall be fully preserved at the cost of the railroad company without expense to the trustee or the bondholders; and if any company of whose capital stock the greater part shall have been acquired and pledged hereunder, at any time while a greater part of the capital stock of such company shall be pledged hereunder, shall fail to
187 pay all taxes, assessment, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then it, the railroad company, either will pay the same or will acquire and will transfer to the trustee the claim therefor, or will make adequate provision for the satisfaction or discharge thereof: Provided, however, That nothing in this section contained shall require the railroad company to pay, acquire, or make provision for any such tax, assessment, or charge so long as in good faith the railroad company shall contest the validity thereof.

SEC. 6. Except as in this indenture expressly authorized, the railroad company will not by affirmative vote or consent, or by abstaining from voting, sanction, or permit any increase of the capital stock of any company of whose capital stock the greater part shall be sub-

ject to this indenture, or the issue or the guaranty of any new bonds by any such company, or the creation of any new indebtedness of any such company (except current operating accounts for a period not at any date exceeding six months prior thereto), or the creation of any new mortgage or other lien upon the railroad or property of any such company, unless simultaneously there shall be effective provision that such new indebtedness, and the evidences thereof and such new bonds issued or guaranteed, and such new mortgage or other lien, and all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously pledged hereunder) forthwith, upon the issue or creation thereof, shall be transferred to or pledged with the trustee, by it to be held subject to all the trusts of this indenture; and all such additional stock shall be fully paid and non-assessable.

188 Except as in this indenture expressly authorized, the railroad company will not, by affirmative vote or consent, or by abstaining from voting, sanction or permit any company, of whose capital stock the greater part shall be subject to this indenture, to sell or otherwise to dispose of, any mine, colliery, railroad or bridge belonging to such company, unless the operation thereof be abandoned, or any property required for such operation, or to lease the same (unless such lease be upon the express condition that it shall terminate at the election of the trustee in case any default shall be made and shall continue as provided in section 2 of article four hereof), except to the railroad company or to some other company of whose capital stock not less than ninety per cent. shall then be held by the railroad company and be pledged with the trustee hereunder.

SEC. 7. Any and all claims or indebtedness, which the railroad company hereafter may acquire against any other company, of whose capital stock the greater part shall have been pledged or assigned to the trustee hereunder, shall (subject to the provisions in respect thereof in this indenture contained) be and become subject to the lien of this indenture; and, if and when requested in writing by the trustee, the railroad company will execute to the trustee appropriate assignments thereof.

SEC. 8. The railroad company will not issue, negotiate, sell or dispose of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained; and in issuing, selling, negotiating or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, only to and for the purposes herein prescribed, and to and for no other or different purpose.

189 SEC. 9. In each and every year after the year 1901 during the month of May the railroad company will deliver to the trustee, and also to the copartnership firm of J. P. Morgan & Co., bankers in the city of New York, as sinking fund trustees hereunder, a statement in writing under its corporate seal, showing the total amount of coal sold and delivered during the preceding calendar year from the mines

of the Pennsylvania Coal Company; and simultaneously it will pay to the said copartnership firm of J. P. Morgan & Co., as sinking fund trustees hereunder, a sum equal to ten cents for every ton of coal so sold and delivered. The moneys so received, together with all accumulations of interest thereon, as hereinafter provided, shall be appropriated to, and shall constitute, a sinking fund, as additional security for the retirement of every bond of this issue at or before the stated maturity thereof.

The moneys paid or coming into the sinking fund shall by the said firm of J. P. Morgan & Co., sinking fund trustees, be held as bankers; and from time to time the said sinking fund, together with any accumulations of interest thereon, shall by them be invested in bonds hereby secured, by the purchase thereof in such manner as to them shall seem best, and at such prices as they shall deem best, not exceeding par and accrued interest, with five per cent. premium added to the principal.

To the extent that, in the opinion of the sinking fund trustees, bonds hereby secured can not be purchased on said terms, the sinking fund trustees may and shall proceed to draw and to designate by lot, bonds hereby secured to an aggregate amount sufficient at the valuations above prescribed to exhaust the net moneys paid by the railroad company under the provisions of this section, and all accumulations of interest thereon and then in possession of the sinking fund trustees and available for the redemption of the bonds so designated.

190 The numbers of all bonds so designated and drawn shall be published as directed by the sinking fund trustees, twice in each week for three successive weeks in the month of January or the month of July, in two or more newspapers published in the city of New York, with a notice that upon presentation thereof to the sinking fund trustees, every such bond will be paid at par, together with a premium of five per cent. thereof and all interest accrued thereon upon the first day of the following month of February or of August, as the case may be; and after such day so designated no interest shall thereafter accrue or be payable upon, or in respect of, any bond so designated and notified, nor shall any coupon representing any such subsequently accruing interest be of any force or effect. But, to the extent of any moneys at any time thereafter in their possession, upon receipt of any such bond so designated and notified, and not presented before the day so designated, together with all coupons (if any) belonging thereto for interest accruing after such designated day, the sinking fund trustees may receive the same, and may pay therefor a sum equal to par together with a premium of five per cent. thereof and all interest accrued thereon up to the date so designated.

All of the bonds hereby secured, which shall be called or purchased, as aforesaid, shall, as soon as received by the sinking fund trustees, be conspicuously and indelibly stamped on the face thereof, as "Received for the sinking fund, and no longer negotiable or transferable," and the date of the receipt thereof by the sinking fund trustees shall also be plainly noted thereon; and the coupons thereto belonging shall be

defaced or canceled by perforations or punctures through the name of the treasurer; or the sinking fund trustees may exchange any coupon bond for a registered bond or bonds without coupons, for the like aggregate principal sum, as permitted by section 5 of article one of this indenture; and, in case of such exchange, every such registered bond so received shall be stamped "Received for the sinking fund and no longer transferable."

191 All coupon bonds or registered bonds so received by the sinking fund trustees shall be held by them for the sinking fund. All of the bonds hereby secured, which shall come into or be received for the sinking fund, shall remain in force as valid obligations, as an investment of and for the sinking fund, but for no other purpose; and the semi-annual interest thereon, as the same shall mature, shall be payable, and shall continue to be paid by the railroad company to the sinking fund trustees, in the same manner and at the same times as such payments of interest would be made if the said bonds were held and owned by any other corporation or person, and the amount of such interest shall be added to and deposited and shall be applied as a part of the sinking fund, in the manner, and with the limitations hereinbefore provided in respect of the deposit and investment of other moneys paid or coming into the sinking fund and the accumulations thereof.

When all of the bonds secured by this indenture shall have been paid, or shall have been called or designated for acquisition for the sinking fund, as hereinbefore provided, all of the said bonds that shall have been acquired or held for the sinking fund shall by the sinking fund trustees be canceled and delivered to the railroad company, together with all coupons (if any) thereto belonging; and the sinking fund trustees shall also pay over and deliver to the railroad company all moneys and securities for money then in or belonging to the sinking fund; but not without making ample provision, or taking adequate security, for the payment of the principal at or before the maturity of any of the said bonds that shall have been called for the sinking fund, as hereinbefore provided, and shall not have been presented and delivered in pursuance of such call.

No registered bond without coupons shall be drawn so long as any coupon bond is outstanding and unpaid.

As sinking fund trustees, J. P. Morgan & Co. shall act as a

192 copartnership. Notwithstanding any change in said firm, J. P. Morgan & Co., as from time to time constituted, shall continue to be sinking fund trustees, with all the powers, right, and title vested hereunder in the sinking fund trustees. But in case of any change in said firm, the railroad company and the trustee, by an instrument in writing under the corporate seals of the trustee and of the railroad company may appoint to be sinking fund trustee in place and in lieu of J. P. Morgan & Co. some trust company in good standing, doing business in the city of New York and having a capital and surplus aggregating at least $1,000,000. Thereupon the firm of J. P. Morgan & Co., as then constituted, shall execute and deliver an instru-

ment transferring to such sinking fund trustee all of the estates, properties, rights, powers, and duties of the said J. P. Morgan & Co. as sinking fund trustees, and shall duly transfer and deliver to the new sinking fund trustee so appointed in their place all bonds and other property and moneys held by them as such sinking fund trustees after deducting therefrom their reasonable costs and charges then remaining unpaid. Without any further act, deed, or conveyance, such new sinking fund trustee forthwith shall become and be vested with all the properties, rights, powers, trusts, duties, and obligations of J. P. Morgan & Co. as sinking fund trustees hereunder, with like effect if originally named herein as sinking fund trustee.

Neither J. P. Morgan & Co., nor any successor, as sinking fund trustees, shall be answerable for the default or misconduct of any agent or attorney appointed by them in pursuance hereof, if such agent or attorney shall have been selected with reasonable care, or for anything whatever in connection with such sinking fund except willful misconduct and gross negligence. The sinking fund trustees shall be entitled to a reasonable compensation payable primarily by the railroad company and secondarily out of the sinking fund.

193 ARTICLE THREE.

SECTION 1. The trustee shall be authorized to cause to be registered in its name as trustee hereunder any and all coupon bonds pledged with it hereunder, or which at any time hereafter may be pledged with it under any of the provisions of this indenture, or it may cause the same to be exchanged for registered bonds without coupons of any denomination, or it may cause any such bonds to be stamped "Nonnegotiable. Held in trust under the collateral trust indenture bearing date February 1, 1901, executed by Erie Railroad Company to The Mercantile Trust Company, as trustee."

The trustee shall cause to be transferred into its name, as trustee hereunder, all registered bonds which shall have been delivered and assigned to it as security hereunder. The trustee at any time may transfer into its name, as trustee hereunder, all or any shares of stock, the certificates for which shall have been pledged with it hereunder.

The trustee may do whatever may be necessary for the purpose of maintaining or preserving the corporate existence of any company the greater part of whose shares shall have been pledged hereunder, and for such purposes, from time to time, it may sell, assign, transfer, and deliver so many shares of the stock of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies; provided, however, that under this provision no transfer shall be made which shall so reduce the amount of stock in any company held by the trustee as to render it less than a controlling interest in such stock; and in every case the trustee may make such arrangements as it shall deem necessary for the protection of the trust hereunder.

SEC. 2. Unless and until there shall be some continuing default (1) in the payment of any interest on any bond or bonds secured by
194 this indenture, and such defaults shall have continued for a period of ninety days, or (2) in the payment of the principal of any bond hereby secured when the same shall have become payable, or (3) in the due observance or performance of any other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for a period of six months after written notice thereof shall have been given by the trustee to the railroad company—(a) the trustee (except upon the request or with the assent of the railroad company) shall not enforce the payment of, or collect, the principal or interest of any bonds or of any other claims or indebtedness now or hereafter subject to this indenture, whether at or before or after the maturity of such bonds or contract obligations or other claims or indebtedness, and shall not enforce any provision of the mortgages, trust deeds, or other instruments under which such bonds or other obligations were issued or by which the same are secured; and (b) the railroad company shall be entitled to receive all interest paid in respect of any such bonds or obligations, and the dividends on all shares of stock which shall be subject to this indenture, although the same shall have been transferred to the trustee; (c) from time to time (subject to the covenants in respect thereof in this section contained), upon the request of the railroad company on a date not more than sixty days prior to the maturity of any coupons, held by the trustee for such interest, the trustee shall deliver such coupons to the railroad company in order that the railroad company may receive payment thereof for its own use, or may cause the same to be canceled, and, upon request of the railroad company on a date not more than sixty days prior to the maturity of any interest or dividends, the trustee shall deliver to the railroad company suitable orders in favor of the railroad company, or its nominee, for the payment of such interest and dividends upon any bonds or shares held by the trustee, and he railroad company may collect such coupons, interest, and divi-
195 dends, but not by any proceeding which the trustee shall deem to be prejudicial to the trusts hereunder, and the trustee at once shall pay over to the railroad company any such interest and dividends which may be collected or be received by it; and (d) the railroad company, for its own use, shall be entitled to demand, collect, and receive, and may release and discharge, the principal and interest of any claims and indebtedness subjected to the lien of this indenture under section 7 of article two hereof, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose.

Provided, however, and hereby it is declared and agreed that, except as in this indenture otherwise expressly provided, (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to the railroad company, any principal of any bond pledged or assigned to the trustee hereunder; (2) the railroad com-

pany shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond, or any principal or interest of any such other obligation, claim, or indebtedness which shall have been collected or paid out of the proceeds of any sale of the property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, obligations, claims, or indebtedness in case of a dissolution or liquidation of such company; it being the intention that the railroad company shall be entitled to receive payments made only out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon, or right to interest or dividends, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or interest, or any such other claims or indebtedness, by legal proceeding or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee shall deem
196 prejudicial to the trust hereunder, and (5) until actually paid, released, or discharged, every such coupon, or right to interest or dividends, and such other claims and indebtedness shall remain subject to the lien of this indenture.

If any such coupon, claim or indebtedness shall not be paid or satisfied within sixty days after delivery thereof to the railroad company hereunder, the railroad company shall return the same to the trustee; and in case of the payment or satisfaction of any such coupon, claim, or indebtedness delivered by the trustee to the railroad company hereunder, the railroad company, upon demand of the trustee, shall furnish satisfactory evidence of such payment or satisfaction.

SEC. 3. In case any sum shall be paid on account of the principal of any bonds or of any obligations held by the trustee hereunder, or in case any sum shall be paid on account of the interest on any such bonds or obligations out of the proceeds of a sale of the property covered by a mortgage or trust deed securing such bonds or obligations, or in case, upon the dissolution or liquidation of any company, any sum shall be paid upon any shares of stock of such company pledged hereunder or upon any such claims against or indebtedness of any such company held by the trustee, then, in any such case, any such sum, unless applied on account of the purchase price of property purchased pursuant to section 5 of this article, shall be received by the trustee and shall be paid over by the trustee to the railroad company to reimburse it for expenditures by it made for any one or more of the purposes for which bonds reserved under section 4 of article one hereof or their proceeds may be used, upon certificates of such expenditures, signed by the president or a vice-president, and by the comptroller or auditor or treasurer of the railroad company.

SEC. 4. Unless and until there shall be some continuing default (1) in the payment of any interest on any bond or bonds secured by
197 this indenture and such default shall have continued for a

period of ninety days; or (2) in the payment of the principal of any bond hereby secured when the same shall have become payable, or (3) in the due observance or performance of any other covenant or condition in this indenture, required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for a period of six months after written notice thereof shall have been given by the trustee to the railroad company—the railroad company shall have the right to vote upon all shares of stock subject to this indenture for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such shares were not subject hereto; and from time to time, upon demand of the president of the railroad company, the trustee, forthwith, shall execute and deliver to the railroad company or to its nominees suitable powers of attorney or proxies to vote upon any shares of stock which shall have been transferred to the name of the trustee.

SEC. 5. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations which shall have been delivered to, and held by, the trustee hereunder, then in any such case, if the trustee shall hold more than ninety per cent in amount of the entire issue of such bonds or obligations in default, upon the written request of the railroad company, it shall, and in other cases, upon such written request, it may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose or enforce the mortgage, or trust, or charge by which such bonds or obligations in default are secured. In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default in the payment of interest shall have continued for a period of ninety days, then the trustee, in its discretion, may institute such proceedings without such written request.

198 In case, at any time, any company of whose capital stock the greater part shall be held by the trustee hereunder shall be dissolved or liquidated, or in case all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale, or in case any property covered by a mortgage securing any bonds, or subject to any charge or trust for the payment of any other obligations held by the trustee hereunder, shall be sold upon foreclosure of such mortgage, or by enforcement of such charge or trust, then and in every such case (if the property of such company, or the property sold, can be acquired by crediting on the bonds, obligations, claims, indebtedness or shares of stock of such company, held by the trustee hereunder, any sum accruing or to be received thereon out of the proceeds of such property, and paying not more than ten per cent of the price of such property in cash) the trustee, in its discretion, may, but, if by the railroad company requested in writing and provided with the amount of cash necessary therefor (whether such amount be more or be less than ten per cent of the price of such property), the trustee shall purchase, or shall

cause to be purchased, or shall permit the railroad company to purchase, such property, either in the name or on behalf of the trustee or of the railroad company, or by purchasing trustees, and shall use, or shall permit the railroad company to use, such bonds, obligations, claims, indebtedness and stock, so far as may be, to make payment for such property. In case of such purchase the trustee shall take such steps as it may deem proper to cause such property to be vested either in the railroad company, subject to the lien of this indenture, or in some other corporation organized or to be organized, with power to acquire and manage such property, provided that all the outstanding bonds and shares of capital stock of such other corporation (excepting the number of shares required to qualify directors) shall by the trustee be acquired on behalf of the railroad company and be held under this indenture.

199 With the consent of the railroad company at any time the trustee may take such proceedings as in its discretion it shall deem desirable to protect its interests hereunder in respect of any bonds, obligations, or stock subject to the lien hereof, and for that purpose it may join in any plan of reorganization in respect of any such bonds, obligations, or stocks, and may accept new securities issued in exchange therefore under such plan. In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default shall have continued for the period of ninety days, the trustee shall be entitled to take such proceedings without the consent of the railroad company.

The railroad company covenants that, forthwith, on demand of the trustee, it, the railroad company, will pay, or will make satisfactory provision for, all expenditures to be incurred by the trustee under any of the provisions of this section, including all expenditures necessary to obtain and to perfect the ownership and title to any property which pursuant to the provisions of this section the trustee shall purchase or shall cause to be purchased; and in case the railroad company shall fail so to do, then, without impairment of, or prejudice to, any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien prior to that under this indenture upon the bonds, obligations, claims, indebtedness, or stock in respect of which such advances shall have been made, and upon the proceeds thereof and upon any property acquired by means of such bonds, obligations, claims, indebtedness, or stock.

In case the trustee shall not purchase or cause to be purchased
200 the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds, obligations, or stock, then the trustee shall receive any portion of the proceeds of the sale accruing on the bonds, obligations, and stock by it held hereunder, and from time to time such proceeds shall be paid

over to the railroad company to reimburse it for expenditures which shall have been made by it for any purpose for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures signed by the president or a vice-president and by the comptroller or auditor or treasurer of the railroad company.

SEC. 6. Anything in this indenture to the contrary notwithstanding, any company of whose shares of capital stock the larger part shall be held by the trustee hereunder may be merged or consolidated with, or all or any part of the property of any such company may be sold to, the railroad company or with or to any other company of whose capital stock at least ninety per cent in amount shall then be held by the trustee hereunder;

Provided, however, (1) that in case of a merger or consolidation with, or sale or conveyance to, the railroad company, the property of such company, or the property sold or conveyed, shall become and be subject to the lien of this indenture, free from any prior charge except to secure bonds then held by the trustees or by the trust company hereunder, and shall be vested in the trustees; and (2) that in case of a merger or consolidation with, or sale or conveyance to, any company other than the railroad company, all the shares of capital stock (except the number of shares required to qualify directors) and all the bonded indebtedness and other obligations of such consolidated company or company into which such other company shall have been merged (except current operating liabilities) shall continue to be held by the trustee, notwithstanding such merger, consolida-
201 tion, sale, or conveyance. The trustee may make any exchange, substitution, cancellation, or surrender of securities required for the purposes or in accomplishment of any such merger or consolidation; and the trustee may receive the opinion of any counsel approved by it as to the legal effect of any such merger or consolidation, and as to the steps necessary to be taken to consummate the same, and as to any other matter under this section; and such opinion shall be full protection to the trustee for any action by it taken pursuant thereto.

SEC. 7. At any time in its discretion the trustee may, and, if requested in writing by the railroad company, the trustee shall, consent to the extension or renewal of any bonds or obligations now held, or which hereafter shall be held by the trustee hereunder; provided that the mortgage and lien securing such bonds or obligations shall continue unimpaired notwithstanding such extension. The trustee may receive the opinion of any counsel approved by it as conclusive evidence that any such extension is in compliance with the provisions of this section.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond which in any way, at or after maturity, shall have been transferred or pledged

separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of
202 any interest on any bond or bonds secured by this indenture, and any such default shall continue for a period of ninety days, or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured, or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of six months after written notice thereof shall be given to the railroad company by the trustee or by the holders of five per cent in amount of the bonds hereby secured—then and in every such case the trustee, by any officer, attorney, or agent, appointed by it therefor, shall be entitled to vote on all shares of stock then held by the trustee hereunder, and shall be entitled to receive and collect all dividends and all interest moneys maturing or payable upon any and all stocks and bonds then held by the trustee hereunder, and the trustee shall be entitled, by its attorneys or agents, to enter into and upon all or any property and premises, rights and interests conveyed or mortgaged to the trustee hereunder, and may exclude the railroad company, its agents and servants, wholly therefrom, and, having and holding the same, may use, operate, manage, and control the same and conduct the business thereof, by its superintendents, managers, receivers, agents, and servants, to the best advantage of the holders of the bonds hereby secured; and, at the expense of the trust estate, the trustee may administer and manage the same as it may deem to the best advantage of the holders of said bonds. After deducting all expenses incurred under this section and any other expenses of the trust hereunder, the trustee shall apply all moneys collected or received by it hereunder as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, with interest
203 thereon at the rate of four per cent per annum; such payments to be made ratably to the persons entitled thereto, without discrimination or preference; and

In case the principal of the bonds hereby secured shall have become due, by declaration or otherwise, first to the payment of the accrued interest (with interest on the overdue installments thereof at the rate of four per cent per annum) in the order of the maturity of the installments, and next to the payment of the principal of all bonds hereby secured; in every instance such payments to be made ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify the provisions of section 1 of this article four, but are subject thereto.

SEC. 3. In case default shall be made in the payment of any interest on any bond or bonds hereby secured, and any such default shall continue for a period of six months, then and in every case of such continuing default, the holders of a majority in amount of the bonds hereby secured then outstanding, by notice in writing delivered to the railroad company and to the trustee, may declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary notwithstanding. This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon all such bonds, with interest at the rate of four per cent per annum on overdue installments of interest, shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby
204 secured then outstanding, by written notice to the railroad company and to the trustee, may rescind and annul such declaration and its consequences; but no such rescission and annulment shall extend to, or shall affect any subsequent default, or impair any right consequent thereon.

In case the trustees shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the trustee, then and in every such case the railroad company and the trustee shall be restored respectively to their several positions and rights hereunder in respect of the mortgaged premises, and the shares of stock and the bonds and other property herein pledged or agreed to be pledged; and all rights, remedies, and powers of the trustee shall continue as though no such proceeding had been taken.

SEC. 4. In case (1) default shall be made in the payment of any interest on any bond at any time issued under and secured by this indenture, and any such default shall continue for a period of ninety days; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall continue for a period of six months after written notice thereof from the trustee; then, and in each and every such case of default, with or without entry, personally or by attorney, in its discretion, (a) the trustee may sell to the highest and best bidder all and singular the stocks, bonds, and other property which then shall be held by

the trustee, or in any manner shall be subject to this indenture, including any real and personal property, franchises, and rights of
205 any kind, and all right, title and interest, claim and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of section 6 of this article four, in which case such sale may be made in parcels as in said section provided, which sale or sales shall be made at public auction at such place in the city of New York, in the State of New York, or at such other place or places, and at such time or times, and upon such terms as the trustee may fix and briefly specify in the notice or notices of sale to be given, as herein provided; or, (b) the trustee may proceed to protect and enforce its rights and rights of bondholders under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder.

SEC. 5. Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured, in case of any such continuing default, it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit, or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured; but, anything in this indenture to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct and
206 to control the method and place of conducting any proceedings for any sale of the premises subject to the lien of this indenture, or for the foreclosure hereof, or for a receiver or any other proceedings hereunder.

SEC. 6. In the event of any sale hereunder, whether under the power of sale or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property held by the trustee, or in any manner subject to this indenture, shall be sold in one parcel and as an entirety, unless the holders of a majority in amount of the bonds hereby secured, then outstanding, shall in writing request the trustee to cause said premises to be sold in parcels, in which case the sale or sales shall be made in such parcels, and at such times and places, as may be specified in such request, or unless such sale as an entirety shall be impracticable by reason of some statute or other cause. This provision shall bind the parties hereto, and the holders of the bonds and the coupons hereby secured.

SEC. 7. Notice of any sale pursuant to any provision of this indenture shall state the time and place or the times and places when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be given sufficiently if published once in each week for four successive weeks prior to such sale in a newspaper published in New York, N. Y.

207 SEC. 8. From time to time the trustee may adjourn any sale by it to be made under the provisions of this indenture, by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and, in such event, without further notice or publication, the trustee may make such sale at the time and place to which the same shall be so adjourned.

SEC. 9. Upon the completion of any sale or sales under this indenture the trustee shall execute and deliver to the accepted purchaser or purchasers good and sufficient assignments, transfers, and conveyances of the stocks, bonds, and other property sold, and shall deliver to such purchaser or purchasers all bonds and obligations and the certificates for all shares of stock by it, held hereunder, which shall have been sold to such purchaser or purchasers. The trustee and its successors hereby are appointed the true and lawful attorney or attorneys irrevocable, of the railroad company, in its name and stead to make all necessary assignments, transfers and conveyances of shares of stock or bonds or other property thus sold; and for that purpose it and they may execute all necessary acts of assignment and transfer and may substitute one or more persons with like power; the railroad company hereby ratifying and confirming all that its said attorney or attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred, or under and by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company, of, in and to the property sold, and shall be a perpetual bar, both at law and in equity, against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises sold, or any part thereof, from, through or under the railroad company, its successors or assigns.

208 SEC. 10. The receipt of the trustee shall be a sufficient discharge to any purchaser of the property or any part thereof, sold as aforesaid, for the purchase money: and no such purchaser or his representatives, grantees or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or shall in any manner whatsoever be answerable for any loss, misapplication or nonapplication of any such purchase money or any part thereof, or shall be bound to inquire as to the authorization, necessity, expediency or regularity of any such sales.

SEC. 11. In case of such sale, whether made under the power of sale hereby granted or pursuant to judicial proceedings, the whole of the

principal sums of the bonds hereby secured, if not previously due, shall at once become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 12. The purchase money, proceeds or avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, together with any other sums which then may be held by the trustee under any of the provisions of this indenture as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys and counsel, and of all expenses, liabilities and advances made or incurred by the trustee under this indenture and to the payment of all taxes, assessments or liens prior to the lien of these presents, except any taxes, assessments or other superior liens to which such sales shall have been made subject;

209 Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of four per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, ratably, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, subject, however, to the provisions of section 1 of this article four: and

Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 13. Upon any such sale by the trustee or pursuant to judicial proceedings, any purchaser, in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any bonds, and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons in order that there may be credited thereon the sums applicable to the payment thereof under section 12 of this article; and such purchaser thereupon shall be credited, on account of such purchase price payable by him, with the sums so applicable to the payment of, and credited on, the bonds and coupons so presented; and, at any such sale, any bondholders may bid for and purchase such property, and may make payment therefor as aforesaid, and, in compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability.

210 SEC. 14. The railroad company covenants that (1) in case default shall be made in the payment of any interest on any bonds at any time outstanding and secured by this indenture, and such default shall continue for a period of six months, or (2) in case default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds, or by declaration as authorized by this indenture, or upon a sale of the mortgaged premises as hereinbefore provided, then,

upon demand of the trustee, the railroad company will pay to the trustee, for the benefit of the holders of the bonds and coupons hereby secured, then outstanding, the whole amount which then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest at the rate of four per cent per annum upon the overdue principal and installments of interest; and in case the railroad company shall fail to pay the same forthwith upon such demand, the trustee in its own name, and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The trustee shall be entitled to recover judgment as aforesaid either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture upon the mortgaged and pledged premises, and the right of the trustee to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises, and of the application of the proceeds of sale to the payment of the mortgage debt, the trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds
211 issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgage debt remaining unpaid, with interest. No recovery of any such judgment by the trustee, no levy of any execution upon any such judgment upon property subject to the lien of this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the mortgaged premises or any part thereof, or any rights, powers or remedies of the trustee hereunder, or any lien, rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies of the trustee and of the bondholders shall continue unimpaired as before.

Any moneys thus collected by the trustee under this section shall be applied by the trustee towards payment of such amounts then due and payable upon such bonds and coupons and in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind, upon presentation of the respective bonds and coupons and stamping such payments thereon, if partly paid, or upon cancellation thereof, if paid in full.

SEC. 15. The railroad company will not at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, and stay or extension law, now or at any time hereafter in force in any locality where the mortgaged premises or pledged property, or any part of either, may or shall be situate, nor will it claim, take or insist on, any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the mortgaged premises or pledged property, or any part thereof, prior

to any sale, or sales, thereof to be made pursuant to any provision herein contained, or to the decree of any court of competent jurisdiction, nor after any such sale or sales will it claim or exercise any right, conferred by any statute enacted by any State, or otherwise, to redeem the property so sold or any part thereof, and
212 it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

SEC. 16. Upon filing a bill in equity, or upon beginning any other judicial proceedings, to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein conferred, and provided to be exercised by the trustee upon the occurrence and continuance of default, as hereinbefore provided; and, as matter of right, the trustee shall be entitled to the appointment of a receiver of the premises subject to the lien of this indenture, and of the earnings, income, revenue, rents, issues or profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledgee, to continue to retain possession and control of the stocks, bonds, cash and other property pledged or to be pledged with the trustee hereunder.

SEC. 17. At any time hereafter before full payment of the bonds secured hereby and whenever it shall deem expedient for the better protection or security of such bonds (although then there shall be no default entitling the trustee to exercise the rights and powers conferred by section 2 of this article four of this indenture) the railroad company, with the consent of the trustee, may authorize the trustee for any period, fixed or indefinite, to vote upon all the shares of stock then held by the trustee hereunder, and to collect the dividends thereon and the interest upon any bonds or other obligations then
213 held by the trustee hereunder, and to enter into full possession of the whole or any part of the property and premises hereby mortgaged or conveyed or intended so to be. In such event the trustee shall have, and may exercise, the same rights and powers, and shall apply the moneys by it collected or received, in the manner provided in said section 2 of this article four in case of exercise by the trustee of the rights and powers thereby conferred upon a default continuing as therein set forth; but no action under this section shall prejudice or impair the right of the trustee at any time subsequently to exercise, or to continue to exercise, the rights and powers conferred by said section 2 of this article four, or by any other provision of this indenture, when entitled thereto.

SEC. 18. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any

trust thereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the trustee written notice of such default and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured, then outstanding, shall have made written request upon the trustee, and shall have afforded to it a reasonable opportunity, either to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name; nor unless, also, they shall have offered to the trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request and offer of indemnity are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts of this indenture and to any action or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and
214 coupons shall have any right in any manner whatever to affect, disturb or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 19. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee, or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 20. No delay or omission of the trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default, continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein; and every power and remedy given by this article to the trustee, or to the bondholders, may be exercised from time to time, and as often as may be deemed expedient, by the trustee or by the bondholders.

ARTICLE FIVE.

No recourse under or upon any obligation, covenant or agreement of this indenture, or of any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly
215 or through the railroad company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly understood that this mortgage, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to,

or be incurred by, the incorporators, stockholders, officers, or directors of the railroad company, or of any successor corporation, or any of them, because of the creation of the indebtedness hereby authorized, or under or by reason of the obligations, covenants or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all personal liability of every name and nature, either in common law or in equity, or by statute of, and any all rights and claims against every such stockholder, officer, or director are hereby expressly waived as a condition of and as a consideration for the execution of this indenture and the issue of such bonds and coupons.

ARTICLE SIX.

SECTION 1. Any request or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent instruments of similar tenor and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee with regard to due action taken by it under such request or other instrument, if made in the following manner:

The fact and date of the execution by any person of any such
216 request, or other instrument, or writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person whose name was subscribed to such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as a bondholder, and the amounts and issue numbers of the bonds held by such persons, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers or other depositary (wherever situated), if such certificate shall be deemed by the trustee to be satisfactory, showing therein that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

SEC. 2. The railroad company and the trustee may deem and treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond and coupon, as the case may be, for the purpose of receiving payment thereof and for

all other purposes; and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

The railroad company and the trustee may deem and treat the person in whose name any registered bond without coupons issued hereunder shall be registered upon the books of the railroad company, as hereinbefore provided, as the absolute owner of such bond for the purpose of receiving payment of, or on account of, the principal and interest of such bond, and for all other purposes, and may deem
217 and treat the person in whose name any coupon bond shall be so registered as the absolute owner thereof for the purpose of receiving payment of, or on account of, the principal thereof, and for all other purposes except to receive payment of interest represented by outstanding coupons; and all such payments so made to any such registered holder for the time being, or upon his order, shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

ARTICLE SEVEN.

In case any real property, rolling stock, machinery or other tangible property (but not shares of stock or certificates therefor, bonds, certificates of indebtedness or other securities) shall be conveyed or mortgaged to the trustee hereunder, then from time to time, upon the written request of the railroad company approved by resolution of its board of directors or executive committee, the trustee shall release from the lien and operation of this indenture any of such real property, rolling stock, machinery or other tangible property described in such written request; provided, that there shall be delivered to the trustee together with such written request a certified copy of the resolution approving thereof, and a certificate signed by the president or a vice-president of the railroad company, stating (a) that the railroad company has sold or exchanged, or has agreed to sell or exchange, such property, and the price or consideration to be received therefor by the railroad company, in cash or other property, and that such price or consideration in his opinion is equal to the full value of such property; and (b) that it is no longer necessary or expedient to retain the property described in such request for use in carrying on the business of the railroad company or in connection with the maintenance or operation of any mine, colliery, railway or
property belonging to any of the companies of whose capital
218 stock the greater part shall then be held by the trustee hereunder.

The railroad company covenants and agrees that it will set aside, separate and apart from all other property and funds of the railroad company, the price or consideration by it received for any property which may be released under the provisions of this article, and that the same shall be applied, but only with the approval of the trustee, for some one or more of the purposes for which bonds or their pro-

ceeds reserved under section 3 of article one of this indenture may be applied.

It is expressly understood and declared that nothing in this article contained shall authorize or permit the release by the trustee of any shares of stock of the certificates therefor, or any bonds or other evidences of indebtedness or securities which shall be held by the trustee hereunder, but that the provisions of this article shall apply only to real property, rolling stock, machinery, or other tangible property which, pursuant to any provision of this indenture, shall have been conveyed or assigned to the trustee by way of mortgage.

Article eight.

Section 1. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; or for anything whatever in connection with this trust, except willful misconduct or gross negligence. The trustee shall not be personally liable for any debts contracted by it, or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts during any period wherein the trustee shall manage the trust property or premises. The trustee shall not
219 be under any obligation to take any action towards the execution or enforcement of the trusts hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish it reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at least five per cent. in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent. in amount of the bonds hereby secured, then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but the foregoing provisions of this section are intended only for the protection of the trustee, and shall not be construed to limit or affect any discretion or power by any provision of this indenture given to the trustee to determine whether or not it shall take action in respect of any default, or any power or discretion of the trustee to take action in respect of any default without such notice or request from bondholders. The trustee shall not be responsible for the recording of this indenture and shall not be required to file the same as a chattel mortgage.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the railroad company agrees to pay such compensation, as well as all expenses necessarily incurred or disbursed by the trustee hereunder.

SEC. 2. The trustee, or any trustees hereafter appointed, may resign, and may be discharged of the trusts created by this denture by giving notice thereof to the railroad company and to the bondholders, by publication, at least twice a week, for four successive weeks, in one newspaper at that time published in New York, N. Y.

220 The trustee may be removed at any time by an instrument in writing under the hands of the holders of not less than two-thirds in amount of the bonds hereby secured and then outstanding.

SEC. 3. In case at any time said trustee, The Mercantile Trust Company, or any trustee hereafter appointed, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed and declared that, in case at any time there shall be a vacancy in the office of trustee hereunder, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. Thereupon the railroad company shall publish notice of such appointment once a week for six successive weeks in a newspaper published in New York, N. Y., but any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured prior to the expiration of one year after such publication of notice. Every such trustee appointed in place of The Mercantile Trust Company, or its successor in the trust, shall always be a trust company in good standing, doing business in the city of New York, and having a capital and surplus aggregating at least $1,000,000, if there be such a trust company willing and able to accept the trust upon reasonable or customary terms.

Any such new trustee appointed hereunder shall execute, acknowledge, and deliver to the trustee last in office, and also to the

221 railroad company, an instrument accepting such appointment hereunder, and thereupon such new trustee, without any further act, deed, or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in the trust hereunder with like effect as if originally named as trustee herein; but, nevertheless, on the written request of the new trustee, the trustee ceasing to act shall execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the trustee so resigning or removed, and shall duly assign, transfer, and deliver all stocks, bonds, or other property and moneys held by such trustee to the new trustee so appointed in its place; and, upon request

of any such new trustee, the railroad company shall make, execute, acknowledge, and deliver any and all assignments, deeds, conveyances, or instruments in writing for more fully and certainly vesting in and confirming to such new trustee all such estates, properties, rights, powers, and duties.

221 ARTICLE NINE.

SECTION 1. Until some default shall have been made in the due and punctual payment of the interest, or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall waive any such period of grace (such waiver by the railroad company being hereby expressly permitted), the railroad company, its successors and assigns, shall be suffered and permitted to retain actual possession of any property, other than certificates
222 for shares of stock, bonds, certificates of indebtedness or other securities, cash, or other property pledged or to be pledged hereunder with the trustee, which hereafter may be mortgaged to the trustee pursuant to any provision of this indenture, and to manage, operate, and use such property, with the rights and franchises appertaining thereto, and to collect, receive, take, use, and enjoy the earnings, income, rents, issues, and profits thereof, but not to sell or dispose of the property itself except as expressly in this indenture authorized; and to vote upon or to cause to be voted upon all the shares of stock subject to this indenture except as hereinbefore otherwise expressly provided.

SEC. 2. If, when all the bonds hereby secured shall have become due and payable, the railroad company well and truly shall pay, or shall cause to be paid, the whole amount of the principal moneys and interest due upon all of such bonds and coupons for interest thereon then due and unpaid, or shall provide for such payment by depositing with the trustee hereunder for the payment of such bonds and coupons, the entire amount then due thereon for principal and interest, and also shall pay, or shall cause to be paid, all other sums payable hereunder by the railroad company (including any costs and charges of the trustee or of the sinking fund trustee then remaining unpaid), and well and truly shall keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights, and interests hereby conveyed or pledged shall revert to the railroad company and the estate, rights, title, and interest of the trustee shall thereupon cease, determine, and become void, and in such case the trustee, on demand of the railroad company, and at its cost and

expense, shall execute proper instruments acknowledging satisfaction of and discharging this indenture; otherwise the same shall be, continue, and remain in full force and virtue.

223 ARTICLE TEN.

SECTION 1. All the covenants, stipulations, promises, and agreements in this indenture contained, by or in behalf of the railroad company, shall bind its successors and assigns, whether or not so expressed.

SEC. 2. Nothing contained in this indenture or in any bond hereby secured shall prevent any consolidation or merger of the railroad company with any other corporation or any conveyance and transfer subject to the continuing lien of this indenture and to all the provisions thereof, of all the mortgaged and pledged premises as an entirety to any other corporation; provided, however, that such consolidation, merger, or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that all stock, and the certificates therefor, and all bonds, certificates of indebtedness, and other obligations then held by the trustee shall continue to be held by the trustee, as though such consolidation, merger, or sale had not taken place, and, provided, further, that upon such consolidation, merger, or sale the due and punctual payment of the principal and interest of all of the said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case, pursuant to section 2 of this article, the railroad company shall be consolidated or merged with any other corporation, or shall sell, convey, and transfer, subject to this indenture, all the mortgaged and pledged premises as an entirety, as aforesaid, the successor corporation formed by such consolidation, or into which the railroad company shall have been merged, or which shall have
224 purchased and received a conveyance and transfer as aforesaid—upon executing, acknowledging, and delivering to the trustee an indenture satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of said bonds and the performance of all the covenants and conditions of this indenture—shall succeed to, and shall be substituted for, the railroad company, party of the first part hereto, with the same effect as though it had been named herein as such party of the first part; and thereupon such successor corporation may cause to be signed, and may issue, either in its own name or in name of the railroad company, any or all of such bonds which theretofore shall not have been signed by the railroad company and delivered to the trustee; and, upon the order of said successor corporation, in lieu of the railroad company, and subject to all the terms, conditions, and restrictions herein prescribed, the trustee shall certify and shall de-

liver any of such bonds, which previously shall have been signed and delivered by the officers of the railroad company to the trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution thereof.

SEC. 4. For every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the words "railroad company" include and mean, not only the party of the first part hereto, but also any such successor corporation. Every such successor corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the railroad company in its name or otherwise.

225 SEC. 5. Any act or proceeding, by any provision of this indenture required to be done or performed by any board or officer of the railroad company, shall and may be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be such lawful sole successor of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article the railroad company, by instrument in writing executed by authority of two-thirds of its board of directors and delivered to the trustee, may surrender any of the powers reserved to the railroad company or to such successor corporation under this article; and thereupon such power so surrendered shall terminate.

The Mercantile Trust Company, trustee, party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

Except when otherwise indicated, the words "the trustee" or "said trustee," or any other equivalent term, as used in this indenture shall be held and construed to mean the trustee or trustees, for the time being, whether original or successor, and the words "trustee," "bond," "bondholder," "coupon," and "holder" shall include the plural as well as the singular number, and the term "majority" shall signify "majority in amount," whether or not so expressed.

The internal-revenue stamps required by law are to be affixed to this indenture from time to time when and as the bonds thereby secured shall be issued.

In witness whereof, Erie Railroad Company, the party hereto of the first part, has caused this indenture to be signed by its
226 president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary, and the due execution of these presents to be proved, and the Mercantile Trust Company, the party hereto of the second part, has caused its corporate seal to be hereunto affixed, and the same to be attested by the signa-

ture of its secretary, and the due execution of these presents to be proved, and these presents to be signed by its vice-president.

ERIE RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Signed, sealed, and delivered in the presence of—
WM. H. BRUDER.

Attest:
[SEAL.] J. A. MIDDLETON, *Secretary.*

THE MERCANTILE TRUST COMPANY,
By H. C. DEMING, *Vice-President.*

Signed, sealed, and delivered in the presence of—
WM. H. BRUDER.

Attest:
[SEAL.] E. R. ADEE, *Secretary.*

On page 35, line 13, the words " President of the " interlined before execution.

WM. H. BRUDER.

227 STATE OF NEW YORK,
County of New York, ss:

On the 14th day of March, in the year one thousand nine hundred and one, before me personally came Eben B. Thomas, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the president of Erie Railroad Company, the corporation described in and which executed the above instrument as party of the first part therein; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

WM. H. BRUDER, [SEAL.]
Notary Public, New York Co.

STATE OF NEW YORK,
County of New York, ss:

On the 14th day of March, in the year one thousand nine hundred and one, before me personally came Henry C. Deming, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the Mercantile Trust Company, the corporation described in and which executed the above instrument as party of the second part therein; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

I. MICHAELS, [SEAL.]
Notary Public,
New York County, N. Y., No. 65.

231 *General mortgage, securing four per cent convertible fifty-year gold bonds.—Interest payable April 1 and October 1.*

Erie Railroad Company to the Standard Trust Company of New York, trustee. Dated April 1, 1903. Stetson, Jennings & Russell, General Counsel, 15 Broad street, New York.

233 TABLE OF CONTENTS.

	Page.
Recitals:	
Directors' resolutions	1
Stockholders' consent	3
Form of coupon bond	5
Form of registered bond	7
Form of coupon	9
Form of Trustee's certificate	10
Granting clauses	11–22
ARTICLE ONE.	
Issue of bonds:	
Sec. 1. Total authorized issue, $50,000,000	22
Certification by trustee	22
Sec. 2. $10,000,000 issuable immediately	24
Sec. 3. $40,000,000 issuable from time to time after 1903	24
Sec. 4. Company may take bonds at market price	31
Sec. 5. Exchanges of bonds	31
Sec. 6. Replacement of mutilated or destroyed bonds	32
Sec. 7. Temporary bonds	33
Sec. 8. Rights limited to parties and bondholders	33
ARTICLE TWO.	
Covenants of railway company:	
Sec. 1. To pay interest and principal of bonds	34
Sec. 2. To execute further assurances	34
Sec. 3. To provide for registration	35
Sec. 4. To preserve leaseholds	37
To create no prior liens on mortgaged premises	37
Sec. 5. To pay taxes and assessments	38
Sec. 6. As to companies whose stocks are pledged	39
Sec. 7. To assign claims	40
Sec. 8. To issue and use bonds only as authorized	40
Sec. 9. Conversion of bonds into stock, etc	41
234 ARTICLE THREE.	
Concerning pledged securities:	
Sec. 1. Lien of prior indentures	42
Powers and duties of trustee	43
Sec. 2. Collection of dividends and interest	45
Sec. 3. Application of payments	48
Sec. 4. Voting of stocks until default	48
Sec. 5. Foreclosure of mortgages	49
Reorganizations	51
Sec. 6. Mergers	52
Sec. 7. Extensions or renewals	54
ARTICLE FOUR.	
Remedies of trustees and bondholders:	
Sec. 1. Detached coupons—lien subordinated	55
Sec. 2. Entry after default	55
Sec. 3. Voting and dividend collections after default	58

Remedies of trustees and bondholders—Continued. Page.
Sec. 4. Principal of bonds may be declared payable 59
Sec. 5. Power of sale 60
Power to foreclose 61
Sec. 6. Bondholders may direct trustee 61
Sec. 7. Property to be sold as entirety 62
Sec. 8. Notice of sale 62
Sec. 9. Adjournments of sale 63
Sec. 10. Conveyance to purchaser 63
Sec. 11. Receipt to purchaser a discharge 64
Sec. 12. Maturity of principal in case of sale 64
Sec. 13. Distribution of proceeds of sale 64
Sec. 14. Purchaser may pay in bonds 65
Sec. 15. Trustee may recover judgment 66
Sec. 16. Waiver of redemption, etc 68
Sec. 17. Trustee entitled to appointment of receiver 68
Sec. 18. Railroad company may surrender possession 69
Sec. 19. Modification of indenture 70
Sec. 20. Bondholders not entitled to sue 71
Sec. 21. Remedies cumulative 72
Sec. 22. Trustee's delay or omission on waiver 72

ARTICLE FIVE.

Immunity of officers, directors, and stockholders 73

ARTICLE SIX.

Sec. 1. Authentication of bondholders' instruments 73
Sec. 2. Apparent title to bonds 74

235 ARTICLE SEVEN.

Releases of mortgaged property:
Sec. 1. Railroad property 75
Sec. 2. Leasehold interests 77
Sec. 3. Receiver may grant releases 77
Sec. 4. Alteration of structural contracts 77
Sec. 5. Evidence of facts 78

ARTICLE EIGHT.

Concerning the trustee:
Sec. 1. Immunities and compensation 78
Sec. 2. Resignation or removal 80
Sec. 3. Appointment of successor trustee 80
Appointment of additional trustee 82

ARTICLE NINE.

Sec. 1. Possession until default 82
Sec. 2. Defeasance 83

ARTICLE TEN.

Sundry provisions:
Sec. 1. Covenants to bind successors and assigns 83
Sec. 2. Railroad company may consolidate 83
Sec. 3. Successor may issue bonds 84
Sec. 4. Rights and powers of successor 85
Sec. 5. Authority of officers of successor 85
Sec. 6. Railroad company may surrender powers 85
Trustees' acceptance of trust 86
Acknowledgments 87–92
Certificate of record 93–111

237 This indenture, made this first day of April, in the year one thousand nine hundred and three, between

Erie Railroad Company, a corporation created by and existing under the laws of the State of New York, hereinafter called the "railroad company," party of the first part, and

The Standard Trust Company of New York, a corporation created by and existing under the laws of the State of New York, hereinafter called the "trustee," party of the second part.

Whereas at the 43rd meeting of the board of directors of the railroad company, duly held, pursuant to due notice, at the office of the company, in the city of New York, on the 11th day of February, 1903, a quorum being present, resolutions were duly adopted, including the following, that is to say:

Whereas upon the report of the president this day made, the board of directors of the Erie Railroad Company has determined that it is desirable now to make comprehensive provision for the progressive improvement of the line and terminals of its railroad, during a series of years, to an extent involving the probable expenditure of $50,000,000 for such purpose, and for the acquisition of equipment and the funding or consolidation of existing obligations, which sum can best be provided through an issue of four per cent convertible fifty-year bonds, such bonds to be dated April 1, 1903, and to be convertible into the common stock of the company (stock trust certificates), at a price not less than the market value thereof at the date when the stockholders of the company shall have given their consent to such bonds; such bonds to be issued either in a single series or in successive series, and such price of conversion to be fixed from time to time by the board of directors when authorizing the issue of the several series, and to be specified in every bond of the several series when and as issued;

Now therefore be it

Resolved, That for the purpose of completing and finishing or operating and improving its railroad, or for any other of its lawful purposes, including the acquisition of equipment or the funding or consolidation of existing obligations, the Erie Railroad Com-

238 pany do borrow the sum of $50,000,000, and do issue and dispose of its bonds for such amount so borrowed, and do mortgage its property and franchises to secure the payment of the said bonds; and, accordingly, that the president or any vice-president, and the secretary or any assistant secretary, of the Erie Railroad Company, be, and hereby they are, authorized to execute and to issue and deliver bonds of the Erie Railroad Company for the aggregate principal sum of $50,000,000 dated April 1, 1903, and payable April 1, 1953, with interest thereon at the rate of four per cent per annum, payable semi-annually on the first day of April and the first day of October in each and every year until the principal shall be fully paid; both the principal and the interest to be payable in gold coin of the United States of the present standard of weight and fineness, at the office or agency of the Erie Railroad Company in the city of

New York, without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under or by reason of any present or future law of the United States or of any State, county, or municipality therein; such bonds to be coupon bonds each for the principal sum of $1,000, giving to the holder the right to register the principal thereof and the right to convert the same into registered bonds without coupons; and also registered bonds without coupons, each for the principal sum of $500, of $1,000, or of such multiples of $1,000 as from time to time may be prescribed by the railroad company by resolution of its board of directors; the bonds to be substantially in the form now submitted to this meeting, of which copies are annexed to the minutes thereof; interim or temporary bonds to be issued and to be exchangeable for permanent bonds pursuant to like resolution.

Resolved, That at any time after April 1, 1905, and before April 1, 1915, the holder of any such bonds shall have the right to convert the principal thereof at par into common stock (stock trust certificates) of the Erie Railroad Company at a price not less than the market value thereof at the date when the stockholders of this company shall have given their consent to such bonds; such bonds to be issued either in a single series, or in successive series, and such prices of conversion to be fixed from time to time by the board of directors when authorizing the issue of the several series, and to be specified in every bond of the several series when and as issued.

Resolved, That the president or any vice-president, and the secretary or any assistant secretary, of the Erie Railroad Company, be, and hereby they are, authorized in the name and behalf of the Erie Railroad Company, and under its corporate seal, to execute and acknowledge, and to deliver to the Standard Trust Company of New York, a corporation of the State of New York, as trustee, a
239 mortgage or deed of trust to be dated April 1, 1903, mortgaging and pledging any and all of the railroads, franchises, income and property, now owned or hereafter acquired by the Erie Railroad Company, as security for the said issue of bonds for the aggregate principal sum not exceeding $50,000,000, authorized by the foregoing resolutions; such mortgage or deed of trust to be in form generally similar to the first consolidated mortgage or deed of trust of the Erie Railroad Company dated December 10, 1895, and to be prepared and approved by the general counsel of this company.

Resolved, That the coupons attached to the said coupon bonds to be issued under these resolutions may be authenticated by the engraved fac-simile signature of the present treasurer, or of any future treasurer of the Erie Railroad Company, it being hereby intended that the railroad company may adopt, and may use for that purpose, the engraved signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer, at the time when such bonds shall actually be certified and delivered.

Resolved, That the first $10,000,000 bonds of such $50,000,000 bonds shall be convertible at par into common stock at $50 per share, and

from time to time, when and as it shall become necessary for the conversion of any of said $50,000,000 bonds, the common stock be increased to the required amount, and that whenever so requested by the voting trustees such increased stock be issued to them in exchange for such bonds, that they may issue their common stock trust certificates in respect thereof.

Resolved, That the president or any vice-president and the secretary or any assistant secretary be, and hereby they are, authorized, in behalf of the Erie Railroad Company, to take all such action as from time to time may become necessary or proper to carry these resolutions into effect.

Resolved, That the execution and delivery of the bonds hereby authorized, and of the mortgage or deed of trust securing the same, shall take place when and not before consent thereto shall have been given by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent shall be given and certified, and shall be filed and recorded in the office of the clerk or register of the county of New York, as provided in section 2 of the stock corporation law, and consent to such mortgage shall have been given also by the board of railroad commissioners.

And whereas prior to the execution and delivery of the bonds and of the mortgage or deed of trust securing the same, as authorized by the said resolutions, consent in due form to the execution and
240 issue of such convertible bonds conferring upon the holder thereof the right to convert the principal thereof into common stock (stock trust certificates) of the Erie Railroad Company as therein provided was duly given upon February 11, 1903, by stockholders owning at least two-thirds of the stock of the Erie Railroad Company, which consent, prior to the execution and delivery of this indenture and of the bonds therein mentioned, as thus duly given and certified, was duly filed and recorded in the office of the clerk or register of the county of New York as provided in section 2 of the stock corporation law, and consent to the execution of such mortgage has been duly given or authorized by stockholders, and has been duly given also by the board of railroad commissioners of the State of New York; and

Whereas at the 44th meeting of the board of directors of the Erie Railroad Company held upon the 21st day of April, 1903, the draft of a mortgage or deed of trust of the form and tenor and date of this indenture was submitted and read, and resolutions authorizing the execution and delivery thereof were duly and unanimously adopted by said board; and

Whereas the bonds to be secured by this indenture may be issued in series, and are to be coupon bonds of the denomination of $1,000, numbered consecutively from 1 upwards, giving to the holder the right to register the principal thereof and the right to convert the same into registered bonds without coupons; and also registered bonds without coupons, each for the principal sum of $500, or of $1,000, or of such multiples of $1,000 as from time to time may be

prescribed by the railroad company by resolution of its board of directors; every series of such bonds to have a distinctive serial letter and every such bond to bear a distinctive number or designation; and all such bonds from time to time, as directed by the board of directors of the railroad company, to be executed in the name and behalf of the corporation and under its corporate seal, by
241 the president or any vice-president, and by the secretary or any assistant secretary of the railroad company, and to be substantially of the following tenor—the letter of the series, the number of the bond, the rate at which shares of common stock will be issued in conversion of the bond, and the principal sum of each registered bond without coupons, and the date from which interest thereon is to accrue, having been inserted in the respective blanks therefor:

(Form of coupon four per cent gold bond.)

No. Series. $1,000.

UNITED STATES OF AMERICA.

Erie Railroad Company 4% convertible 50-year coupon gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promises to pay to the bearer, or, if registered, to the registered holder of this bond, one thousand dollars in gold coin of the United States of America, on the first day of April, 1953, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon at the rate of four per cent per annum from April 1, 1903, payable semiannually at the said office or agency, in like gold coin, on the first day of April and the first day of October in each and every year until the payment of said principal sum, but only upon presentation and surrender, as severally they shall mature, of the coupons therefor annexed hereto; such United States gold coin in every case to be of the standard of weight and fineness as it existed April 1, 1903.

Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

This bond is one of a series of four per cent convertible 50-year gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding fifty million dollars at any one time outstanding, under and in pursuance
242 of, and all equally secured by, a mortgage or deed of trust dated April 1, 1903, duly executed by the railroad company to the Standard Trust Company of New York, as trustee, of the property and franchises mentioned in said mortgage or deed of

trust, to which reference hereby is made for a description of the property and franchises mortgaged and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are secured and are to be used; the officers, directors, and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

This bond shall pass by delivery, unless registered in the owner's name on the books of the railroad company, at its office or agency in the city of New York, such registry being noted on the bond by the bond registrar of the railroad company. After such registration, no transfer shall be valid unless made on the railroad company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, and thereafter transferability by delivery shall be restored, but this bond may again from time to time be registered or transferred to bearer as before. Such registration, however, shall not affect the negotiability of the coupons which shall continue to be transferable by delivery merely.

The holder, also, at his option, may surrender for cancellation this bond with the coupons for future interest thereon in exchange for a registered bond without coupons, as provided in said indenture.

As duly authorized by the consent of stockholders, the board of directors has conferred upon the holder of this bond the right to convert the principal thereof at par at any time after April 1, 1905, and before April 1, 1915, into the fully paid common stock of the Erie Railroad Company of the par value of $100, at the price of $ for each and every share; and if such common stock shall not be sufficient to meet the conversion when made, the board of directors will authorize an increase sufficient for that purpose. Accordingly this bond is convertible at the option of the holder hereof, at any time after April 1, 1905, and prior to April 1, 1915, as provided in said mortgage or deed of trust, into shares of the common capital stock of the railroad company as such stock shall be constituted at the time of such conversion, with an adjustment of current or accrued interest and dividends as between this bond and the stock into which the same may be converted, with the right on the part of the railroad company during the continuance of the voting trust agreement of January 1, 1896, in said indenture described, to deliver in lieu of certificates of common stock, voting trust certificates therefor.

243 This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under this indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, and coupons for such interest, with

the engraved fac-simile signature of its treasurer, to be attached hereto, this first day of April, 1903.

[L. S.] ERIE RAILROAD COMPANY,
By , *President.*

Attest:
, *Secretary.*

(Form of registered four per cent gold bond.)

No. Series. $——.

UNITED STATES OF AMERICA.

Erie Railroad Company 4% convertible 50-year registered gold bond.

Know all men by these presents, that the Erie Railroad Company, a corporation, hereinafter called the "railroad company," for value received, promise to pay to or assigns, dollars, in the gold coin of the United States of America, on the first day of April, 1953, at the office or agency of the railroad company in the city of New York, N. Y., and to pay interest thereon from the first day of , 19 , at the rate of four per cent per annum, payable semi-annually at said office or agency, in like gold coin, on the first day of April and the first day of October in each and every year until the payment of said principal sum; such United States gold coin in every case to be of the standard of weight and fineness as it existed April 1, 1903.

Both the principal and the interest of this bond are payable without deduction for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under any present or future law of the United States, or of any State or county or municipality therein.

244 This bond is one of a series of four per cent convertible 50-year gold bonds (coupon and registered) of the railroad company, issued and to be issued, for an aggregate principal sum not exceeding fifty million dollars at any time outstanding, under and in pursuance of, and all equally secured by, a mortgage or deed of trust dated April 1, 1903, duly executed by the railroad company to The Standard Trust Company of New York, as trustee, of the property and franchises mentioned in said mortgage or deed of trust, to which reference hereby is made for a description of the property and franchises mortgaged and pledged, the nature and extent of the security, the rights of the holders of said bonds under the same, and the terms and conditions upon which said bonds are secured and are to be used; the officers and directors and stockholders of the railroad company being expressly exempted, relieved, and absolved from any and all personal liability in respect of said bonds, all such liability being hereby expressly waived.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company, at its office or agency in the city of New York, upon surrender and cancellation of this bond; and thereupon a new registered bond will be issued to the transferee in exchange therefor, as provided in said indenture, and on payment, if the railroad company shall so require, of the charge therein provided for. This bond, also, in the manner prescribed in said indenture, and upon payment of the charge therein provided for, is exchangeable for coupon bonds for the same aggregate principal sum.

As duly authorized by the consent of stockholders, the board of directors has conferred, upon the holder of this bond, the right to convert the principal thereof at par at any time after April 1, 1905, and before April 1, 1915, into the fully paid common stock of the Erie Railroad Company of the par value of $100, at the price of $ for each and every share; and if such common stock shall not be sufficient to meet the conversion when made, the board of directors will authorize an increase sufficient for that purpose. Accordingly this bond is convertible, at the option of the holder hereof, at any time after April 1, 1905, and prior to April 1, 1915, as provided in said mortgage or deed of trust, into shares of the common capital stock of the railroad company as such stock shall be constituted at the time of such conversion, with an adjustment of current or accrued interest and dividends as between this bond and the stock into which the same may be converted, with the right on the part of the railroad company, during the continuance of the voting trust agreement of January 1, 1896, in said indenture described, to deliver in lieu of certificates of common stock, voting trust certificates therefor.

This bond shall not become obligatory for any purpose
245 until it shall have been authenticated by the certificate hereon endorsed, of the trustee under said indenture.

In witness whereof, the Erie Railroad Company has caused these presents to be signed by its president or one of its vice-presidents, and its corporate seal to be hereunto affixed, and to be attested by its secretary or an assistant secretary, this first day of April, 1903.

[L. S.] ERIE RAILROAD COMPANY,

By , *President.*

Attest:

, *Secretary.*

And whereas, there are to be attached to the said coupon bonds, at the time of the issue thereof, coupons representing the semi-annual installments of interest which are to become due thereon, each of which coupons is to be substantially of the following tenor, to wit.:

(Form of interest coupon, of which the first is to be payable October 1, 1903.)

No. $20.00

On the first day of Erie Railroad Company will pay to bearer, at its office or agency in the city of New York, N. Y., twenty

dollars, United States gold coin of the standard existing April 1, 1903, without deduction for taxes, being six months' interest then due on its four per cent convertible 50-year gold bond, series , No. , subject to the terms and conditions stated in said bond and in the indenture dated April 1, 1903, therein mentioned.

Treasurer.

And whereas, on each of said coupon bonds, and on each of said registered bonds without coupons there is to be endorsed a
246 certificate of the trustee, or its successor appointed hereunder, that it is one of a series of bonds described in this indenture, and no bond shall be secured by this indenture or shall be obligatory for any purpose unless such certificate shall have been executed by the said trustee or its successor appointed hereunder; said certificate to be substantially of the following tenor, to wit:

(Form of trustee's certificate.)

This bond is one of a series of bonds described in the within mentioned indenture.

THE STANDARD TRUST COMPANY OF NEW YORK,
By . *Trustee.*

And whereas, each of the coupons to be attached to said coupon bonds is to be authenticated by the engraved fac-simile signature of the present treasurer or of any future treasurer of the railroad company, and the railroad company may adopt and may use for that purpose the engraved fac-simile signature of any person who shall have been such treasurer, notwithstanding the fact that he may have ceased to be such treasurer at the time when any such coupon bond shall be actually certified and delivered, and such coupons shall be attached to the bond; and

Whereas, this indenture is of the tenor of the draft thereof submitted to and duly approved by the railroad company; and

Whereas, all acts and things prescribed by law and by the by-laws of the railroad company have been duly complied with, and the railroad company has executed this indenture, and proposes to issue the bonds hereby secured, in the exercise of each and every legal right and power in it vested:

247 Now, therefore, this indenture witnesseth:

That in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and to the sum of one dollar to it duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the

terms and conditions upon which such bonds shall be issued and received:

The railroad company, party of the first part hereto, has executed and delivered these presents, and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over, unto

The trustee, party of the second part, its successors and assigns forever:

All the estate right, title, interest, and property now belonging to the railroad company, or that hereafter may be acquired by the railroad company, of, in and to

All and singular the railway of the railroad company, from and including Piermont, on the Hudson River, in the State of New York, to and including the terminus of the said railway on Lake Erie at or near Dunkirk, in said State, and the railway known as the Newburgh branch, from Newburgh to the main line, and also all that part of the railway designated as the Buffalo branch of the Erie Railway extending from Hornellsville to Attica, in the State of New York; also that part of the railway known as the Newburgh and New York

Railroad, extending from Turners on the main line to Vail's
248 Gate on the Newburgh branch; also the railway formerly belonging to the Lockport and Buffalo Railroad Company and extending from Lockport to North Tonawanda (subject to the lease thereof to the International Railway Company), both in the State of New York; also the railway formerly belonging to the Erie International Railway Company, and extending from a point of connection with the road formerly known as the Suspension Bridge and Erie Junction Railroad in Erie County to International Bridge in Erie County, both in the State of New York; also the railway formerly known as the Suspension Bridge and Erie Junction Railroad, extending from East Buffalo, in Erie County, to Suspension Bridge, in Niagara County, with the passenger branch extending from the main line near Eleventh street, in the city of Niagara Falls, Niagara County, to the passenger station at the corner of Fourth and Niagara streets, in said city, all in the State of New York; also the railway formerly known as the Buffalo, New York and Erie Railroad, extending from Painted Post, Steuben County, to the city of Buffalo, Erie County, both in the State of New York; also all the railroad formerly of the Buffalo and Southwestern Railroad Company, extending from Jamestown, in Chautauqua County, to Buffalo, in Erie County, both in the State of New York; and also all other railways now belonging to the railroad company in the States of New York, Pennsylvania, and New Jersey, or any of them;

Also all the estate, right, title, and interest, terms and remainder of terms, franchises, privileges, and rights of action of whatsoever name or nature in law or in equity, conveyed or assigned to the New York and Erie Railroad Company, or to the Erie Railway Company, or to the New York, Lake Erie and Western Railroad Company, or to the

Erie Railroad Company, by the Union Railroad Company, a corporation existing under the laws of the State of New York; by the Bergen County Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Buffalo, Bradford and Pitts-
249 burg Railroad, a corporation existing under the laws of the States of New York and Pennsylvania; by the Rochester and Genesee Valley Railroad Company, a corporation existing under the laws of the State of New York; by the Long Dock Company, a corporation existing under the laws of the State of New Jersey; by the Goshen and Deckertown Railroad Company, a corporation existing under the laws of the State of New York; by the Hoboken Land and Improvement Company, a corporation existing under the laws of the State of New Jersey, by the New York and Fort Lee Railroad Company, a corporation existing under the laws of the State of New Jersey, and the New Jersey Junction Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Jefferson Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Montgomery and Erie Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Docks and Improvement Company, a corporation existing under the laws of the State of New Jersey; by the Middletown and Crawford Railroad Company, a corporation existing under the laws of the State of New York; by the New York, Lake Erie and Western Coal and Railroad Company, a corporation existing under the laws of the State of Pennsylvania; by the Northern Railroad Company of New Jersey, a corporation existing under the laws of the State of New Jersey; by the New York and Greenwood Lake Railroad Company, a corporation existing under the laws of the State of New Jersey; by the Avon, Geneseo and Mount Morris Railroad Company, a corporation existing under the laws of the State of New York; by the Tioga Railroad Company, a corporation existing under the laws of the State of Pennsylvania; or by the Newark and Hudson Railroad Company, a corporation existing under the laws of the State of New Jersey.

And also all the estate, right, title, and interest of the rail-
250 road company in and to certain real estate situate in Hudson County, in the State of New Jersey, known as the Penhorn property; and also in and to a certain parcel of land lying west of the Bergen Tunnel, in Hudson County, State of New Jersey, known as the Laundry property; and also in and to all other real estate of the railroad company, situate in the State of New Jersey, of every kind and description, and wherever in the said State the same may be situate.

And also all the estate, right, title, and interest of the railroad company of, in, and to certain piers, bulkheads, and water fronts in the said city of New York—that is to say, piers 20 and 21, North River, with slips and appurtenances; also 560 feet of bulkhead extending northerly from the northerly line of pier 19, with certain wharf sur-

face, together with ferry near foot of Chambers street, and rights and franchises appurtenant thereto; also bulkhead, slip, and ferry at the foot of West Twenty-third street, and that portion of the bulkhead between Twenty-second and Twenty-third streets abutting on the ferry, together with ferry rights and franchises appurtenant thereto; also pier at foot of West Forty-ninth street, and slips in connection therewith, together with certain water front south of the pier, and also pier 7, East River, and slips connected therewith and appurtenant thereto.

And also all tracts of land or interest therein of the railroad company lying and being in the following States and counties, namely, counties of Rockland, Orange, Sullivan, Delaware, Broome, Tioga, Chemung, Steuben, Alleghany, Livingston, Wyoming, Genesee, Erie, Niagara, Cattaraugus, Chautauqua, and Monroe, in the State of New York; counties of Hudson, Essex, Bergen, and Passaic, in the State of New Jersey; counties of Susquehanna, Jefferson, Elk, Pike, McKean, Wayne, and Lackawanna, in the State of Pennsylvania.

Also all and singular the railroad, property, and franchises of The Nypano Railroad Company demised and leased to the Erie
251 Railroad Company by the indenture made the 17th day of March, 1896, by and between said The Nypano Railroad Company, a corporation of the States of Ohio and Pennsylvania, as party of the first part thereto, and the Erie Railroad Company as party of the second part thereto, and all rights of the Erie Railroad Company of every name and nature in and to such railroad, property, and franchises leased as aforesaid; subject, however, to the conditions, reservations, and provisos set forth in a certain indenture of pledge, dated July 6, 1896, by the Erie Railroad Company to The Farmers' Loan and Trust Company, as trustee, wherein the said leasehold estate and interest was assigned to the said trustee as security under the first consolidated mortgage deed, dated December 10, 1895, made by the Erie Railroad Company to said The Farmers' Loan and Trust Company; and also any and all other right, title, and interest of every name and nature now possessed or hereafter acquired by the railroad company in or to the property, railroad, and franchises of said The Nypano Railroad Company, or of any branch, extension, or leased or operated line thereof, or in or to any stocks, bonds, or other obligations of said The Nypano Railroad Company, or of any successor company or companies, subject to the terms upon which any such acquisition may have been made.

Also all the right, title, estate, interest, and property of the railroad company of, in, and to any and all other lines of railway, extensions, and branches now owned, leased, or held by the railroad company or in which it has any interest whatsoever (excepting its leasehold interest in the Buffalo Creek Railroad, and excepting also all shares of capital stock not herein expressly described and made subject hereto), wherever located, including the franchises appurtenant thereto, notwithstanding the same may not be particularly set forth or described in this indenture.

Also all the estate, right, title, interest, and property of the railroad company of, in, and to any and all lines of railway, extensions, and branches, including the franchises appurtenant thereto, and
252 any and all ferry houses, ferry boats, shops, depots, terminal properties, rolling stock, and other equipment, and other acquisitions, additions, improvements, and betterments, and any and all bonds, stocks, and other property of every kind or description (notwithstanding that the same are not now particularly set forth in this indenture), which from time to time, in the manner hereinafter provided, shall be purchased, acquired, or constructed by the use of any of the bonds secured by this indenture.

Including in the railroads, franchises, and properties subject to this indenture any and all roadbed, superstructure, rights of way, rails, tracks, sidetracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, machine shops and other shops, turntables, water stations, fences, docks, structures, erections, and fixtures, and all other things of whatever kind in anywise or at any time belonging or appertaining to any and every line of railway at any time subject to this indenture, or to any branch thereof, or provided for use thereon or in connection therewith; and any and all lands designed for depots, warehouses, or other structures at any terminus or on or along such lines of railway or upon or along any such branch; and any and all locomotives, engines, cars, and other rolling stock, equipment, machinery, instruments, tools, implements, materials, furniture, and other chattels now or hereafter acquired or provided for use upon such lines of railway or branches or upon any other line or branch; and any and all property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, such lines of railway or any such branch; and any and all corporate rights, privileges, and franchises which the railroad company now has, or hereafter can or shall acquire, possess, or exercise in, to, upon, or in any respect of such lines of railway or branches or any part thereof, necessary for, or appertaining to, the construction, maintenance, or
253 operation of such lines of railway or any such branch, or any part thereof; and any and all the rents, issues, profits, tolls, and other income of such lines of railway and of any and all branches; and also any and all the rights, privileges, franchises, properties, real or personal, rights, and things which the railroad company may or shall hereafter possess, or become entitled to possess, for the purposes of or in connection with such lines of railway or any such branch.

Together with all and singular the franchises, rights, and privileges now or hereafter appurtenant to or used in connection with the lines of railway above mentioned, or any branch thereof.

Also all the right, title, and interest of the railroad company in and to the following shares of stock heretofore transferred to, and now

held by, The Farmers' Loan and Trust Company, as trustee under the said first consolidated mortgage deed, dated December 10, 1895:

254 Name of company.	Par value per share.	Number of shares.
Buffalo, New York and Erie Railroad Company	$100	8,988
Jefferson Railroad Company	50	41,909
Buffalo, Bradford and Pittsburgh Railroad Company	100	22,049
Bergen County Railroad Company	100	2,000
Middletown and Crawford Railroad Company	50	2,413
Newark and Hudson Railroad Company	100	2,500
Paterson, Newark and New York Railroad Company	50	5,000
Bergen and Dundee Railroad Company	100	400
Long Dock Company	100	8,000
New York, Lake Erie and Western Docks and Improvement Company	100	6,040
Suspension Bridge and Erie Junction Railroad Company	100	5,000
Buffalo Creek Railroad Company	100	1,250
Chicago and Erie Railroad Company	100	1,000
Pavonia Ferry Company	100	1,000
Hillside Coal and Iron Company	100	10,000
Northwestern Mining and Exchange Company	100	5,000
Blossburg Coal Company	100	10,000
Tioga Railroad Company, preferred stock	50	3,794
Tioga Railroad Company, common stock	50	7,818
Elmira State Line Railroad Company	100	692
Arnot and Pine Creek Railroad Company	100	2,550
Union Steamboat Company	100	10,000
Union Dry Dock Company	500	380
Conesus Lake Railroad Company	50	375
The Nypano Railroad Company	100	199,991

Also all the right, title, and interest of the railroad company in and to the following bonds, heretofore delivered to and now held by the said trustee under the said first consolidated mortgage deed dated December 10, 1895:

$580,000 bonds of the Buffalo, Bradford and Pittsburgh Railroad Company, secured by its mortgage dated January 1st, 1865, to Dorman B. Eaton, as trustee.

255 $57,200 bonds of the Middletown and Crawford Railroad Company, secured by its mortgage dated April 1st, 1871, to Jonathan M. Matthews, Ambrose S. Murray and Alexander Crawford, as trustees.

$250,000 bonds of the Newark and Hudson Railroad Company, secured by its mortgage dated September 20th, 1871, to H. N. Otis, as trustee.

$499,000 bonds of the Paterson, Newark and New York Railroad Company, secured by its mortgage dated January 1st, 1868, to W. C. Rushmore and C. Walsh, as trustees.

$604,000 bonds of the New York, Lake Erie and Western Docks and Improvement Company, secured by its mortgage dated June 1st, 1883, to The Farmers' Loan and Trust Company, as trustee, as modified by the supplemental contract dated February 8, 1890.

$1,900,000 bonds of the New York, Lake Erie and Western Coal and Railroad Company, secured by its mortgage dated May 15th, 1882, to the Metropolitan Trust Company of the city of New York and J. Lowber Welsh, of the city of Philadelphia, as trustees.

$1,000,000 bonds of the Suspension Bridge and Erie Junction Railroad Company, secured by its mortgage dated June 1st, 1870, to Horatio N. Otis, as trustee.

$9,899,000 income bonds of the Chicago and Erie Railroad Company, secured by its mortgage dated August 21st, 1890, to New York Security and Trust Company and John B. Elam, as trustees.

$125,000 bonds of the Tioga Railroad Company, secured by its mortgage dated November 1, 1876, to Myron P. Bush, as trustee.

$140,000 bonds of the Lockport and Buffalo Railroad Company, secured by its mortgage dated October 1, 1877, to Mathias H. Arnot, as trustee.

$20,000,000 bond of The Nypano Railroad Company, secured by its mortgage dated March 17, 1896, to The Farmers' Loan and Trust Company, as trustee.

Also all the right, title and interest of the railroad company in and to shares of stock of the following corporations, for which the certificates have been delivered to and are now held by the Mercantile Trust Company, as trustee under the Pennsylvania collateral indenture of the railroad company dated February 1, 1901, viz: The Pennsylvania Coal Company, the Erie and Wyoming Valley Railroad Company, the Delaware Valley and Kingston Railroad
256 Company, and fifty-one per cent of the capital stock of the New York, Susquehanna and Western Railroad Company.

Also *also* the right, title and interest of the railroad company in and to sixty shares, of the aggregate par value of $6,000, of the capital stock of the Penhorn Creek Railroad Company, being all the outstanding capital stock of said corporation.

But nothing in this indenture is intended or shall be construed to prevent or limit the powers in respect of any bonds and stocks, subject to this indenture conferred upon the trustee under said first consolidated mortgage deed dated December 10, 1895, or upon the trustee under the said indenture dated February 1, 1901.

Also all property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned or transferred by the railroad company or anyone in its behalf to the trustee, which hereby is authorized to receive any property at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of the bonds issued or to be issued hereunder, and to hold and apply any and all such property according to the terms hereof.

It being intended to include within the grant of this indenture all the right, title and interest of the railroad company of, in and to all lines of railway, extensions, branches, real estate and railroad property, and all stocks and bonds and other securities now or hereafter described or embraced, in the two several indentures heretofore executed and delivered by the railroad company, viz: (1) The first consolidated mortgage deed to The Farmers' Loan and Trust Company, as trustee, dated December 10, 1895, and (2) the Pennsylvania collateral indenture to The Mercantile Trust Company, as trustee, dated February 1, 1901; and of, in and to the properties severa-
257 ally and respectively mentioned in and subject to the lien of

said several indentures; and also all the right, title and interest of the railroad company of, in and to any and all other property herein conveyed, or agreed to be conveyed, to the trustee hereunder.

To have and to hold, the premises, railroads, properties, real or personal, rights, franchises, estates, appurtenances, stocks, and bonds hereby conveyed and assigned, or intended to be conveyed or assigned, unto the trustee, its successor or successors and assigns, forever:

Subject, however, to the two indentures last above mentioned, and to the existing liens of the several mortgages or charges underlying either of the said indentures, and to all other existing liens and charges, upon and against the railroads, properties, and franchises, and stocks, bonds, and other obligations, hereby or in and by said indentures, mortgages, or charges, severally and respectively, conveyed, assigned, mortgaged, or pledged, or so intended to be:

But in trust, nevertheless, for the equal, proper, and proportionate benefit and security, severally and respectively, of all and every the present and future holders of any and every bond and interest obligation issued under and secured by this indenture, as well all those now issued as all hereafter issued in addition thereto or by way of substitution or exchange, in accordance with the terms of this indenture, and for enforcing the payment thereof when payable, in accordance with the true intent and meaning of the stipulations of this indenture and of the said bonds and interest obligations respectively, without preference, priority, or distinction as to lien or otherwise, of any one bond over any other bond, by reason of priority in the execution, delivery, or negotiation thereof, and so that each and every bond, issued and to be issued as aforesaid, shall
258 have, under and by this indenture, the same right, lien, and privilege as every other bond of the issue; and so that the principal and interest of every such bond shall, subject to the terms hereof, be secured hereby equally and proportionately with every other bond, as though all had been made, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of all such bonds shall take effect from the day of the date of this indenture, without regard to the date of actual issue, sale, or disposition thereof, and so that the lien and security of this indenture, and of all bonds issued hereunder, shall take effect from the day of the date hereof, as though upon such day all such bonds shall have been actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

And it is hereby expressly covenanted that all such bonds, and the coupons for interest thereon, are to be issued, certified, delivered, received, and negotiated, and that the mortgaged and pledged properties and franchises are to be held by the trustee, subject to the following further covenants, conditions, and provisions, viz:

ARTICLE ONE.

SECTION 1. From time to time the bonds to be secured hereby shall be executed by the railroad company and by it shall be delivered for

certification to the trustee; and thereupon as provided in this article, and not otherwise, the trustee shall certify and shall deliver the same. At the option of the railroad company, from time to time, any of such bonds may be executed, certified, and delivered originally either as coupon bonds or as registered bonds.

The amount of bonds hereby secured which may be executed
259 by the railroad company, and which may be certified by the trustee, is limited so that never at any time shall there be outstanding bonds hereby secured for an aggregate principal sum exceeding $50,000,000. All of such bonds shall be dated April 1, 1903; but in no instance shall the interest upon any such bond begin to accrue from a date earlier than the first day of April or the first day of October, as the case may be, next preceding the day of the certification thereof. The trustee shall not certify or deliver any coupon bond hereby secured, until all coupons thereof then matured shall have been detached and shall have been canceled. The trustee shall not certify or deliver any registered bond without coupons until there shall have been inserted therein the date from which interest is to accrue, which date shall be the first day of April or the first day of October, as the case may be, next preceding the day of the certification thereof, except as provided in section 6 of this article one.

Only such of said bonds as shall bear thereon a certificate substantially in the form hereinbefore recited, duly executed by the trustee, shall be secured by this indenture, or shall be entitled to any lien or benefit hereunder. No such bond nor any coupon thereunto attached shall be valid for any purpose until such certificate shall have been duly endorsed on such bond. Every such certificate of the trustee upon any bond executed by the railroad company shall be the conclusive and the only evidence that the bond so certified was duly issued hereunder, and is entitled to the benefit of the trust hereby created.

On request of the railroad company, but within the limitations hereinafter prescribed, bonds shall be certified and be delivered hereunder in advance of registration or recording of this indenture; but the railroad company with all convenient speed shall cause this indenture to be recorded as a mortgage upon railways.

Whenever, from time to time, any bonds certified by the trustee shall be deliverable by it according to the terms of this indenture
(excepting the $10,000,000 bonds, for the immediate delivery
260 whereof provision is hereinafter made in section 2 of this article), such bonds shall be delivered by the trustee as may be directed by resolution of the board of directors of the railroad company or of the executive committee thereof. A copy of any such resolution, certified by the secretary under the corporate seal, shall be full authority to the trustee for the certification and delivery of such bonds.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture, bonds for the aggregate principal sum of ten million dollars ($10,000,000), convertible at par into common stock of the

railroad company at 50 per cent of the par value of such stock, shall be executed by the railroad company and be delivered to the trustee for certification, and as soon as may be after the execution of this indenture, and without any further action on the part of the railroad company, shall by the trustee be certified and be delivered to the railroad company from time to time upon the written order of the railroad company signed by its president and its treasurer under the corporate seal.

SEC. 3. The remaining forty million dollars ($40,000,000), par value, of the bonds authorized to be issued under and secured by this indenture, shall be reserved to be executed by the railroad company and to be certified and delivered by the trustee from time to time after December 31, 1903, for some one or more of the purposes specified in this section, but only as herein provided, and subject to the restrictions herein stated.

Such reserved bonds may be issued in one or more series. The board of directors of the railroad company from time to time shall determine the amount of bonds to be issued in any series, and shall fix the price or rate at which shares of the common stock of the railroad company will be issued in and upon conversion of the bonds of such series, when the right to demand such conversion shall be exercised by the holder of any such bond; but in no instance shall
261 such price or rate be less than the market price of such shares on February 11, 1903. The price or rate of conversion, as so fixed by the board of directors, shall be stated in every bond issued hereunder, and shall be alike in every bond of the same series.

A. The purposes for which such $40,000,000 of reserved bonds from time to time shall be executed, cetrified, and delivered, and for which such bonds or their proceeds may be used, are:

(a) The construction or acquisition after December 31, 1903, of branch or connecting lines of railroad and extensions; and of ferry houses, ferry boats, shops, depots, terminal properties, rolling stock and other equipment, and other acquisitions, additions, improvements, and betterments, upon, along or appertaining to, or for use in connection with, any lines of railway, branches, or terminal properties, which, at the time of such construction or acquisition, shall belong to the railroad company and be subject to the lien of this indenture, or shall belong to any other company of whose capital stock at least ninety per cent in amount shall then be subject to this indenture (whether or not subject to the prior lien of the said first consolidated mortgage deed dated December 14, 1895, or of the said indenture dated February 1, 1901), or upon, along, or appertaining to, or for the use in connection with, the lines of railway of the Paterson and Hudson River Railroad Company, the Paterson and Ramapo Railroad Company, the Union Railroad Company, the New York and Greenwood Lake Railway Company, the Northern Railroad Company of New Jersey, the Cleveland and Mahoning Valley Railroad Company, the Sharon Railway, the Westerman Railroad, or the Elmira State Line Railroad Company; and to reimburse the

railroad company for sums expended by it, or by any such other company, after December 31, 1903, for any of the foregoing purposes.

(b) The acquisition after December 31, 1903, of shares of
262 the capital stock, bonds, or other indebtedness of any company owning any branch or connecting lines of railroad or extensions; or any ferry houses, ferry boats, shops, depots, or terminal properties such as are specified in the foregoing clause (a), provided that no bonds or their proceeds shall be used for the acquisition of any shares of the capital stock, bonds, or other indebtedness, for the purchase and acquisition of which any bonds have been reserved under the provisions of said first consolidated mortgage deed of December 10, 1895; and provided, further, that no bonds shall be used for the purchase of shares of the capital stock, bonds, or other indebtedness of any company unless or until the greater part of the entire capital stock of such company shall be acquired or shall have been acquired, and that all the shares, bonds, and other indebtedness so acquired shall become and shall be subject to the lien of this indenture, whether or not also subject to the prior lien of said first consolidated mortgage deed dated December 10, 1895, or of said indenture of February 1, 1901; and provided, further, that no shares, bonds, or other indebtedness issued or created by any such company after such ninety per cent of the capital stock thereof shall have become subject to this indenture, shall be acquired under this clause (b); but bonds may be certified and delivered under the foregoing clause (a) in respect of any construction or acquisition such as is specified in said clause, by any such company, and to reimburse the railroad company for sums expended by it after December 31, 1903, for any such acquisition.

B. The restrictions subject to which such $40,000,000 of reserved bonds from time to time shall be certified and delivered, are as follows, viz:

(1) Before certifying and delivering bonds under this section, there shall be delivered to the trustee a copy of a resolution of the board of directors of the railroad company, certified by its secretary
263 or an assistant secretary, calling for the certification and delivery of a specified amount of such bonds, and directing the officers of the railroad company to set aside such amount of bonds or their proceeds separte and apart from any other assets and funds of the railroad company, and to use the same only for purposes authorized by this section.

(2) In each calendar year after December 31, 1903, there shall be so certified and delivered out of such $40,000,000 of bonds, such amount not in the aggregate exceeding ten million dollars ($10,000,000) par value in any calendar year, as from time to time shall be called for in such resolutions; but in every instance except the first, before certifying or delivering any of the bonds reserved under this section, the trustee shall require the railroad company to furnish, in addition to such resolution of its board of directors, the certificate or certificates of some officer or officers of the railroad company, stating:

(a) That all bonds certified and delivered under this section in respect of which no such certificate previously shall have been furnished, and the proceeds of all such bonds, have been actually used, or actually appropriated and set aside for liabilities actually incurred, for said purposes or for some one or more of them, or to reimburse the railroad company as aforesaid—indicating the particular branches, extensions, terminal properties, rolling stock, or other property, acquired or constructed or contracted for, or the stock, bonds, or other indebtedness of any other company acquired, and the kind or class of betterments or improvements made or contracted for, and the amount of bonds or proceeds of bonds or other cash, used or applied or actually appropriated and set aside for each such purpose;

(b) That the price paid or liability incurred for such construction, or for such acquisition, betterments, or improvements, was not in excess of the fair value of such property or of such work, and
264 that the bonds included in such certificate were sold, disposed of or otherwise accounted for, at not less than their fair market value at the time of such sale, disposition, or accounting;

(c) That no part of such certified expenditures or liabilities was included in any previous certificate furnished hereunder, or was made or reimbursed or provided for out of any bonds or moneys received by the railroad company under any other provision of this indenture, or under any provision of the first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901;

(d) That no part of the expenditures certified in such certificate was included in the operating or maintenance expenses reported in any annual report theretofore issued by the railroad company;

(e) In case such certificate shall show the acquisition of, or any contract for, new property, then such certificate also shall state whether such new property is known or believed to be, or that when acquired such new property will be, subject to any lien or charge prior to this indenture, except prior liens and charges to which the grant of this indenture is made subject, and undetermined liens or ordinary operating accounts or charges incidental to construction, and such certificate shall specify the amount of any such prior lien or charge (other than as aforesaid) known or believed to exist or intended or expected to be created;

(f) Any such certificate under this section may state any other facts pertaining to the right to certify and deliver bonds hereunder. The same officer or officers of the railroad company need not certify to all the facts required to be certified under the provisions of this section, but different officers may certify to different facts, respectively.

265 (3) None of the $40,000,000 of reserved bonds deliverable after December 31, 1903, pursuant to this section 3, shall be certified and delivered for or in respect of the construction or acquisition of property subject to any lien or charge so certified, unless or

until the railroad company shall have deposited with the trustee an amount of bonds hereby secured equal at par to the aggregate amount of such certified indebtedness, liens and charges. Whenever thereafter any of such certified indebtedness, liens and charges shall be paid or be satisfied, or shall be acquired and be subjected to the lien hereof, then an equal amount at par of the bonds hereby secured so deposited with the trustee under this clause shall be redelivered by the trustee to the railroad company or upon its order, so that the amount of such bonds held by the trustee under this clause at all times shall be equal to the amount of such indebtedness, liens and charges remaining unsatisfied or not subjected to the lien thereof.

(4) The railroad company covenants that whenever all the bonds reserved under this section shall have been certified and delivered to, and used by, the railroad company, it will execute and deliver to the trustee a similar certificate indicating the particular application of all such bonds, or proceeds of such bonds, in respect of which the railroad company shall not theretofore have furnished such certificate to the trustee.

(5) Every such certificate furnished under this section, unless signed, first, by the president or a vice-president or the general manager or the chief engineer, and, secondly, by the comptroller or auditor or treasurer, of the railroad company, shall have endorsed thereon, or shall be accompanied by, a written statement of one of the officers first above designated, and one of the officers secondly above designated, that they believe that such certificate is true, and that such bonds or their proceeds have been used, and the expenditures certified
266 have been made, only for purposes authorized by this section. A certificate signed by one of the officers first above designated and one of the officers secondly above designated, or a certificate having endorsed thereon or annexed thereto a written statement of such officers in the form in this paragraph specified, shall be received by the trustee as conclusive evidence of any facts pertaining to the right to certify and deliver bonds pursuant to this section.

Unless the bonds or the certificates for shares of stock or the other indebtedness acquired under the provisions of this section, shall be deliverable and shall have been delivered to the trustee under the said first consolidated mortgage deed dated December 10, 1895, or to the trustee under the said indenture dated February 1, 1901, such bonds, and such certificates of stock, endorsed for transfer in blank, and the assignments of such other indebtedness, shall be delivered to the trustee hereunder, together with the said statements and certificates, and the railroad company shall execute or shall cause to be executed any conveyances or instruments of further assurance that may be necessary for the purpose of subjecting to the lien and operation of this indenture any new property so acquired by the railroad company, and, so far as may be, any indebtedness, liens or charges so taken up or acquired by use of said bonds, and, also, in the case of any construction upon or acquisition for any of the railroads specifically referred to in part A of this section 3, the railroad company shall execute or

cause to be executed such instruments as may be necessary to subject the same to the leases, if any, under which such railroads are held: and, also shall furnish the written opinion of counsel for the railroad company to the effect that such conveyances or other instruments are sufficient for that purpose or that no conveyance or instrument of further assurance is necessary for the purpose aforesaid. Such resolutions, statements, certificates, and opinion shall be deemed,
267 and shall be taken to be, full authority and protection to the trustee for its certification of such bonds under the foregoing provisions of this section.

SEC. 4. Whenever, under section 3 of this article, the railroad company shall be entitled to reimbursement out of bonds of any series hereby secured or their proceeds, the railroad company may take and accept such bonds at prices to be fixed by the resolution of the board of directors, but not in any case less than the average market prices for bonds of the same series at the New York Stock Exchange during the previous calendar month (if there be any such market price for such bonds) in settlement and discharge of its claim to be reimbursed; and the bonds so taken and accepted by the railroad company shall be held and may be used by it for its general corporate purposes, freed and discharged from all restrictions and provisions of said section 3 as though such bonds had been sold at such price and the proceeds paid over to the railroad company.

SEC. 5. Whenever any coupon bond or bonds, issued under and secured by this indenture, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for a registered bond or registered bonds without coupons, the railroad company shall execute, and the trustee shall certify, and in exchange for such coupon bond or bonds shall deliver registered bonds, or one registered bond, without coupons, for the like aggregate principal sum. The registered bond or bonds without coupons so delivered in exchange, shall be of the same series as the surrendered coupon bond or bonds, and shall bear interest from the date of the last-matured coupon thereof.

Whenever any registered bond without coupons shall be surrendered, transferred, and canceled, as provided in section 3 of article two hereof, the railroad company, upon request therefor, shall issue
268 to the transferee, and the trustee shall certify and shall deliver, registered bonds, or one registered bond without coupons, of the same series, for the like aggregate principal sum.

Whenever any registered bond or bonds without coupons, for the principal sum of one thousand dollars or some even multiple of one thousand dollars, shall be surrendered for exchange for a coupon bond or bonds, the railroad company shall issue, and the trustee shall certify, and, in exchange for such registered bond or bonds without coupons, shall deliver a coupon bond or coupon bonds of the same series, for the like aggregate principal sum, with coupons maturing on and after the date when the next semiannual installment of interest would have been payable on such surrendered bond or bonds.

In every case of any such exchange, the trustee forthwith shall cancel the surrendered bond or bonds and coupons and shall deliver the same to the railroad company.

For (1) any exchange of coupon bonds for registered bonds, and for (2) any transfer of registered bonds without coupons, and for (3) any exchange of registered bonds without coupons for coupon bonds, the railroad company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge, and in addition thereto, such further sum as may be necessary to meet other expense connected therewith; such further sum, however, not to exceed one dollar for each new coupon bond or registered bond without coupons issued upon such exchange or transfer.

SEC. 6. In case any coupon bond issued hereunder with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may execute, and thereupon the trustee shall certify and deliver, a new bond of like tenor and date (including coupons in case of a coupon bond) bearing the same serial number, in exchange
269 and substitution for, and upon cancellation of, the mutilated coupon bond and its coupons, or the mutilated registered bond without coupons, or in lieu of and substitution for the coupon bond and its coupons or the registered bond without coupons so destroyed, upon receipt of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond without coupons, and upon receipt also of satisfactory indemnity.

SEC. 7. Until the bonds to be issued under and secured by this indenture can be engraved and printed, the railroad company may execute, and, upon its request, the trustee shall certify and deliver, in lieu of such engraved bonds and subject to the same provisions, limitations, and conditions, temporary bonds of any denomination, substantially of the tenor of the bonds to be issued as hereinbefore provided. Upon surrender of such temporary bonds for exchange, the railroad company at its own expense shall issue, and upon cancellation of such surrendered bonds the trustee shall certify and deliver, in exchange therefor, engraved coupon bonds or registered bonds without coupons of the denominations hereinbefore provided, for the same aggregate principal sum as the temporary bonds surrendered; and, until so exchanged, the temporary bonds shall be entitled to the same security as the engraved bonds issued hereunder.

SEC. 8. Nothing in this indenture, or in the bonds issued hereunder, expressed or implied, is intended, or shall be construed, to give to any person or corporation other than the parties hereto, and the holders of bonds issued under and secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or under any covenant, condition, or provision herein contained; all its covenants, conditions, and provisions being intended to be, and being, for the sole and exclusive benefit of the parties hereto, and of the holders of the bonds hereby secured.

270 ARTICLE TWO.

The railroad company covenants as follows:

SECTION 1. Duly and punctually it will pay the principal and the interest of every bond issued under this indenture, at the dates and the place and in the manner mentioned in such bonds or in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes which the railroad company or the trustee may be required to pay or to retain therefrom, under or by reason of any present or future law of the United States, or of any State or county or municipality therein. The interest on the coupon bonds shall be payable only upon presentation and surrender of the several coupons for such interest as they respectively mature, and when paid such coupons shall forthwith be canceled. The interest on the registered bonds without coupons shall be payable only to the registered holders thereof.

Duly and punctually the railroad company will also pay the principal and the interest of every bond issued under the said first consolidated mortgage deed dated December 10, 1895, and of every bond issued under the said indenture dated February 1, 1901, according to the terms of said bonds and coupons and of said indentures securing the same, severally and respectively.

SEC. 2. All railways, franchises, and other property of every kind, in respect of the acquisition or construction whereof bonds under this indenture hereafter shall be certified and be issued as hereinbefore provided, and all franchises and other property of every kind as described and to the extent provided in the granting clauses of this indenture, which hereafter may be acquired by the railroad company, immediately upon the acquisition thereof by the
271 railroad company, and without any further conveyance or assignment, shall become and shall be subject to the lien of this indenture as fully and completely as though now owned by the railroad company, and specifically described in the granting clauses hereof; but at any and all times the railroad company will execute and deliver any and all such further assurances or conveyances or assignments thereof as the trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture; and also it will do, execute, acknowledge, and deliver, or cause to be done, executed, acknowledged, and delivered, all and every such further acts, deeds, conveyances and transfers and assurances in the law, for the better assuring, conveying, assigning, and confirming unto the trustee, all and singular, the hereditaments and premises, estates, and property hereby conveyed or assigned, or intended so to be, or which the railroad company may hereafter become bound to convey or assign to the trustee, as the trustee shall reasonably require.

But nothing expressed or implied in this indenture is intended, or shall be construed, to limit the right or power of the railroad company, hereby distinctly reserved, by the use of its credit or in any

manner other than by the use of the bonds hereby secured, or their proceeds, to construct or acquire other lines of railway, branches, or extensions, or interests therein, or other property, free from the lien hereof.

SEC. 3. The railroad company, at an office or agency to be maintained by it in the city of New York, will keep a register or registers for the registration and transfer of bonds issued hereunder, in which it will register, subject to such reasonable regulations as it may prescribe, all such bonds without coupons, and, upon presentation thereof for such purpose, any such coupon bonds; and such register or registers at all reasonable times shall be open to the inspection of the trustee.

272 Upon presentation to the bond registrar of the railroad company, at the place where such register shall be kept, of any such registered coupon bond, accompanied by delivery of a written instrument of transfer in a form approved by the railroad company, executed by the registered holder, such bond shall be transferred upon such register by the registered holder, in person or by attorney, and such transfer shall be noted by such bond registrar upon the bond. The registered holder of any such registered coupon bond also shall have the right to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal of such bond when due shall be payable to the person presenting the bond; but any such coupon bonds registered as payable to bearer may be registered again in the name of the holder with the same effect as a first registration thereof. Successive registrations and transfers as aforesaid may be made from time to time as desired, and each registration of a coupon bond shall be noted by the bond registrar on the bond.

Registration of any coupon bond, however, shall not affect the transferability of any coupon thereto belonging, by delivery merely, and payment to the bearer of any such coupon shall discharge the railroad company in respect of the interest therein mentioned, whether or not the bond shall have been registered.

Any registered bond without coupons may be transferred upon such register at such office or agency by the registered holder, in person or by attorney, upon surrender of such bond to such bond registrar for cancellation, accompanied by delivery of a written instrument of transfer in a form approved of by the railroad company, duly executed by the registered holder of the bond; and thereupon a new registered bond, or new registered bonds, for an equivalent principal sum shall be issued to the transferee or transferees as provided in section 5 of article one hereof.

273 SEC. 4. The railroad company shall not and will not suffer or permit any default wherefor any of the several lessors may terminate any of the existing leases of the Cleveland and Mahoning Valley Railroad, the Sharon Railroad, or the Westerman Railroad, or any lease hereafter made to it or for its benefit, of any franchises or property now or hereafter belonging to any of the said railroad

companies. In case and whenever it shall make default in paying any sum stipulated to be paid in any such present or future lease of any of the said railroads, the trustee, without affecting any of its rights hereunder, from time to time, in its discretion, may itself pay any sum so in default, and thereupon shall have and forthwith may assert a lien for such advances upon the premises hereby mortgaged, and the proceeds thereof, which lien shall be entitled to priority in rank and payment from the income and profits of the mortgaged premises over any bonds hereby secured.

The railroad company will not voluntarily create or suffer to be created any debt, lien, or charge (except as permitted or required under the said first consolidated mortgage deed dated December 10, 1895, or under the said indenture dated February 1, 1901, severally and respectively) which would be prior to the lien of these presents upon the mortgaged or pledged premises and property or any part thereof, or upon the income thereof; and within three months after the same shall accrue it will pay, or will cause to be discharged, or will make adequate provision to satisfy and discharge all lawful claims and demands of mechanics, laborers, and others, which, if unpaid, might by law be given precedence to this indenture as a lien or charge upon the mortgaged premises or any part thereof or the income thereof; and if any company of whose capital stock the greater part, pursuant to the provisions of article one or to the provisions of sections 5 and 6 of article three of this indenture, shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder
274 (excepting the New York, Susquehanna and Western Railroad Company, or the Buffalo Creek Railroad Company, or the Blossburg Coal Company, or the Conesus Lake Railroad Company), shall create or shall suffer to be created (except as permitted or required under the two indentures above mentioned, or under this indenture, or as required by any existing obligation) any lien or charge upon its property or income, or any indebtedness other than indebtedness to the railroad company, or for the current operating expenses of such company during a period not exceeding three months, then it (the railroad company) will cause the same to be paid or discharged, or will make adequate provision for the satisfaction or discharge thereof; provided, however, that the railroad company shall have the right to contest by legal proceeding any such debt, lien, or charge, and pending such contest may delay or defer the payment or discharge thereof.

SEC. 5. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges (the lien whereof would be prior to the lien hereof) lawfully imposed upon the premises or properly subject to this indenture, or upon any part thereof, or upon the income and profits thereof, and also all taxes, assessments, and governmental charges lawfully imposed upon the lien or interest of the trustee in respect of such premises or property, so that the lien and priority of this indenture shall be fully pre-

served at the cost of the railroad company without expense to the trustee or the bondholders; and if any company of whose capital stock the greater part pursuant to article one or article three of this indenture shall have been pledged hereunder, at any time while the greater part of the capital stock of such company shall be pledged hereunder (except the Buffalo Creek Railroad Company, or any coal company, in respect of lands upon which mining shall have been abandoned), shall fail to pay all such taxes, assessments, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then the railroad company itself will pay the same or make adequate provision for the satisfaction or discharge thereof; provided, however, that the railroad company shall have the right to contest by legal proceeding any such tax, assessment, or charge, and pending such contest may delay or defer the payment thereof.

SEC. 6. Except in the cases in this indenture expressly authorized, the railroad company will not, by affirmative vote or by abstaining from voting, sanction or permit any increase of the capital stock of any company of whose capital stock the greater part shall be subject to this indenture, or the issue or guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company, unless simultaneously there shall be made effective provision that such indebtedness and the evidences thereof, and such bonds issued or guaranteed, and such mortgage or other lien, and all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously subject to this indenture), forthwith, upon the issue or creation thereof, shall be delivered to, and be pledged with, the trustee under the said first consolidated mortgage deed dated December 10, 1895, or with the trustee under the said indenture dated February 1, 1901, if required by said instruments, severally and respectively, or with the trustee hereunder, and shall be subject to all the trusts of this indenture; and all such additional stock shall be fully paid and nonassessable. Nothing herein, however, shall be construed to prohibit any increase of stock of, or the creation of mortgages or other liens by, the Buffalo Creek Railroad Company or the New York, Susquehanna and Western Railroad Company.

Except as herein otherwise expressly provided, the railroad company will not, by affirmative vote or by abstaining from voting, sanction or permit any railroad or ferry or terminal company, of whose capital stock the greater part shall be owned by the railroad company and be subject to this indenture, to sell or otherwise to dispose of its railroad or any part thereof, or any ferry or terminal, or to lease the same (unless such lease be upon the condition that it shall terminate, at the election of the trustee, by entry or otherwise, in case default shall be made and shall continue as provided in section 2 of article four hereof, or, at the election of the purchaser, in case of a sale of the property subject to this indenture, under this indenture or under either of said two former indentures,

dated respectively December 10, 1895, and February 1, 1901), except to the railroad company or to some other company of whose capital stock not less than ninety per cent shall then be held by the railroad company and be subject to this indenture.

SEC. 7. Any and all claims and indebtedness, which the railroad company now has or hereafter may acquire against any other company, of whose capital stock the greater part shall have become subject to this indenture, shall (subject to the provisions in respect thereof in this indenture contained) be and become subject to this indenture, and if and when requested in writing by the trustee, the railroad company will execute to the trustee appropriate assignments thereof: subject, however, to any prior rights of the trustee under the said first consolidated mortgage deed dated December 10, 1895, or of the trustee under the said indenture dated February 1, 1901.

SEC. 8. The railroad company will not issue, negotiate, sell or dispose of any bonds hereby secured in any manner other than in accordance with the provisions of this indenture and the agreements in that behalf herein contained; and in issuing, selling, negotiating or otherwise disposing of such bonds, from time to time, it will
277 well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for the purposes herein prescribed, and to or for no other or different purpose.

SEC. 9. Prior to the first day of April, 1905, the railroad company will authorize the increase of its common capital stock to such amount as may be necessary to provide for the conversion thereinto of all of the bonds issued hereunder in accordance with the terms thereof; and, when and as demand therefor after April 1, 1905, and before April 1, 1915, shall be made by the holder of any such bond, it will as soon as practicable issue certificates for such shares of common stock as the same shall then be constituted, in exchange for, and in conversion of, such bond at the rate stipulated therein, but never at a rate less than the market price of such common stock on February 11, 1903; provided, however, that in case the voting trust of the stock of the railroad company under a certain agreement dated January 1, 1896, between Charles H. Coster, Louis Fitzgerald, and Anthony J. Thomas, of the one part, and J. Pierpont Morgan, Louis Fitzgerald, and Sir Charles Tennant, Bart., voting trustees, of the other part, or any extension or renewal of said agreement, shall exist at the time of any such conversion, common stock voting trust certificates shall be deliverable in lieu of common stock certificates; and provided further that scrip may be delivered for any fraction of a share of common stock, which scrip shall be exchangeable for common stock certificates, or common stock voting trust certificates, as the case may be, when presented in amounts aggregating $100 or some even multiple thereof, but which, until so exchanged, shall not confer on the holder the right to receive any dividends declared on such common stock, or any right whatever other than such right of exchange.

Demand by the holders of bonds for the conversion thereof
278 into common stock shall be made by writings addressed to the railroad company, which shall be delivered, together with the bonds to be converted, to the bond registrar of the railroad company. If the bond so surrendered be a registered bond without coupons, all rights to interest subsequently payable shall cease and determine. If the bond so surrendered be a coupon bond, the holder shall also surrender all unmatured coupons thereof. All registered bonds (with or without coupons) shall bear a written assignment in blank in a form satisfactory to the railroad company.

Upon the conversion and exchange of any such surrendered bond as above provided, the railroad company forthwith will cancel such surrendered bond (and also all unmatured coupons thereof if it be a coupon bond), and will exhibit the same to the trustee; and thereupon the said bond shall be deemed to be and shall be satisfied and discharged, and no bond in place thereof shall be issued by the railroad company or be certified or be delivered by the trustee.

ARTICLE THREE.

SECTION 1. It is hereby declared and covenanted that until the final satisfaction or release of the said first consolidated mortgage deed dated December 10, 1895, and of the said indenture dated February 1, 1901, all the bonds, stocks, and other property covered by said indentures, severally and respectively, shall be and shall remain subject to the prior and superior lien thereof, and shall be held as provided in said indentures, severally and respectively, and with all the powers, rights, and discretions, and subject to all the provisions set forth in said indentures, severally and respectively; and neither the execution of this indenture, nor any action hereunder, shall in any manner affect said indentures or either of them, or any rights of the holders of the bonds thereby secured, or any rights or duties of the trustee under either of said indentures.

279 Whenever said indenture dated February 1, 1901, shall have been satisfied or released, the trustee hereunder shall be entitled to receive, to take possession of, and to hold, as trustee under this indenture, all the bonds, shares of stock and other property (including cash) then held by the trustee under said indenture dated February 1, 1901; and the railroad company covenants that it will execute and will deliver to the trustee hereunder such assignments, transfers, powers of attorney, and other instruments as the trustee may reasonably require in order to vest in the trustee hereunder, or in order to enable the trustee hereunder to acquire, the title and possession of all such bonds, shares of stock, and other property; and the trustee thereupon shall hold under this indenture all such bonds, shares of stock, and other property, including cash.

The railroad company covenants that forthwith upon the execution hereof it will cause due notice of the execution of this indenture to be given to each corporation or association which issued any of the

shares of stock or any of the bonds now held by the trustee under either of said two former indentures; and from time to time, upon the delivery to the trustee under either of said indentures, of stocks, bonds, or other obligations of any other corporation or association, it will give similar notice to such other corporation.

The trustee shall be authorized (1) to cause to be registered in its name as trustee, any and all coupon bonds pledged with and delivered to it hereunder, or which at any time hereafter may be received by it under any of the provisions of this indenture, or (2) to cause the same to be exchanged for registered bonds without coupons of any denomination, or (3) to cause any such bonds to be stamped "Not negotiable. Held by The Standard Trust Company of New York, as trustee under the general mortgage of Erie Railroad Company, dated April 1, 1903."

The trustee shall cause to be transferred into its name, as
280 trustee hereunder, all registered bonds which shall have been delivered and assigned to it hereunder. The trustee at any time may transfer into its name, as trustee hereunder, all or any shares of stock the certificates for which shall have been pledged with and delivered to it hereunder, or in its discretion it may hold such certificates in the name of the registered holder thereof at the time of such pledge, provided that the same be endorsed in blank for transfer.

The trustee may do whatever may be necessary for the purpose of maintaining, preserving, renewing, or extending the corporate existence of any company the greater part of whose shares shall then be held by the trustee hereunder, and for such purposes, from time to time, it may sell, assign, transfer, and deliver so many shares of the stock of the several companies as may be necessary to qualify persons to act as directors of, or in any other official relation to, said companies. Whenever requested in writing by the railroad company the trustee shall assign and transfer to persons designated by the railroad company a sufficient number of any shares that then shall be held by the trustee hereunder to qualify such persons to act as directors of, or in any official relation to, the several companies which issued such shares; provided, however, that under this provision no transfer shall be made which shall reduce the amount of stock in any company held by the trustee so as to render it less than a controlling interest in such stock; and in every case the trustee may make such arrangements as it shall deem necessary for the protection of the trust hereunder.

Until the final satisfaction or release of said indentures dated December 10, 1895, and February 1, 1901, severally and respectively, unless the railroad company either (1) shall be in default in the payment of any interest upon any bond or bonds hereby secured and then outstanding, and such default shall have continued for the
281 period of six months, or (2) shall be in default in the payment of the principal of any bond hereby secured; or (3) shall be in default in the payment of the principal of any of the bonds

secured by the said indenture dated February 1, 1901; or (4) shall be in default in the due observance or performance of some other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, all stocks, bonds, coupons, claims, and other property that shall be subject to either of said indentures dated December 10, 1895, and February 1, 1901, severally and respectively, except as herein expressly otherwise provided, may be used, held, dealt with, and disposed of under and in accordance with the provisions of article four of said indenture dated December 10, 1895, and of article three of said indenture dated February 1, 1901, severally and respectively, as well by the railroad company as by the several trustees under said indentures, respectively, as though this indenture had not been made. None of the particular provisions hereinafter contained shall be construed as limiting the general provision contained in this section.

SEC. 2. Unless and until a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed; or unless the trustee shall have entered into possession of the mortgaged premises or part thereof under the power herein granted; or unless and until there shall be a default (1) in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture and such default shall have continued for the period of six months; or (2) in the payment of the principal of any bond hereby secured; or (3) in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901; or (4) in the due
282 observance or performance of any other covenant or condition in this indenture required to be kept or performed by the railroad company and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, (a) the trustee shall not (except with the assent of the railroad company) collect, or be entitled to collect, the principal or interest of any bonds or of any other claims or indebtedness now or hereafter subject to this indenture, whether at, or before, or after the maturity of such bonds or contract obligations or other claims or indebtedness, and shall not enforce any provisions of the mortgages, trust deeds or other instruments under which such bonds or other obligations were issued, or by which the same are secured; (b) the railroad company shall be entitled to receiv all interest paid in respect of any such bonds or obligations, and the dividends on all shares of stock, which shall be subject to this indenture, although the same may have been transferred to the trustee; (c) from time to time (subject to the covenants in respect thereof in this section contained), upon the request of the railroad company, the trustee shall deliver to it any coupons for such interest then in the possession of the trustee, in order that the railroad company may receive payment thereof for its own use or may cause the same to be canceled, and the trustee shall deliver to the railroad com-

pany suitable orders in favor of the railroad company, or its nominee, for the payment of such interest and dividends, and the railroad company may collect such coupons, interest, and dividends (but not by any proceeding which the trustee shall deem to be prejudicial to the trusts hereunder), and the trustee at once shall pay over to the railroad company any such interest and dividends which may be collected or be received by it; and (d) the railroad company, for its own use, shall be entitled to demand, receive, and collect, and may
283 release and discharge, the principal and interest of any such claims and indebtedness subjected to the lien of this indenture under section 7 of article two hereof, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose:

Provided, however, and hereby it is declared and agreed that, except as in this indenture otherwise expressly provided, (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to the railroad company, the principal of any bond subject to this indenture; (2) the railroad company shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond, or the principal of or any interest on any such other obligations, claims, or indebtedness which shall have been collected or paid out of the proceeds of any sale or condemnation of the property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, obligations, claims, or indebtedness, in case of a dissolution or liquidation of such company, it being the intention that the railroad company shall be entitled to receive only payments made out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon or right to interest or dividends delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or interest or any such other claims or indebtedness by legal proceedings or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee shall deem prejudicial to the trust hereunder; and (5) until actually paid, released, or discharged every such coupon or right to interest or dividends and all such other claims and indebtedness shall remain subject to this indenture.

284 If any such coupons, or if any evidence of any such claim or indebtedness, delivered to the railroad company hereunder, shall not, as aforesaid, forthwith be paid or canceled, the railroad company shall return the same to the trustee, and in case of the payment of any such coupon, claim, or indebtedness shall, upon the demand of the trustee, furnish satisfactory evidence of the cancellation and extinguishment thereof.

SEC. 3. In case any sum shall be paid on account of the principal of any bonds or of any obligations subject to this indenture, or in case any sum shall be paid on account of the interest on any such bonds

or obligations, out of the proceeds of property covered by a mortgage or trust deed securing such bonds or obligations, or in case, upon the dissolution or liquidation of any company, any sum shall be paid upon any bonds or any shares of stock or any claims against or indebtedness of such company, subject to this indenture, then, in any such case, any such sum, unless received by the trustee under the said first consolidated mortgage deed dated December 10, 1895, or by the trustee under the said indenture dated February 1, 1901, upon the trusts thereof, severally and respectively, or unless applied on account of the purchase price of property purchased pursuant to section 5 of this article, shall be received by the trustee and shall be paid over by the trustee to the railroad company to reimburse it for expenditures by it made for any of the purposes for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures, signed by the president or a vice-president or the general manager or chief engineer and by the comptroller or auditor or treasurer of the railroad company.

SEC. 4. Unless and until a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed, or unless the trustee shall have entered into possession of the mortgaged
285 premises or part thereof under the power herein granted, or unless and until there shall be a default (1) in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture and such default shall have continued for the period of six months, or (2) in the payment of the principal of any bond hereby secured, or (3) in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901, or (4) in the due observance or performance of some other covenant or condition in this indenture required to be kept or performed by the railroad company, and such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given by the trustee to the railroad company, the railroad company shall have the right to vote upon all shares of stock subject to this indenture for all purposes not inconsistent with the provisions or purposes of this indenture and with the same force and effect as though such shares were not subject to this indenture; and from time to time, upon demand of the railroad company, the trustee forthwith shall execute and deliver, or shall cause to be executed and delivered, to the railroad company, or to its nominees, suitable powers of attorney or proxies to vote upon any shares of stock which shall have been transferred to the trustee.

SEC. 5. In case default shall be made in the payment of the principal or interest of any of the bonds or obligations which shall have been delivered to, and shall be held by the trustee hereunder, or of any other bonds then secured by the same mortgage or deed of trust as such bonds held by the trustee, then in any such case, if the trustee shall hold more than ninety per cent in amount of the entire issue of such bonds or obligations in default, it shall, upon the written request of the railroad company, and in other cases, upon such written

request, it may, in its discretion, cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to
286 foreclose or enforce the mortgage, or trust or charge by which such bonds or obligations in default are secured. In case the railroad company shall be in default in the payment of the principal of any of the bonds hereby secured, or in case the railroad company shall be in default in the payment of the interest on any of such bonds, and such default in the payment of interest shall have continued for the period of six months, or in case a receiver of the mortgaged premises shall have been appointed, or in case the trustee shall have entered or shall have elected to enter into possession of the mortgaged premises, either under the power herein conferred or by the voluntary action of the railroad company, then and in any such case the trustee, in its discretion, may institute such proceedings without such written request.

In case (1) any company of whose capital stock the greater part shall be held by the trustee subject to this indenture as a first lien thereon shall be dissolved or liquidated, or in case (2) all or any of the property of any such company shall be sold upon the insolvency of such company at any judicial or other sale, or in case (3) any property, covered by a mortgage securing any bonds, or subject to any charge or trust for the payment of any other obligations, held by the trustee subject to this indenture as a first lien thereon, shall be sold upon foreclosure of such mortgage, or by enforcement of such charge or trust, then in any such event, if the property of such dissolved or liquidated company, or the property sold, can be acquired by crediting on the bonds, obligations, claims, indebtedness, or stock held by the trustee hereunder, any sum accruing or to be received thereon out of the proceeds of such property, and by paying not more than ten per cent of the price of such property in cash (or more than ten per cent, if the holders of a majority in amount of the bonds hereby secured shall so request), the trustee in its discretion may, but, if requested in writing by the railroad company or by the
287 holders of a majority in amount of the bonds hereby secured, and provided with the amount of cash necessary therefor (whether such amount be more or less than ten per cent of the price of such property), the trustee in every case shall purchase or cause to be purchased, or permit the railroad company to purchase, such property, either in the name or on behalf of the trustee or of the railroad company, or by purchasing trustees, and shall use, or permit the railroad company to use, such bonds, obligations, claims, indebtedness, and stock, so far as may be, to make payment for such property; and i case of any such purchase the trustee shall take such steps as it m deem proper to cause such property to be vested either in the railr l company, subject to this indenture, or in some other corporation ganized or to be organized, with power to acquire and manage such property, provided that all the bonds and other indebtedness and apital stock thereof (excepting the number of shares required to q alify directors) shall be received by the trustee and shall be

held for the benefit of the railroad company, or its assigns, subject to this indenture.

With the written consent of the railroad company, the trustee at any time may vote upon any shares of stock that shall be held by it hereunder, and may take such other action as in its discretion it shall deem advisable to protect its interests and the interests of the bondholders hereunder, in respect of any bonds, obligations, or stocks subject to the lien hereof, and with such consent of the railroad company, the trustee may join in any plan of reorganization in respect of any such bonds or stocks and may accept new securities issued in exchange therefor under such plan. In case the railroad company shall be in default in the payment of any interest or the principal of any of the bonds hereby secured and such default shall have continued for the period of six months, the trustee shall be entitled to take such steps without the consent of the railroad company.

The railroad company covenants that, on demand of the
288 trustee, it, the railroad company, forthwith will pay, or will satisfactorily provide for, all expenditures incurred by the trustee under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any property which the trustee shall purchase or shall cause to be purchased pursuant to the provisions of this section; and in case the railroad company shall fail so to do, then, without impairment of, or prejudice to, any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien prior to these presents upon all the stocks, bonds, claims, and indebtedness in respect of which such advances shall have been made, and the proceeds thereof and any property acquired by means thereof.

In case the trustee shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stocks, then the trustee shall receive any portion of the proceeds of the sale accruing on the securities by it held hereunder, and such proceeds, from time to time, shall be paid over to the railroad company to reimburse it for expenditures by it made for any of the purposes for which bonds or their proceeds may be used under section 3 of article one hereof, upon certificates of such expenditures signed by the president or a vice-president or the general manager or chief engineer, and by the comptroller or auditor or treasurer, of the railroad company.

SEC. 6. Anything in this indenture to the contrary notwithstanding, any company all or part of whose capital stock shall be subject to this indenture, may be merged or consolidated with, or all or
289 any part of its property may be sold or conveyed to, the railroad company. In the event of such consolidation or merger or sale, this indenture shall become and be a lien upon the property of the company so consolidated or merged with, or the property so

sold or conveyed to, the railroad company, with the same force and effect as if expressly conveyed by this indenture, and the holders of the bonds hereby secured shall always have as full and complete a lien upon such property as that herein created by the pledge of the stock and bonds of such constituent companies or of such selling company, to the trustee hereunder.

Anything in this indenture to the contray notwithstanding any company, all or part of whose capital stock shall be subject to this indenture, may be merged or be consolidated with, or all of its property may be sold or conveyed to, any other company, all or part of whose capital stock shall be subject to this indenture; provided, however, that the portion of the capital stock of any such consolidated or merging company (but never less than a majority thereof) issued for and in lieu of any stock previously pledged hereunder, shall always bear to the total capital stock a proportionate relation at least as high as that borne by such previously pledged stock to the total capital stock of such constituent companies; and provided further that in the case of any such sale by any such company of all its property, the portion of the capital stock of the purchasing company (but never less than a majority thereof) subject to this indenture, shall always bear to the total capital stock of such purchasing company a proportionate relation at least as high as that borne by the previously pledged stock of the selling company to the total capital stock of such selling company. Such portion of such stock of such consolidated or merging company shall then become and be subject to this indenture, and shall be held by the trustee hereunder pursuant to the provisions hereof, or by the trustee under the first consolidated mortgage deed dated December 10, 1895,
290 or by the trustee under the indenture dated February 1, 1901, pursuant to the provisions thereof, severally and respectively, and the holders of the bonds hereby secured shall always, subject to the lien of said two former indentures last above mentioned, have a lien upon such portion of such stock of such consolidated or merging company as full and complete as upon the stock of such constituent companies, by reason of the pledge hereunder.

The trustee holding the same may make and exchange, substitution, cancellation, or surrender of securities required for the purposes or in accomplishment of any such merger or consolidation; and the trustee hereunder may receive the opinion of any counsel approved by it as to the legal effect of any such merger or consolidation, and as to the steps necessary to be taken to consummate the same, and as to any other matter under this section; and such opinion shall be full protection to the trustee for any action by it taken pursuant thereto.

SEC. 7. Nothing in this indenture contained shall prevent (1) the renewal or extension, if without impairment of lien or security, at the same or a lower rate of interest, (a) by the railroad company of any bond or obligation secured by a mortgage or charge underlying the lien of the said first consolidated mortgage deed dated

December 10, 1895, or of the said indenture dated February 1, 1901, or secured by a mortgage or lien permitted to be created under the provisions of either of said indentures or of this indenture; or (b) by any company any of the shares of whose capital stock shall be subject to this indenture, of any bond or obligation secured by mortgage upon its property; or (c) by any company of any of its bonds or obligations which shall be subject to this indenture; or (2) the issue in place of and in substitution for any such bonds or obligations of the railroad company or of any such other company, of other bonds or obligations for equivalent amounts, bearing the same or a
291 lower rate of interest, adequately secured by a similar mortgage or lien upon the same property; provided, however, that in case any bonds or obligations subject to this indenture shall be so renewed or extended, such bonds or obligations as so renewed or extended shall continue subject to this indenture to the same extent, and shall be lodged and held in the same manner as theretofore; and that in case any bonds or obligations subject to this indenture shall be exchanged for bonds or obligations substituted as aforesaid, the substituted bonds or obligations shall ipso facto forthwith become subject to this indenture to the same extent, and shall be lodged and held in the same manner as those for which they are substituted.

At any time, in its discretion, the trustee may, and if requested in writing by the railroad company it shall, consent to any such renewal, extension, or substitution. The trustee may receive the opinion of any counsel approved by it as conclusive evidence that any such renewal, extension, or substitution is in compliance with the provisions of this section.

ARTICLE FOUR.

SECTION 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond which in any way at or after maturity shall have been transferred or pledged separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of or from this indenture, except after the prior payment in full of the principal of the bonds issued hereunder and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months, or in case (2) default shall be made in
292 the payment of the principal of any bond hereby secured, or in case (3) default shall be made in the payment of the principal of any of the bonds secured by the said indenture dated February 1, 1901, or (4) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall have continued for the period of six months after writ-

ten notice thereof shall have been given to the railroad company by the trustee or by the holders of five per cent in amount of the bonds hereby secured, then and in each and every such case the trustee, personally, or by its agents or attorneys, may enter into and upon all or any part of the railways, rolling stock, property and premises, lands, rights, interests, and franchises hereby conveyed or intended so to be, and each and every part thereof, and may exclude the railroad company, its agents and servants, wholly therefrom; and having and holding the same, may use, operate, manage, and control said railways and other premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents, and servants or attorneys, to the best advantage of the holders of the bonds hereby secured; and upon every such entry the trustee, at the expense of the trust estate, from time to time, either by purchase, repairs, or construction, may maintain and restore, and may insure or keep insured, the rolling stock, tools, and machinery and other property, buildings, bridges, and structures erected or provided for use in connection with said railways and other premises whereof it shall have become possessed as aforesaid in the same manner and to the same extent as is usual with railway companies; and likewise, from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals, and replacements,
and useful alterations, additions, betterments, and improve-
293 ments thereto and thereon as to it may seem judicious; and in
such case the trustee shall have the right to manage the mortgaged premises and to carry on the business and exercise all rights and powers of the railroad company, either in the name of the railroad company or otherwise, as the trustee shall deem best; and it shall be entitled to collect and receive all tolls, earnings, income, rents, issues, and profits of the same and every part thereof, and also the income from stocks and bonds subject to this indenture; and after deducting the expenses of operating said railways and other premises, and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest in default, in the order of the maturity of the installments of such interest, with interest on the overdue installments at the rate of four per cent per annum: such payments to be made ratably to the persons entitled thereto, without discrimination or preference.

In case the principal of the bonds hereby secured shall have become due, by declaration or otherwise, first to the payment of the accrued

interest (with interest on the overdue installments thereof at the rate of four per cent per annum) in the order of the maturity of the installments, and next to the payment of the principal of all bonds hereby secured; in every instance such payments to be made
294 ratably to the persons entitled to such payment without any discrimination or preference.

These provisions, however, are not intended in anywise to modify the provisions of section 1 of this article four, but are subject thereto.

SEC. 3. In case the trustee shall have entered, or shall have elected to enter, as aforesaid, or in case a receiver shall have entered into possession of the railroad hereby mortgaged and conveyed, or in case default shall be made and shall continue as specified in the preceding section 2 of this article, the trustee shall be entitled (subject to any prior rights of the trustee under the said first consolidated mortgage deed dated December 10, 1895, or of the trustee under the said indenture dated February 1, 1901, severally and respectively, in respect of the stocks and bonds pledged thereunder) to vote on all shares of stock then subject to this indenture, and for the benefit of the holders of the bonds hereby secured, shall be entitled to collect and receive all dividends on the shares of stock that shall then be subject to this indenture, and all sums payable for principal, interest, or otherwise upon any bonds or obligations that shall then be subject to this indenture, and to apply as hereinbefore provided the net moneys received; and, as holder of any such shares of stock and of any such bonds, to perform any and all acts, or to make or execute any and all transfers, requests, requisitions or other instruments, for the purpose of carrying out the provisions of this section; but in the event that a receiver of any railway upon which this indenture is a first lien shall have been appointed and shall be in possession thereof, the trustee from time to time, in its discretion may, and if requested by the holders of a majority in amount of the bonds hereby secured, it shall turn over any part or all of the interest moneys and dividends, so collected by it, to such receiver, and may cooperate with such receiver in managing and operat-
295 ing the entire system of the railroad company in such manner as the trustee shall deem for the best interests of the holders of the bonds hereby secured.

In aid of the powers in this section to it granted, the trustee hereunder, in case of and during any entry or receivership or default as herein contemplated, shall possess and may exercise, to the exclusion of the railroad company, any and all of the rights reserved to the railroad company under the said first consolidated mortgage deed of December 10, 1895, and the indenture of February 1, 1901, in respect of the stocks, bonds, or other obligations held by the trustee of either of said indentures, respectively, and subject to this indenture, including the right to demand and to receive from either of said trustees suitable proxies, orders, or other instruments to enable it or its nominee to vote and to collect dividends and interest upon any of such stocks, bonds, or other obligations.

SEC. 4. In case a default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months, then and in every case of such continuing default, upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding. This provision, however, is subject to the condition that if at any time after the principal of said bonds shall have been so declared due and payable, and before any sale of the mortgaged premises shall have been made, all arrears of interest upon all the bonds secured hereby, with interest at the rate of four per cent per annum on overdue installments of interest, shall either be paid by the railroad company or be col-
296 lected out of the mortgaged premises, and all defaults as aforesaid shall have been made good, then and in such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the railroad company and to the trustee may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture, by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other reason, or shall have been determined adversely to the trustee, then and in every such case the railroad company and the trustee shall be restored to their former position and rights hereunder in respect of the mortgaged premises, and the shares of stock and the bonds and other property subject or to be subject to this indenture, and all rights, remedies, and powers of the trustee shall continue as though no such proceeding had been taken.

SEC. 5. In case (1) default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and any such default shall have continued for the period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the railroad company, and any such last-mentioned default shall have continued for the period of six months after written notice thereof shall have been given to the railroad company by the trustee, or by the holders of five per cent in amount of the bonds hereby secured, then and in each and every such case of default the trustee, with or without entry, personally or by attorney, in its discretion, either

(a) may sell, subject to the liens thereon which then shall be
297 prior and superior to the lien of this indenture, to the highest and best bidder, all and singular the property and premises covered by this indenture, including bonds and stocks, rights, franchises, and interests, and appurtenances, and other real and personal property of every kind, and all right, title, and interest, claim, and demand therein, and right of redemption thereof, in one lot and as an entirety, unless a sale in parcels shall be required under the provisions of section 7 of this article four, in which case such sale shall be made in parcels, as in said section provided; which sale or sales shall be made at public auction at such place in the city of Elmira, in the State of New York, or at such other place and at such time and upon such terms as the trustee may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law; or

(b) may proceed to protect and to enforce its rights and the rights of bondholders under this indenture by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for any foreclosure hereunder, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce any of its rights or duties hereunder.

SEC. 6. Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured, in case of any continuing default as specified in section 5 of this article four, it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the bonds hereby secured, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit, or otherwise as the trustee, being advised by counsel learned in the law, shall
298 deem most expedient in the interest of the holders of the bonds hereby secured; but anything in this indenture to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding from time to time shall have the right to direct and to control the action of the trustee, and the method and the place of conducting any and all proceedings for any sale of the premises and property subject to this indenture, or for the foreclosure of this indenture, or for the appointment of a receiver, or any other proceedings hereunder.

SEC. 7. In the event of any sale, whether made under the power of sale herein granted or conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property subject to this indenture shall be sold in one parcel and as an entirety, including all the rights, title, estates, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature, unless such sale as an entirety is impracticable by reason of some statute or other cause, or unless the holders of a majority

in amount of the bonds hereby secured then outstanding shall in writing request the trustee to cause said premises to be sold in parcels, in which case the sale shall be made in such parcels as may be specified in such request; and this provision shall bind the parties hereto, and each and every of the holders of the bonds and coupons hereby secured or intended so to be.

SEC. 8. Notice of any such sale pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in New York, N. Y., and in a newspaper published in Chicago, Illinois.

299 SEC. 9. The trustee may adjourn from time to time any sale by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication, it may make such sale at the time and place to which the same shall be so adjourned.

SEC. 10. Upon the completion of any sale or sales under this indenture, the trustee shall execute and deliver to the accepted purchaser or purchasers a good and sufficient deed, or good and sufficient deeds, and other instruments, conveying, assigning and transferring the properties and franchises sold, subject severally and respectively to the liens thereon which then shall be prior and superior to the lien of this indenture. The trustee and its successors hereby are appointed the true and lawful attorneys irrevocable of the railroad company, in its name and stead to make all necessary conveyances and assignments of property and all necessary transfers of shares of stock or bonds or other obligations thus sold; and for that purpose it and they may execute all necessary deeds and instruments of assignment and transfer, and may substitute one or more persons with like power; the railroad company hereby ratifying and confirming all that its said attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale herein granted and conferred, or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company, of, in, and to the premises and property so sold, and shall be a perpetual bar both at law and in equity, against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises or property sold, or any part thereof, from, through, or under the railroad company, its successors, or assigns.

The personal property and chattels conveyed or intended
300 to be conveyed by or pursuant to this indenture, other than stocks, bonds, and other securities and claims, shall be real estate for all the purposes of this indenture, and shall be held and

taken to be fixtures and appurtenances of the said railroads and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

SEC. 11. The receipt of the trustee for the purchase money paid at any such sale shall be a sufficient discharge therefor to any purchaser of the property or any part thereof, sold as aforesaid; and no such purchaser or his representatives, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 12. In case of such sale under the foregoing provisions of this article, whether made under the power of sale herein granted or pursuant to judicial proceedings, or in case of a sale upon foreclosure of the said first consolidated mortgage deed dated December 10, 1895, or of the said indenture dated February 1, 1901, by reason of a default of the railroad company thereunder, the principal sums of the bonds hereby secured, if not previously due, shall immediately thereupon become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 13. The purchase money, proceeds, or avails of any such sale, whether under the power of sale herein granted or pursuant to judicial proceedings, together with any other sums which then
301 may be held by the trustee under any of the provisions of this indenture as part of the trust estate or the proceeds thereof shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances made or incurred by the trustee, and to the payment of all taxes, assessments, or liens prior to the lien of these presents, except the superior liens and any taxes, assessments, or other charges subject to which the property shall have been sold.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of four per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest, subject, however, to the provisions of section 1 of this article four.

Third. To the payment of the surplus, if any, to the railroad company, its successors or assigns, or to whomsoever may be lawfully entitled to receive the same.

SEC. 14. Upon any such sale by the trustee or pursuant to judicial proceedings, any purchaser, for or in settlement or payment of the purchase price of the property purchased, shall be entitled to use and apply any bonds, and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons in order that
302 there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds and coupons, as his ratable share of such net proceeds, after the deduction of costs, expenses, compensations, and other charges; and thereupon such purchaser shall be credited, on account of such purchase price payable by him, with the portion of such net proceeds that shall be applicable to the payment of, and that shall have been credited upon, the bonds and coupons so presented; and, at any such sale, any bondholders may bid for and purchase, such property and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability.

SEC. 15. The railroad company covenants that (1) in case default shall be made in the payment of any interest on any bond or bonds at any time outstanding and secured by this indenture, and such default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether upon the maturity of said bonds, or upon declaration as authorized by this indenture, or upon a sale as set forth in section 12 of this article four, then, upon demand of the trustee, the railroad company will pay to the trustee, for the benefit of the holders of the bonds and coupons hereby secured, then outstanding, the whole amount that then shall have become due and payable on all such bonds and coupons then outstanding, for interest or principal, or both, as the case may be, with interest at the rate of four per cent per annum upon the overdue principal and installments of interest; and in case the railroad company shall fail to pay the same forthwith upon such demand, the trustee, in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.
303 The trustee shall be entitled to recover judgment as aforesaid, either before or after or during the pendency of any proceedings for the enforcement of the lien of this indenture, and the right of the trustee to recover such judgment shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the property subject to this indenture, and of the application of the proceeds of sale to the payment of the debt hereby secured, the trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the debt remaining unpaid, with interest. No recovery of any such judgment by

the trustee, and no levy of any execution upon any such judgment upon property subject to this indenture, or upon any other property, shall in any manner or to any extent affect the lien of this indenture upon the property or upon any part of the property subject to this indenture, or any rights, powers, or remedies of the trustee hereunder, or any lien, rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies of the trustee and of the bondholders shall continue unimpaired as before.

Any moneys thus collected by the trustee under this section shall be applied by the trustee towards payment of the amounts then due and unpaid upon such bonds and coupons in respect of which such moneys shall have been collected, ratably and without any preference or priority of any kind (except as provided in section 1 of this article four), according to the amounts due and payable upon such bonds and coupons, respectively, at the date fixed by the trustee for the distribution of such moneys, upon presentation of the several
304 bonds and coupons, and stamping such payment thereon, if partly paid, and upon surrender thereof, if fully paid.

SEC. 16. The railroad company will not at any time insist upon or plead or in any manner whatever claim or take the benefit or advantage of any stay or extension law, now or at any time hereafter in force, nor will it claim, take, or insist upon any benefit or advantage from any law now or hereafter in force providing for the valuation or appraisement of the property or any part of the property subject to this indenture, prior to any sale or sales thereof to be made pursuant to any provisions herein contained, or to the decree, judgment, or order of any court of competent jurisdiction, nor after any such sale or sales will it claim or exercise any right under any statute enacted by any State, or otherwise, to redeem the property so sold or any part thereof, and it hereby expressly waives all benefit and advantage of any such law or laws, and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power as though no such law or laws had been made or enacted.

SEC. 17. Upon filing a bill in equity, or upon commencement of any other judicial proceedings, to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry, and also any and all other rights and powers herein conferred and provided to be exercised by the trustee upon the occur'ence and continuance of default, as hereinafter provided; and, as matter of right, the trustee shall be entitled to the appointment of a receiver of the premises and property subject to this indenture, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledged, to continue to

retain possession and control of any stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 18. At any time hereafter before full payment of the bonds secured hereby, and whenever it shall deem expedient for the better protection or security of such bonds (although then there shall be no defau entitling the trustee to exercise the rights and powers conferred by sections 2 and 3 of this article four), the railroad company, with the consent of the trustee, may surrender and may deliver to the trustee full possession of the whole or of any part of the property, premises, and interests hereby conveyed or assigned, or intended so to be, and may authorize the trustee to collect the dividends and interest on all shares of stock, bonds, and other obligations subject to this indenture, and to vote upon all such shares of stock for any period fixed or indefinite. In such event the trustee shall enter into and upon the premises and property so surrendered and delivered, and shall take and receive possession thereof, for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon maintaining and to maintain such possession though beyond the expiration of any such prescribed period, and the trustee, from the time of its entry upon such premises and property, shall work, maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenues thereof as provided in section 2 of this article four. Upon application of the trustee, and with the consent of the railroad company, if then there be no subsisting default such as is specified in said section 2 of this article four, and without such consent if then there shall be such a subsisting default, a receiver may be appointed to take possession of, and to operate, maintain, and manage the whole or any part of the property subject to this indenture, and the railroad company shall transfer and deliver to such receiver all such property, wheresoever the same may be situated; and in every case, when a receiver of the whole or of any part of said property shall be appointed under this section, or otherwise, the net income and profits of such property shall be paid over to, and shall be received by, the trustee, for the benefit of the holders of the bonds hereby secured; provided, however, that notwithstanding the appointment of any such receiver, the trustee, as pledgee, shall be entitled to retain possession and control of any stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 19. In case of any default hereunder, if, in order to preserve the franchises of the railroad company and to avoid foreclosure and sale involving the organization of a successor company, any plan of reorganization shall be proposed with provisions for the modification of this indenture, so far as to authorize and require the creation of new liens upon the property subject to this indenture, prior and superior to the lien hereof, then, and in every such case, registered

holders of four-fifths in amount of all of the bonds hereby secured then outstanding, by writing, may direct the trustee, in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan, which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to the amount of principal or the date of payment thereof, or as to the rate or dates of payment of interest, or as to the price or rate at which shares of common stock will be issued in conversion of any such bond according to the terms thereof, as herein contemplated. Thereupon, but not otherwise, the trustee shall, by writing, acquiesce in such provisions of such
307 plan, and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in New York County, New York; Passaic County, New Jersey; Susquehanna County, Pennsylvania; Marion County, Ohio; Huntington County, Indiana, and Cook County, Illinois; and, thenceforth, shall be deemed to be part of this indenture, and thereafter the lien of this indenture, and of the bonds hereby secured, shall be deemed to be, and shall be, subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement.

Registration for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 3 of article two of this indenture.

SEC. 20. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture, or for the execution of any trust hereunder, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder previously shall have given to the trustee written notice of such default, and of the continuance thereof, as hereinbefore provided; nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured, then outstanding, shall have made written request upon the trustee, and shall have afforded to it a reasonable opportunity either to proceed to exercise the powers hereinbefore granted or to institute such action, suit, or proceeding in its own name; nor unless, also, they shall have offered to the trustee adequate security and indemnity against
308 the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared, in every such case, at the option of the trustee, to be conditions precedent to the execution of the powers and trusts

of this indenture for the benefit of the bondholders, and to any action or cause of action for foreclosure or for the appointment of a receiver or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever by his or their action to affect, disturb, or prejudice the lien of this indenture, or to enforce any right hereunder except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 21. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee or to the holders of bonds hereby secured is intended to be exclusive of any other remedy or remedies, and each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 22. No delay or omission of the trustee or of any holder of bonds hereby secured to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein; and every power and remedy given by this article to the trustee or to the bondholders may be exercised from time to time and as often as may be deemed expedient by the trustee or by the bondholders.

309 ARTICLE FIVE.

No recourse under or upon any obligation, covenant, or agreement contained in this indenture, or in any bond or coupon hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the railroad company, or of any successor corporation, either directly or through the railroad company, by the enforcement of any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise; it being expressly agreed and understood that this indenture, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, the incorporators, stockholders, officers, or directors of the railroad company or of any successor corporation, or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants, or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom; and that any and all personal liability of every name and nature, and any and all rights and claims against, every such stockholder, officer, or director, whether arising at common law or in equity, or created by statute or constitution, are hereby expressly released and waived as a condi-

tion of, and as part of the consideration for, the execution of this indenture and the issue of the bonds and interest obligations secured hereby.

ARTICLE SIX.

SECTION 1. Any demand, request, or other instrument, required by this indenture to be signed and executed by bondholders, may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by
310 agent appointed in writing. Proof of the execution of any such demand, request, or other instrument, or of the writing appointing any such agent, and of the ownership by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee or of the railroad company with regard to due action taken by it under such instrument, if such proof be made in the following manner:

The fact and date of the execution by any person of any such demand, request, or other instrument or writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in New York, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness to such execution.

The fact of the holding by any bondholder of coupon bonds transferable by delivery, and the amounts and issue numbers and serial letter of such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such depositary the bonds described in such certificate. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds.

SEC. 2. The railroad company and the trustee may deem and may treat the bearer of any coupon bond hereby secured, which shall not at the time be registered as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond or coupon, as the case may be, for the purpose of converting the bond, or of receiving payment of any bond or coupon, and for all other purposes, and neither the railroad company nor the trustee shall be affected by any notice to the contrary.

311 The railroad company and the trustee may deem and treat the person in whose name any registered bond without coupons, issued hereunder, shall be registered upon the books of the railroad company as hereinbefore provided, as the absolute owner of such bond, for the purpose of converting the bond, or of receiving payment of, or on account of, the principal and interest of such bond, and for

all other purposes, and may deem and treat the person in whose name any coupon bond shall be so registered as the absolute owner thereof, for the purpose of converting the bond, or of receiving payment of, or on account of, the principal thereof, and for all other purposes, except to receive payment of interest represented by outstanding coupons; and all such conversions or payments so made to any such registered holder for the time being, or upon his order, shall be valid, and effectual to satisfy and discharge the obligation to convert such bonds, and to the extent of the sum or sums so paid the liability for moneys payable upon any such bonds.

ARTICLE SEVEN.

SECTION 1. Upon the written request of the president or of a vice-president of the railroad company, approved of or authorized by resolution of its board of directors or executive committee, from time to time, while the railroad company is in possession of any of the property subject to this indenture, but subject to the conditions and limitations in this section prescribed, and not otherwise, the trustee shall release from the lien and operation of this indenture any part of the railways, lands, and other property then subject thereto, except stocks, bonds, and other securities: provided (1) that no part of the lines of track or of the rights of way shall be released unless the use thereof no longer shall be necessary or advantageous in the operation of any of the lines of railway subject to this indenture, and no part of such lines of track or rights of way shall so be released if
312 thereby the continuity of the lines of railway of the railroad company shall be broken; and (2) that no part of the railways or other property subject to this indenture shall be released hereunder, unless at the time of such release it no longer shall be necessary or advantageous to retain the same for the operation, maintenance, or use of such lines of railway, or for use in the business of the railroad company, and no such release shall be made unless the railroad company shall have sold, or shall have contracted to exchange for other property or to sell, the property so to be released.

The proceeds of any and all such sales, and all moneys received as compensation for any property subject to this indenture taken by exercise of the power of eminent domain (unless applied in accordance with the requirements of the said indentures dated December 10, 1895, and February 1, 1901, severally and respectively), shall be set apart and applied, with the approval of the trustee, to the purchase of other property, real or personal, or for betterments of or improvements upon any part of the mortgaged premises. Any new property acquired by the railroad company to take the place of any property released hereunder, ipso facto, shall become and be subject to this indenture, as fully as if specifically mortgaged or assigned hereby, but, if requested by the trustee, the railroad company will convey and assign the same to the trustee by appropriate deeds or other instruments upon the trusts and for the purposes of this indenture.

The railroad company, from time to time, while in possession of any of the property subject to this indenture, also shall have full power, in its discretion, to dispose of any portion of the machinery, equipment, and implements, at any time subject to the lien hereof, which may have become unfit for such use, replacing the same by new machinery, equipment, or implements, which shall become subject to this indenture.

313 In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article be required to see to the application of the purchase money.

SEC. 2. Upon the written request of the president or of a vice-president of the railroad company, authorized or approved by resolution of the board of directors or of the executive committee of the railroad company, the trustee, from time to time, shall execute such releases or other instruments as may be required to release from the lien and operation of this indenture, the leasehold interest, or the term of the lessee or lessees and assigns, under any lease or sublease, which may be executed by the railroad company or by any lessor company of any land subject to this indenture or embraced in any lease pledged or assigned under this indenture, which is not embraced in the right of way of the mortgaged railroad or of any leased railroad and is not used for the purpose of stations, yards, roundhouses, freight houses, machine shops, docks, or gravel beds, or other purposes connected with the maintenance or operation of the railroad, and thereupon such leasehold interest or term shall be free from the lien and operation of this indenture. The reversion under any such lease shall be and shall remain subject to this indenture.

SEC. 3. In case any of the property subject to this indenture shall be in the possession of a receiver lawfully appointed, the powers in and by this article conferred upon the railroad company may be exercised by such receiver with the approval of the trustee; and if the trustee shall be in possession of any of such property under any provision of this indenture, then all the powers of this article conferred upon the railroad company may be exercised by the trustee in its discretion.

SEC. 4. The railroad company from time to time may make
314 changes or alterations in, or substitutions of, any leases, trackage rights, or contracts that are subject to this indenture; provided that in case of any changes or alterations in, or any substitutions of, any leases, contracts, or trackage rights, by which the railroad company now secures access to any point or points, the written consent of the trustee under the said first consolidated mortgage deed, dated December 10, 1895, shall first be obtained so far as concerns any such leases, contracts, or trackage rights subject to said indenture, and the written consent of the trustee hereunder shall first be obtained so far as concerns any such leases, contracts, or trackage rights, subject to this indenture and not subject to said first consolidated mortgage deed. In any such event, any modified, altered, or substituted leases, contracts, or trackage rights forthwith shall become bound by and be

subject to the terms of this indenture, in the same manner as those previously existing.

SEC. 5. A certificate signed by the president, or any vice-president, or the chief engineer of the railroad company may be received by the trustee as conclusive evidence of any of the facts mentioned in this article, and shall be full warrant to the trustee for its action on the faith thereof.

ARTICLE EIGHT.

SECTION 1. The trustee shall not be answerable for the default or the misconduct of any agent or attorney appointed in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; nor shall any trustee be responsible for the acts or defaults of any other trustee or trustees, or for anything whatever in connection with this trust, except each for its or his willful misconduct or gross negligence. The trustee shall be protected in acting upon any notice, request, consent, certificate, bond, or other paper or document, believed by it to be genuine and to have been signed by
315 the proper party. The trustee shall not be personally liable for any debts duly contracted by it, or for damages to persons or property carried or injured, or for salaries or nonfulfillment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. Neither shall the trustee be under any obligation to take any action towards the execution or enforcement of the trusts hereby created, which, in the opinion of the trustee, shall be likely to involve expense or liability, unless one or more of the holders of the bonds hereby secured shall, as often as required by the trustee, furnish reasonable indemnity against such expense or liability; nor shall the trustee be required to take notice of any default hereunder, unless notified in writing of such default by the holders of at least five per cent in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested to take action in respect thereof by a writing signed by the holders of not less than twenty-five per cent in amount of the bonds hereby secured, then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but the foregoing provisions of this section are intended only for the protection of the trustee, and shall not be construed to affect any discretion or power by any provision of this indenture given to the trustee, to determine whether or not it shall take action in respect of any default without such notice or request from bondholders, or to affect any other decision or power given to the trustee. The trustee shall not be responsible for the recording of this indenture and shall not be required to file the same as a chattel mortgage.

The trustee shall be reimbursed for, and be indemnified against, any liability or damages which may be sustained by it in the premises. The trustee shall have secured hereby upon the property covered by this indenture, a lien prior to that of any bond issued under

316 this indenture, for its compensation and expenses, and also for any liability or damage by it sustained in the premises.

The trustee shall not be responsible in any manner whatsoever for for the validity hereof, or for the amount or the extent of the security afforded by the property covered hereby, or for the recitals herein or in said bonds contained, all such recitals being and to be taken as the statements of the railroad company; nor shall it be accountable for the use of any bonds certified and delivered by the trustee hereunder or for the application of the proceeds of such bonds.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created, and the railroad company agrees to pay such compensation as well as all expenses necessarily incurred or disbursed by the trustee hereunder.

SEC. 2. The trustee, or any trustee or trustees hereafter appointed, may resign and be discharged from the trusts created by this indenture by giving to the railroad company and to the bondholders notice by publication of such resignation, specifying a date when such resignation shall take effect, which notice shall be published at least once a day not less than thirty days nor more than sixty days prior to the date so specified, in a newspaper at that time published in New York, N. Y., and in a newspaper published in Chicago, Illinois. Such resignation shall take effect on the day specified in such notice, unless previously a successor trustee shall have been appointed as hereinafter provided, in which event such resignation shall take effect immediately upon the appointment of such successor or trustee.

Any trustee or trustees hereunder may be removed at any time by an instrument in writing under the hands of the holders of one-half in amount of the bonds hereby secured and then outstanding.

SEC. 3. In case at any time the trustee, or any successor
317 trustee, shall resign or shall be removed or otherwise shall become incapable of acting, a successor or successors may be appointed by the holders of a majority in amount of the bonds hereby secured then outstanding, by an instrument or concurrent instruments signed by such bondholders or their attorneys-in-fact duly authorized; but until a new trustee shall be appointed by the bondholders as herein authorized, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy; provided, however, that every such trustee shall be a trust company in the city of New York, having a capital and surplus aggregating at least $2,000,000, if there be such a trust company willing and able to accept the trust upon reasonable or customary terms. After any such appointment by the railroad company, it shall publish notice of such appointment once in each of four successive weeks in a newspaper published in New York, N. Y., and a newspaper published in Chicago, Illinois; and any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a new trustee appointed in the manner above provided by the holders of a majority in amount of the bonds hereby secured,

if such appointment by such bondholders be made prior to the expiration of six months after such publication of notice.

Any successor trustee appointed hereunder shall execute, acknowledge, and deliver to the railrod company, an instrument accepting such appointment hereunder, and thereupon such successor trustee, without any further act, deed, or conveyance shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in the trust hereunder, with like effect as if originally named as trustee herein; but nevertheless, on the written request of the railroad company or of the successor trustee, the trustee ceasing to act shall execute and deliver an instrument tranferring to such successor trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts
318 of the trustee so ceasing to act, and shall duly assign, transfer, and deliver its interest in any stocks, bonds, or other property and moneys subject to this indenture to the successor trustee so appointed in its place; and, upon request of any such successor trustee, the railroad company shall make, execute, acknowledge, and deliver any and all deeds, conveyances, or other instruments in writing for more fully and certainly vesting in and confirming to such successor trustee all such estates, properties, rights, powers, and duties.

If at any time or times, in order to conform to any law of any State in which the railroad company may hold property, the railroad company shall so request, the railroad company and the trustee shall unite in the execution, delivery, and performance of all instruments and agreements necessary or proper to appoint another trust company or one or more persons approved by the trustee, to act either as cotrustee or as cotrustees, for any purpose of this indenture, of all or any of the property subject to this indenture jointly with the trustee originally named herein or its successors, or to act as separate trustee or trustees of any of such property.

Article nine.

Section 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds at any time outstanding and hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and, until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall have surrendered possession to the trustee as herein permitted, the railroad company, its successors or assigns, shall be suffered and permitted to retain actual possession of all the property subject to this indenture
319 other than bonds, certificates of stock, cash and other property pledged or to be pledged hereunder with the trustee), and to manage, operate, and use the same and every part thereof, with the rights and franchises appertaining thereto, and to collect,

receive, take, use, and enjoy the tolls, earnings, income, rents, issues, and profits thereof.

SEC. 2. If, when the bonds hereby secured shall have become due and payable, the railroad company shall well and truly pay, or cause to be paid, the whole amount of the principal and interest due upon all of the bonds and coupons hereby secured, then outstanding, or shall provide for the payment of such bonds and coupons by depositing with the trustee hereunder the entire amount due thereon for principal and interest, and also shall pay, or cause to be paid, all other sums payable hereunder by the railroad company, and shall well and truly keep and perform all the things herein required to be kept and performed by it according to the true intent and meaning of this indenture, then and in that case all property, rights and interests hereby conveyed or assigned or pledged shall revert to the railroad company, and the estate, rights, title and interest of the trustee shall thereupon cease, determine and become void; and the trustee in such case, on demand of the railroad company, and at its cost and expense, shall enter satisfaction of this indenture upon the record; otherwise the same shall be, continue and remain in full force and virtue.

ARTICLE TEN.

SECTION 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the railroad company, shall bind its successors and assigns, whether so expressed or not.

SEC. 2. Nothing contained in this indenture or in any bond hereby secured, shall prevent any consolidation or merger of the rail-
320 road company with any other corporation, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof), of all the property subject to this indenture as an entirety to a railroad corporation at that time existing under and by virtue of the laws of any State or States, and empowered to acquire the same; provided, however, that such consolidation, merger or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee or of the bondholders hereunder, and that upon such consolidation, merger or sale, the due and punctual payment of the principal and interest of all of the bonds hereby secured, according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by the corporation formed by such consolidation or merger, or purchasing as aforesaid.

SEC. 3. In case, pursuant to section 2 of this article, the railroad company shall be consolidated or merged with any other corporation, or shall sell, convey and transfer (subject to this indenture), all the property covered by this indenture, as an entirety as aforesaid, the successor corporation formed by such consolidation, or into which the railroad company shall have been merged, or which shall have purchased and received a conveyance and transfer, as aforesaid—upon executing and causing to be recorded an instrument satisfactory to

the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance of all the covenants and conditions of this indenture—shall succeed to, and be substituted for, the railroad company, party of the first part hereto, with the same effect as if it had been named herein as such party of the first part; and such successor corporation thereupon may cause to be signed, and may issue, either in its own name or in the name of the Erie Railroad Company, any or all of such bonds which theretofore shall not have been signed by the Erie Railroad Company and delivered to the trustee;
321 and, upon the order of said successor corporation, in lieu of the railroad company, and subject to all the terms, conditions and restrictions herein prescribed, the trustee shall certify and shall deliver any of such bonds which previously shall have been signed and delivered by the officers of the railroad company to the trustee for certification, and any of such bonds which such successor corporation thereafter shall cause to be signed and delivered to the trustee for that purpose. All the bonds so issued shall, in all respects, have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this indenture, including the execution, issue, and use of any and all bonds hereby secured, the terms "railroad company" and "Erie Railroad Company" include and mean not only the party of the first part hereto, but also any such successor corporation formed by consolidation or otherwise under the laws of New York or of any State or States. Every such successor or purchasing corporation shall possess, and from time to time may exercise, each and every right and power hereunder of the Erie Railroad Company in its name or otherwise.

SEC. 5. Any act or proceeding by any provision of this indenture authorized or required to be done or performed by any board or officer of the railroad company shall and may be done and performed with like force and effect by the like board or officer of any railroad corporation that shall at the time be such lawful sole successor or purchaser of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the railroad company, by instrument in writing executed by authority of two-thirds of its board of directors and delivered to the trustee, may surrender any of the powers reserved
322 to the railroad company or to such successor corporation, and thereupon such power so surrendered shall terminate.

The Standard Trust Company of New York, trustee, the party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

In order to facilitate the record of this indenture the same may be simultaneously executed in several counterparts, each of which when

so executed shall be deemed to be an original, and such counterparts shall together constitute but one and the same instrument.

The Erie Railroad Company hereby constitutes and appoints Frederick D. Underwood to be its attorney for it and in its name, and as and for its corporate act and deed, to acknowledge this mortgage deed before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

The Standard Trust Company of New York hereby constitutes and appoints William C. Lane to be its attorney for it and in its name, and as and for its corporate act and deed, to acknowledge this mortgage deed before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment to the intent that the same may be duly recorded.

In witness whereof the Erie Railroad Company, the party hereto of the first part, has caused this indenture to be signed and acknowledged or proved by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and The Standard Trust Company of New York, the party of the second part, has caused its corporate seal to be hereunto affixed and to be attested by its secretary, and these presents to be
323 signed and acknowledged or proved by its president, the day and year first above written.

[L. S.] ERIE RAILROAD COMPANY,
Per F. D. UNDERWOOD, *President.*

Attest:
G. A. RICHARDSON, *Secretary.*

By WM. C. LANE, *President.*

[L. S.] THE STANDARD TRUST COMPANY OF NEW YORK.

Attest:
WM. C. COX, *Secretary.*

Signed, sealed and delivered in the presence of—
As to Erie Railroad Company.
GEO. H. COREY.
GEORGE H. GARDINER.

Signed, sealed and delivered in the presence of—
As to The Standard Trust Company of New York—
GEO. H. COREY.
GEO. H. GARDINER.

STATE OF NEW YORK,
County of New York, City of New York, ss.:

Be it remembered, and I do certify, that on this 28th day of
324 May, in the year one thousand nine hundred and three, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio,

Indiana, Illinois, and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared Frederick D. Underwood, the attorney named by the Erie Railroad Company in the foregoing mortgage deed, and Granville A. Richardson, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the 1st day of April, 1903, as president and secretary respectively of Erie Railroad Company, with whom I am personally acquainted, and who are personally well known to me to be, and who I am satisfied are, the president and attorney, and the secretary respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary respectively of Erie Railroad Company, the within-named grantor, and one of the corporations described in and which executed the said mortgage deed, in the said city and county of New York, for themselves and on behalf of said Erie Railroad Company, and being by me informed of the contents of said mortgage deed they, on this day severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date, and further acknowledged that they voluntarily executed, signed, sealed and delivered the said mortgage deed as their free and voluntary act and deed individually and as such president and secretary respectively, and as the free and voluntary act and deed of the said Erie Railroad Company, for the uses and purposes therein contained and set forth, and the said Frederick D. Underwood, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the same to be the act of the said Erie Railroad Company; and the said Frederick D. Underwood and Granville A. Richardson, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said Frederick D. Underwood in the city of New York, and the said Granville A. Richardson in the city of New York, both in the State of New York; that the said Frederick D. Underwood is the president and the said Granville A. Richardson is the secretary of the said Erie Railroad Company, one of the corporations described in and which executed the above instrument; that their names, respectively signed in attestation of the foregoing mortgage deed, are in the said deponents' own proper handwriting respectively; that they know the corporate seal of the said Erie Railroad
325 Company, the grantor in the foregoing mortgage deed named; that the seal affixed to the foregoing instrument is the common or corporate seal of the said Erie Railroad Company, and was thereto affixed by authority of the board of directors, and by order of said Erie Railroad Company, as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority, as president and secretary, respectively, of said company; and the said Granville A. Richardson did further depose and say that he was personally present and saw said Frederick D. Underwood as such president, sign the said mortgage deed and affix the common or corporate seal of the said Erie Railroad Company thereto, and heard

him declare that he signed, sealed, and delivered the same as the voluntary act and deed of the said Erie Railroad Company by order of the said board of directors, and that thereupon he, the said Granville A. Richardson, signed his name thereto at the same time as a subscribing witness.

In witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

326 STATE OF NEW YORK,
County of New York, ss:

I, Thos. L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 29th day of May, 1903.

[L. S.] THOS. L. HAMILTON, *Clerk.*

STATE OF NEW YORK,
County of New York, City of New York, ss:

Be it remembered, and I do certify, that on this 28th day of May, in the year one thousand nine hundred and three, in said city and county aforesaid, before me, the undersigned, George H. Corey, a notary public in and for the county of New York, in the State of New York, and a commissioner of deeds in and for the State of New York, duly appointed and commissioned as such by the respective governors of and for the States of New Jersey, Ohio, Indiana,

and Illinois and the Commonwealth of Pennsylvania, being now duly qualified to act as such for each of said States and for said Commonwealth, personally appeared William C. Lane, the attorney named by The Standard Trust Company of New York in the foregoing mortgage deed, and William C. Cox, whose names are signed to the foregoing and hereto annexed mortgage deed bearing date the first day of April, 1903, as president and secretary, respectively, of
The Standard Trust Company of New York, with whom I
327 am personally acquainted, and who are personally well known
to me to be, and who, I am satisfied, are the president and attorney, and the secretary, respectively, and to be the same persons whose names are subscribed to the foregoing instrument as such president and secretary, respectively, of The Standard Trust Company of New York, the within named grantee, and one of the corporations described in and which executed the said mortgage deed, in the said city and county of New York, for themselves, and on behalf of said The Standard Trust Company of New York, and being by me informed of the contents of said mortgage deed, they, on this day, severally acknowledged the due execution of the foregoing mortgage deed on the day the same bears date; and further acknowledged that they voluntarily executed, signed, sealed, and delivered the said mortgage deed as their free and voluntary act and deed, individually and as such president and secretary, respectively, and as the free and voluntary act and deed of said The Standard Trust Company of New York, for the uses and purposes therein contained and set forth, and the said William C. Lane, by virtue and in pursuance of the authority therein conferred upon him, acknowledged the same to be the act of the said The Standard Trust Company of New York, and the said William C. Lane and William C. Cox, being by me first duly sworn according to law, did each for himself and neither for the other, on his oath, depose and say that they reside, the said William C. Lane in the city of New York, and the said William C. Cox in the city of New York, both in the State of New York, and that the said William C. Lane is the president and the said William C. Cox is the secretary, of said The Standard Trust Company of New York, one of the corporations described in and which executed the above instrument; that their names respectively signed in attestation of the foregoing mortgage deed are in the said deponent's own proper handwriting respectively, that they know the corporate seal of said The Standard Trust Company of New York, the grantee in the foregoing mortgage deed named, that the seal affixed to the foregoing instrument is the common or corporate seal of said The Standard Trust Company of New York, and was thereto affixed by authority of the board of directors and by order of said The Standard Trust Company of New York as the act and deed thereof; that they signed their names thereto, each in the presence of the other, by like authority as president and secretary respectively of said company; and the said William C. Cox did

further depose and say that he was personally present and saw said William C. Lane as such president sign the said mortgage deed and affix the common or corporate seal of said The Standard Trust
328 Company of New York thereto, and heard him declare that he signed, sealed and delivered the same as the voluntary act and deed of said The Standard Trust Company of New York by order of the said board of directors, and that thereupon he, the said William C. Cox, signed his name thereto at the same time as a subscribing witness.

It witness whereof, I have hereunto set my hand and my respective official seals the day and year first above written.

[L. S.] GEO. H. COREY,
Notary Public, County of New York.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of New Jersey.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Indiana.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Illinois.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the Commonwealth of Pennsylvania.

[L. S.] GEO. H. COREY,
Commissioner of Deeds for the State of Ohio.

STATE OF NEW YORK,
County of New York, ss:

I, Thos. L. Hamilton, clerk of the county of New York, and also clerk of the Supreme Court for the said county, the same being a court of record, do hereby certify that George H. Corey, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for said county, duly commissioned and sworn, and authorized by the laws of said State to take the acknowledgments and proofs of deeds or conveyances for land, tenements or hereditaments in said State of New York. And, further, that I am well acquainted with the handwriting of such notary public, and verily believe that the signature to said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 29th day of May, 1903.

[L. S.] THOS. L. HAMILTON, *Clerk.*

329 NEW YORK.

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block

series (mortgages), section 1, Liber 88, p. 1, and indexed under blocks number 2, 36, 130, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] JOHN H. J. RONNER, *Register.*

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 3, Liber 113, p. 1, and indexed under blocks number 663, on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] JOHN H. J. RONNER, *Register.*

Recorded in the office of the register of the county of New York on the 29th day of May, A. D. 1903, at 11 o'clock 07 a. m., in block series (mortgages), section 4, Liber 135, p. 1, and indexed under block number 1108 on the land map of the city of New York.

Witness my hand and official seal.

[L. S.] JOHN H. J. RONNER, *Register.*

330 Recorded in the office of the clerk of the county of Allegany on the 9th day of June, 1903, in Liber 99 of mortgages, p. 183, at 2.30 p. m.

Witness my hand and official seal.

[L. S.] THOS. S. TEFFT,
Dep. Clerk of Allegany County.

Recorded in the office of the clerk of the county of Broome on the 6th day of June, 1903, in Liber 122 of mortgages, p. 373, at 10.45 a. m.

Witness my hand and official seal.

[L. S.] A. K. MAREAN,
Clerk of Broome County.

Recorded in the office of the clerk of the county of Cattaraugus, on the 4th day of June, 1903, in Liber 141 of mortgages, p. 307, at 8 o'clock and examined.

Witness my hand and official seal.

[L. S.] E. E. KELLEY,
Clerk of Cattaraugus County.

331 Recorded in the office of the clerk of the county of Chautauqua, on the 4th day of June, 1903, in Liber 255 of mortgages, p. 61, at 3.36 p. m.

Witness my hand and official seal.

[L. S.] E. J. MCCONNELL,
Dep. Clerk of Chautauqua County.

Recorded in the office of the clerk of the county of Chemung, on the 9th day of June, 1903, in Liber 116 of mortgages, p. 22—9 a. m.

Witness my hand and official seal.

[L. S.] EDWIN D. BURGESS,
Dep. Clerk of Chemung County.

Recorded in the office of the clerk of the county of Erie, on the 2nd day of June, 1903, in Liber 975 of mortgages, page 43, at 3.26 p. m.
Witness my hand and official seal.
[L. S.]
J. H. PRICE,
Clerk of Erie County.

322 Recorded in the office of the clerk of the county of Delaware on the 5th day of June, 1903, in Liber 87 of mortgages, p. 161, at 4.55 o'clock p. m.
Witness my hand and official seal.
[L. S.]
W. T. BLACK,
Clerk of Delaware County.

Recorded in the office of the clerk of the county of Genesee on the 4th day of June, 1903, in Liber 115 of mortgages, p. 1, 8 a. m.
Witness my hand and official seal.
[L. S.]
C. B. PIXLEY,
Clerk of Genesee County.

Recorded in the office of the clerk of the county of Livingston on the 3rd day of June, 1903, in Liber 126 of mortgages, p. 64, 11.05 a. m.
Witness my hand and official seal.
[L. S.]
H. B. CURTIS,
Clerk of Livingston County.

333 Recorded in the office of the clerk of the county of Monroe on the 3rd day of June, 1903, at 9.13 a. m. in Liber 469 of mortgages, p. 106.
Witness my hand and official seal.
[L. S.]
JAMES COCHRANE,
Deputy Clerk of Monroe County.

Recorded in the office of the clerk of the county of Niagara on the 5th day of June, 1903, in Liber 286 of mortgages, p. 438, at 9.30 a. m.
Witness my hand and official seal.
[L. S.]
HECTOR M. SLOCUM,
Clerk of Niagara County.

Recorded in the office of the clerk of the county of Orange on the 4th day of June, 1903, in Liber 404 of mortgages, p. 1, 1.50 p. m.
Witness my hand and official seal.
[L. S.]
W. G. TAGGART,
Clerk of Orange County.

334 Recorded in the office of the clerk of the county of Rockland on the 4th day of June, 1903, in Liber 166 of mortgages, p. 15, at 10 o'clock a. m.
Witness my hand and official seal.
[L. S.]
CYRUS M. CRUM,
Clerk of Rockland County.

Recorded in the office of the clerk of the county of Steuben on the 8th day of June, 1903, in Liber 156 of mortgages, p. 408 &c., 2.30 p. m.
Witness my hand and official seal.
[L. S.]
J. D. WHEELER,
Clerk of Steuben County.

Recorded in the office of the clerk of the county of Sullivan on the 5th day of June, 1903, in Liber 96 of mortgages, p. 462, at 8.40 a. m.
Witness my hand and official seal.
[L. S.]
G. F. CURREY,
Clerk of Sullivan County.

335 Recorded in the office of the clerk of the county of Tioga on the 8th day of June, 1903, in Liber 71 of mortgages, p. 258, at 9 o'clock a. m.
Witness my hand and official seal.
[L. S.]
F. W. RICHARDSON,
Clerk of Tioga County.

Recorded in the office of the clerk of the county of Wyoming on the 3rd day of June, 1903, in Liber 66 of mortgages, p. 395, at 2.40 p. m.
Witness my hand and official seal.
[L. S.]
E. M. JENNINGS,
Clerk of Wyoming County.

NEW JERSEY.

Recorded in the office of the clerk of the county of Bergen on the 3rd day of June, 1903, in Liber 151 of mortgages, p. 307, at 1 p. m.
Witness my hand and official seal.
[L. S.]
JOHN R. RANNEY,
Clerk of Bergen County.

336 Recorded in the office of the register of the county of Essex on the 2nd day of June, 1903, in Liber 417 of mortgages, p. 1, at 2.27 p. m.
Witness my hand and official seal.
[L. S.]
GEORGE E. DECAMP,
Register of Essex County.

Recorded in the office of the register of the county of Hudson on the 2nd day of June, 1903, in Liber 497 of mortgages, p. 197, &c., at 9.20 a. m.
Witness my hand and official seal.
[L. S.]
JAMES C. CLARK,
Register of Hudson County.

Recorded in the office of the clerk of the county of Passaic on the 3rd day of June, 1903, in Liber P-6 of mortgages, p. 436, &c., at 2.30 p. m.
Witness my hand and official seal.
[L. S.]
JNO. J. SLATER,
Clerk of Passaic County.

Received in the clerk's office of the county of Morris, New Jersey, on the second day of June, 1903, at 4.24 o'clock p. m. and recorded in Book Q–5 of mortgages for said county on pages 1, &c.

Witness my hand and official seal.

[L. S.] DANIEL S. VOORHEES,
Clerk of Morris County.

337 Recorded in the office of the secretary of the State of New Jersey on the 3rd day of June, 1903, in Liber L of corporations, p. 308.

Witness my hand and official seal.

[L. S.] S. D. DICKINSON,
Secretary of State.

PENNSYLVANIA.

Recorded in the office of the recorder of deeds of the county of Pike, on the third day of June, 1903, in Liber 14 of mortgages, p. 473, etc.

Witness my hand and official seal.

[L. S.] JOHN C. WESTBROOK, JR.,
Recorder of Pike County.

3.50 p. m.

Recorded in the office of the recorder of deeds of the county of Wayne, on the 4th day of June, 1903, in Liber 19 of mortgages, p. 531.

Witness my hand and official seal.

[L. S.] F. H. CRAGO,
Recorder of Wayne County.

338 11.30 a. m.

Recorded in the office of the recorder of deeds of the county of Susquehanna on the 5th day of June, 1903, in Liber 28 of mortgages, p. 183.

Witness my hand and official seal.

[L. S.] B. B. BUFFEN,
Recorder of Susquehanna County.

Recorded in the office of the recorder of deeds of the county of Lackawanna, on the 4th day of June, 1903, in Liber 139 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] EMIL BONN,
Recorder of Lackawanna County.

7.50 p. m.

Recorded in the office of the recorder of deeds of the county of McKean, on the 9th day of June, 1903, in Liber 59 of mortgages, p. 50, &c.

Witness my hand and official seal.

[L. S.] H. M. CHOATE,
Recorder of McKean County.

339 Recorded in the office of the recorder of deeds of the county of Elk on the 9th day of June, 1903, in Liber P of mortgages, p. 1.
Witness my hand and official seal.
[L. S.]
A. M. ENT,
Recorder of Elk County.

Recorded in the office of the recorder of deeds of the county of Jefferson on the 9th day of June, 1903, in Liber Q of mortgages, p. 102.
Witness my hand and official seal.
[L. S.]
GIL. C. REITZ,
Recorder of Jefferson County.

10.30 a. m.
Recorded in the office of the recorder of deeds of the county of Warren on the 10th day of June, 1903, in Liber 30 of mortgages, p. 50.
Witness my hand and official seal.
[L. S.]
C. D. CRANDALL,
Recorder of Warren County.

340 Recorded in the office of the recorder of deeds of the county of Erie on the 5th day of June, 1903, in Liber 48 of mortgages, p. 1.
Witness my hand and official seal.
[L. S.]
WM. C. KRAEMER,
Recorder of Deeds of Erie County.

Recorded in the office of the recorder of deeds of the county of Crawford on the 6th day of June, 1903, in mortgage Book 62, p. 265.
Witness my hand and official seal.
[L. S.]
A. G. OSTER,
Recorder of Crawford County.

Recorded in the office of the recorder of deeds of the county of Venango on the 6th day of June, 1903, in Liber 97 of mortgages, p. 1.
Witness my hand and official seal.
[L. S.]
D. K. BUCHANAN,
Recorder of Venango County.

Recorded in the office of the recorder of deeds of the county of Tioga on the eighth day of June, 1903, in Liber 36 of mortgages, p. 183.
Witness my hand and official seal.
[L. S.]
CHARLES L. BABCOCK,
Recorder of Tioga County.

341 Recorded in the office of the recorder of deeds of the county of Mercer on the 8th day of June, 1903, in Liber 37 of mortgages, p. 280.
Witness my hand and official seal.
[L. S.]
G. G. LAFFERTY,
Recorder of Mercer County.

Recorded in the office of the recorder of deeds of the county of Lawrence on the 8th day of June, 1903, in Liber 58 of mortgages, p. 1.

Witness my hand and official seal.

[L. S.] ALFRED C. HYDE,
Recorder of Lawrence County.

OHIO.

16673.

Received for record June 5, 1903, at 1 p. m.

Recorded in the office of the recorder of the county of trumbull on the 20th day of June, 1903, in volume 57 of mortgages, page 364 et seq.

Witness my hand and official seal.

[L. S.] C. N. KYLE,
Recorder of Trumbull County.

342 Received for record June 5, 1903, at 10 a. m.

Received in the office of the recorder of the county of Mahoning on the 12th day of June, 1903, in volume 67 of mortgages, page 305, &c.

Witness my hand and official seal.

[L. S.] W. H. MCGINNIS,
Recorder of Mahoning County.

3774.

Received for record June 11, 1903, at 1 p. m.

Recorded in the office of the recorder of the county of Columbiana on the 11th day of June, 1903, in volume 271 of mortgages, page 332, &c.

[L. S.] E. M. CROSSER,
Recorder of Columbiana County.

12113.

Received for record June 5, 1903, at 4.35 p m.

Recorded in the office of the recorder of the county of Portage on the 25th day of June, 1903, in volume 190 of mortgages, page 75 et seq.

Witness my hand and official seal.

[L. S.] THOMAS RICHARDS,
Recorder of Portage County.

343 19469.

Received for record June 4, 1903, at 10 a. m.

Recorded in the office of the recorder of the county of Geauga on the 13th day of June, 1903, in volume 118 of mortgages, page 36, etc.

Witness my hand and official seal.

[L. S.] F. E. FORD,
Recorder of Geauga County.

292585.

Received for record June 12, 1903, at 9.10 a. m.
Recorded in the office of the recorder of the county of Cuyahoga on the 29th day of June, 1903, in volume 883 mortgages, page 1 et seq.
[L. S.]

J. C. SIEGRIST,
Recorder of Cuyahoga County.

34838.

Received for record June 11, 1903, at 8 a. m.
Recorded in the office of the recorder of the county of Summit on the 25th day of June, 1903, in volume 283 of mortgages, page 459 et seq.
Witness my hand and official seal.
[L. S.]

W. ALLING,
Recorder of Summit County.

344 2729.

Received for record June 6, 1903, at 10 a. m.
Recorded in the office of the recorder of the county of Medina on the 25th day of June, 1903, in volume 38 of mortgages, page 42 et seq.
Witness my hand and official seal.
[L. S.]

FRED. BECK,
Recorder of Medina County.

Received for record June 6, 1903, at 2.45 p. m.
Recorded in the office of the recorder of the county of Wayne on the same day of June, 1903, in volume 135 of mortgages, page 228 et seq.
[L. S.]

LEWIS C. FRANKS,
Recorder of Wayne County.

482.

Received for record June 8, 1903, 7.30 a. m.
Recorded in the office of the recorder of the county of Ashland on the 22nd day of June, 1903, in volume 108 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]

B. F. PAULLIN,
Recorder of Ashland County.

345 Received for record June 8, 1903, at 9.45 a. m.
Recorded in the office of the recorder of the county of Richland, on the 30th day of June, 1903, in volume 64 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.]

W. E. O'DONNELL,
Recorder of Richland County.

Received for record June 8, 1903, at 1.05 p. m.
Recorded in the office of the recorder of the county of Crawford, on the 30th day of June, 1903, in volume 54 of mortgages, page 354 et seq.
[L. S.] H. S. Z. MATTHIAS,
Recorder of Crawford County.

Received for record June 8, 1903, at 4.38 p. m.
Recorded in the office of the recorder of the county of Morrow on the 30th day of June, 1903, in volume 30 of mortgages, page 438 et seq.
Witness my hand and official seal.
[L. S.] G. J. YOUNG,
Recorder of Morrow County.

346 Received for record June 9, 1903, at 8.30 a. m.
Recorded in the office of the recorder of the county of Marion on the 30th day of June, 1903, in volume 60 of mortgages, page 150 et seq.
Witness my hand and official seal.
[L. S.] A. W. BRYANT,
Recorder of Marion County.

Received for record June 9th, 1903, at 12.40 p. m.
Recorded in the office of the recorder of the county of Union on the 25th day of June, 1903, in volume 50 of mortgage, page 246 et seq.
[L. S.] JOHN J. ANDREWS,
Recorder of Union County.

Received for record June 9th, 1903, at 4.30 p. m.
Recorded in the office of the recorder of the county of Champaign on the 30th day of June, 1903, in volume 53 of mortgages, page 1 et seq.
Witness my hand and official seal.
[L. S.] J. S. MOSES,
Recorder of Champaign County.

347 No. 588.
Received for record June 10, 1903, at 8.10 a. m,
Recorded in the office of the recorder of the county of Clarke on the 30th day of June, 1903, in volume 110 of mortgages, page 297 et seq.
Witness my hand and official seal.
[L. S.] J. W. ALLEN,
Recorder of Clarke County.

Received for record June 10, 1903, at 10.10 a. m.
Recorded in the office of the recorder of the County of Greene on the 30th day of June, 1903, in volume 60 of mortgages, page 147 et seq.
Witness my hand and official seal.
[L. S.] M. A. BROADSTONE,
Recorder of Greene County.

Received for record June 10, 1903, at 1.05 p. m.

Recorded in the office of the recorder of the county of Montgomery on the 15th day of June, 1903, in volume 254 of mortgages, page 1 et seq.

Witness my hand and official seal.

[L. S.]

JOHN L. THEOBALD,
Recorder of Montgomery County.
By AL. STICKEL, *Deputy.*

353 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
April session, 1908.
No. 87. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. Equity. U. S. v. Erie Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

354 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
April session, 1908.
No. 87. In Equity.

The complainant in this cause hereby joins issue with the defendant, the Erie Railroad Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. Equity. April session, 1908. U. S. v. Erie Railroad Company. Replication. Filed, June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed

in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, *vs.* the Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.]

431 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
ERIE RAILROAD COMPANY. } April session, 1908. In Equity. No. 87.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. U. S. v. Erie Railroad Company. Decree dismissing bill. Filed, Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

432 No. 87. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the circuit court of the United States for the eastern district of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight—that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third

clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
433 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

434 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. In Equity. The United States of America vs. Erie Railroad

Company. Assignment of Errors. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

435 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.
} No. 87. April session, 1908. In Equity.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

436 (Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. In Equity. United States of America v. Erie Railroad Company. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

437 No. 87. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
ERIE RAILROAD COMPANY, DEFENDANT.

Before DALLAS, C. J.

It is hereby ordered, that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 87. April session, 1908. In Equity. United States of America vs. Erie Railroad Com-

pany. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

438 UNITED STATES OF AMERICA, ss:

The President of the United States to Erie Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per JOS. BAYARD,
Attorney for Appellee.

439 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceeding in the case of United States of America vs. Erie Railroad Company, No. 87, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October in the year of our Lord one thousand nine hundred and eight, and of the independence of the United States the one hundred and thirty-third.

[SEAL.]

HENRY B. ROBB,
Clerk of C. C.

(Indorsement on cover:) File No. 21362. E. Pennsylvania C. C. U. S. Term No. 566. The United States of America, appellant, vs. Erie Railroad Company. Filed October 10th, 1908. File No. 21362.

O

9

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 567.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21363.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 567.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Bill of complaint	2	1
Appearance for defendant	14	5
Answer	15	5
General mortgage, July 1, 1887	37	15
Agreement of June 28, 1887	109	51
Stipulation as to submission on bill and answer	163	77
Replication	164	77
Opinions. (Omitted in printing)	165	....
Gray, J. (Omitted in printing)	166	....
Dallas, J. (Omitted in printing)	220	....
Buffington, J. (Omitted in printing)	225	....
Decree	241	78
Assignment of errors	242	78
Petition for appeal	245	80
Order allowing appeal	247	81
Citation and service	248	81
Clerk's certificate	249	82

1 APRIL SESSION, 1908.

Charles J. Bonaparte.
89
Robert W. de Forrest.
John G. Johnson.

United States of America
vs.
The Central Railroad Company of New Jersey.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July next.
1908, June 5. Order for the appearance of Robert W. de Forrest and John G. Johnson, esquires, for defendant, filed.
1908, June 12. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 89. April sessions, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey, defendant.

Bill of complaint.

Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF New Jersey, defendant.

April sessions, 1908. No. 89. In Equity.

To the Honorable the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against The Central

Railroad Company of New Jersey, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "The Central Railroad Company of New Jersey," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of New Jersey, having its principal office in that State, at Jersey City, and also an office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of New Jersey, Pennsylvania, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of a large majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, a corporation of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal company. That said coal company holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the president and the secretary and treasurer of said coal company, who are, and for a long time past have been, the president and the secretary and treasurer, respectively, of the defendant, with the assistance and cooperation of the directors of the said coal company, a majority of whom are, and for a long time past have been, also directors of the defendant.

(4) That, by virtue of the ownership of a large majority of the capital stock of said coal company by the defendant, as hereinbefore stated, the defendant practically owns said coal lands and coal mines and the anthracite coal therein or thereupon and mined and being mined therefrom, and is also owner thereof in part, and likewise

has an interest therein; and that, by virtue of the management of said coal company by the president and other officers and directors of the defendant, as hereinbefore stated, the operations of said coal company in the mining of anthracite coal have been and are now being carried on by and under the authority of the defendant.

7 (5) That, moreover, the defendant is at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of the president of said last-mentioned coal company, who is and for a long time past has been the president of the defendant and of the directors of said last mentioned coal company, a majority of whom are and for a long time past have been also directors of the defendant. That, by virtue of such stock ownership the defendant owns in part and has an interest in said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined and being mined therefrom; and that, by virtue of the management of said last-mentioned coal company by the president and other officers and directors of the defendant, as hereinbefore stated, the operations of said last-mentioned coal company in the mining of anthracite coal are being car-

8 ried on, as they have been in the past, by and under the authority of the defendant.

(6) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined, and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined, as aforesaid, and within said counties of Carbon, Lehigh, Luzerne, and Wyoming, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its said branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended

for the use of the defendant in the conduct of its business as a common carrier.

9 (7) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "Act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(8) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as here-

10 inbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(9) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "The Central Railroad Company of New Jersey," may make full answer under oath to all the allegations herein; and that an injunction

11 be granted to enjoin and prohibit the said "The Central Railroad Company of New Jersey" from further transporting, in

interstate commerce, the anthracite coal which it is the purpose of the defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted, and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of subpœna, to be directed to the said "The Central Railroad Company of New Jersey," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to perform and abide by such order, direction, and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.	April session, 1908. No. 89.

Enter our appearance for defendant in the above case June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C. C., E. D. of Penna. No. 89. April session, 1908. U. S. of America v. Central Railroad Co. of New Jersey. Order for appearance. Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 No. 89. April sessions, 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	In Equity.

Answer of Defendant, The Central Railroad Company of New Jersey.

JACKSON E. REYNOLDS, *Solicitor.*

ROBERT W. DE FOREST, *Counsel.*

Filed Jun' 12, 1908. Henry B. Robb, clerk. By L., deputy clerk.

17 **In the Circuit Court of the United States for the Eastern District of Pennsylvania.**

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant.

April sessions, 1908. No. 89. Bill in Equity.

Answer of the Central Railroad Company of New Jersey.

The Central Railroad Company of New Jersey, the defendant in the above bill of complaint, expressly saving and reserving to itself all benefit and advantage of exception to the manifold errors, uncertainties, and insufficiencies in said bill of complaint contained, for answer thereto, or to such parts thereof as it is advised it is material and necessary to answer, says:

(1) This defendant admits the averments of paragraph 1 of
18 the bill, and further states that it was incorporated by and duly organized under an act of the State of New Jersey entitled "An act to incorporate the Somerville and Easton Railroad Company," approved April 26, 1847, and the supplement to said act, approved February 22, 1849, whereby, inter alia, the corporate name of the said company was changed to "The Central Railroad Company of New Jersey."

This defendant avers that it is duly possessed of and may lawfully exercise all and every the corporate rights, powers, privileges, and franchises mentioned in and conferred by the said acts and by divers other acts supplementary to and amendatory thereof subsequently from time to time enacted, to all of which it prays leave to refer at the hearing of this cause, with the same force and effect as if the same were herein set out at length.

In addition to the powers conferred in and by the aforementioned acts, this defendant avers that it has been and is possessed of all the powers, privileges, and rights conferred by section 51 of the general corporation law of New Jersey, which reads as follows:

"Any corporation may purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of the shares of the capital stock of, or any bonds, securities, or evidences of indebtedness created by, any other corporation or corporations of this or any other State, and while the owner of such stock may exercise all rights, powers, and privileges of ownership, including the right to vote thereon;"

and by two general statutes of the State of Pennsylvania entitled,
respectively, "An act to authorize incorporated companies to
19 invest and reinvest surplus funds in mortgages, stocks, and other securities, and fixing the time for holding elections for directors," approved March 31, 1868, and "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber, and other material interests of this Commonwealth," approved April 15, 1869, to each of which acts it prays leave to refer at

the hearing of this cause with the same force and effect as if the same were herein set forth at length.

(2) This defendant admits the averments of paragraph 2 of the bill, that it has been during its corporate existence a railroad company and for some time past operating, with its branches and connections, a railroad extending through parts of the States of New Jersey and Pennsylvania to New York, and by its connections to other States; that it is and has been since long before the first day of May, 1908, a common carrier within the meaning of the act of Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that as such common carrier it is and has been for all the period aforesaid engaged in interstate transportation, particularly in the transportation in interstate commerce of the article or commodity known as anthracite coal from the mines and mining lands of the State of Pennsylvania to the markets of other States.

(3) This defendant admits, as alleged in paragraph 3 of the bill of complaint, that it is and has been continuously since long before the first day of May, 1908, the owner of a large majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, a
20 corporation of the State of Pennsylvania, and states that the said Lehigh and Wilkes-Barre Coal Company is a corporation organized in January, 1874, by the consolidation and merger under the general statutes of the State of Pennsylvania of the Honey Brook Coal Company and the Wilkes-Barre Coal and Iron Company, corporations organized, respectively, by an act of the legislature of the State of Pennsylvania, entitled "An act to incorporate the Honey Brook Coal Company," approved April 23, 1864, and by an act of the legislature of the State of Pennsylvania, entitled "An act to incorporate the Wilkes-Barre Coal and Iron Company," approved June 8, 1864, and by the acts supplementary thereto and amendatory thereof. To all of said acts it prays leave to refer at the hearing of this cause with the same force and effect as if the same were herein set out at length.

Previous to the year 1874, when these two last-named companies were merged and consolidated into the present Lehigh and Wilkes-Barre Coal Company, this defendant owned, and for several preceding years had owned, a majority of the stock of each of the said Honey Brook Coal Company and Wilkes-Barre Coal and Iron Company. All of the said coal companies were authorized to acquire by purchase or lease coal lands in the State of Pennsylvania, and have acquired such lands, said Honey Brook and Wilkes-Barre Coal and Iron companies prior to their merger and consolidation as aforesaid, and the Lehigh and Wilkes-Barre Coal Company since.

This defendant further states and avers that it became the lawful owner of the shares of each of the said coal companies, as hereinabove stated, many years prior to the enactment of the act of Congress entitled "An act to amend an act to regulate commerce, approved
21 February 1st, 1887, and all acts amendatory thereof, and to

enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906.

This defendant further admits that it is, as stated in paragraph 5 of the bill of complaint, and has been for a period long prior to the first day of May, 1908, the owner of some part, viz, a minority part, of the capital stock of the Temple Iron Company, a corporation of the State of Pennsylvania.

This defendant further admits, as alleged in paragraphs 3, 4, and 5 of the bill of complaint, that each of the above-mentioned coal companies holds under conveyances and leases made long prior to the said first day of May, 1908, its anthracite coal lands situate in what is known as the "Anthracite coal regions" of Pennsylvania, and that said companies have been from a date long prior to the said first day of May, 1908, engaged in mining anthracite coal thereon and therefrom, such mining operations being carried on under the immediate and direct control of the executive officers of the respective companies, these, in turn, being subject to the power and control vested in the boards of directors of the said companies by their respective charters.

And this defendant also admits that at the present time and for many years past the president and the secretary and treasurer of the Lehigh and Wilkes-Barre Coal Company are and have been the same persons who at the same time were president, secretary, and treasurer of this defendant, and that a majority of the board of directors of the said Lehigh and Wilkes-Barre Coal Company are and have been also directors of this defendant; and this defendant also admits that as respects the Temple Iron Company the same person who is and for several years past has been president of said Temple
22 Iron Company is also president of this defendant, and that a minority of the directors of the Temple Iron Company are also directors of this defendant.

This defendant denies that because or by virtue of its ownership of the aforesaid shares of stock of the said coal companies it has become the owner of the coal lands and coal mines, title to which is in the said companies, respectively, or of the coal therein or mined therefrom, or that it has any interest in said lands, mines, or coal; or that by virtue of its ownership of the shares of stocks of the said coal companies and the voting power incident thereto in the election of the managers or directors of each of said companies and such other officers as under the charter of each company are elected by the stockholders, the operations of said coal companies, or any of them, in the mining of anthracite coal are being carried on by and under the authority of this defendant.

(4) This defendant admits that from time to time since the first day of May, 1908, and at the present time anthracite coals produced from mines of the several coal companies heretofore mentioned—a portion whereof is sold before and a portion after the transportation thereof begins—have been transported and are still being transported at lawfully established schedule rates on and over its lines of railroad,

and that a considerable portion—approximately seventy-five per centum (75%) of the coal so mined—is carried to different destinations outside the State of Pennsylvania, the greater part of which is carried to the ports of New Jersey and New York, and that the transportation of such portion thereof by this defendant constitutes commerce between different States, and it also admits that the
23 coal thus transported was not, and is not, necessary nor intended for the use of the defendant in the conduct of its business as a common carrier.

(5) This defendant denies the correctness of the conclusions of law stated in paragraph 6 of the bill. Under advice of counsel, it denies that it results from its ownership of the shares of stock of the aforesaid coal companies, that the anthracite coals mined or produced from the mines of said coal companies have been or are being mined or produced by it or under its authority, or that it has any interest, direct or indirect, therein, within the purview, meaning, and intent of the clause of the act of Congress approved June 29, 1906, which is set out in paragraph 6 of the bill, but on the contrary, it states and avers that it has, and can have no interest or benefit in the operation of said companies other than that of receiving such portion of the clear profits of each as may be by the board of directors of each of said companies from time to time declared as dividends, and allotted to this defendant according to its ownership of the capital stock of each thereof.

(6) This defendant admits that it is now engaged in the interstate transportation of anthracite coal mined by the aforesaid companies, and that it is its purpose to continue such transportation unless it should be required to desist from the same by the order of this honorable court, but it denies that in so doing it is acting in violation of law.

(7) This defendant admits that anthracite coal is an article or commodity other than timber and the manufactured products thereof, as averred in paragraph 8 of the bill, but it denies, under the
24 advice of counsel, that any coal which it transports other than that which may be intended for its use in the conduct of its business as a common carrier, is either owned by it in whole or in part, or that it has any interest, direct or indirect, therein.

(8) This defendant alleges that the majority of the capital stock of the Lehigh and Wilkes-Barre Coal Company, as hereinbefore set forth, constituted a part of its assets in 1877 when it was adjudged insolvent by the Court of Chancery of the State of New Jersey and a receiver appointed, and it was at that time the guarantor of bonds of a par value of $11,500,000 theretofore issued by said coal company. Pursuant to the plan and agreement of reorganization dated February 23, 1878, to which the receiver of the said Court of Chancery was a party, and which was duly approved by the said Court of Chancery by its order of December 19, 1877, in the suit in which the Lehigh Coal and Navigation Company was complainant, $6,660,000 of the capital stock of the said coal company was pledged as part of

the security for its so-called "Adjustment mortgage," dated May 1, 1878, executed pursuant to said agreement and made to secure bonds of a par value of $5,550,000, payable May 1, 1903, and the said stock was on July 1, 1887, transferred and assigned to, and is now held by the Central Trust Company of New York as trustee under the general mortgage executed by this defendant, dated July 1, 1887, to secure an issue of $50,000,000 of bonds, the principal of which is due July 1, 1987, of which bonds to an aggregate amount of $45,091,000 have been issued and are now outstanding in the hands of the public. A copy of said mortgage is hereto annexed, marked "Exhibit A," and made a part of this answer.

25 (9) This defendant alleges that at and about the time of its acquisition of the capital stock of the Honey Brook and the Wilkes-Barre Coal and Iron companies, as hereinbefore set forth, and for the purposes of securing for itself the transportation of the anthracite coal produced by the mines owned by these companies and other companies in the State of Pennsylvania, this defendant, on March 31, 1871, leased the railroad of the Lehigh Coal and Navigation Company, known as the Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of Pennsylvania, to Union Junction, in Luzerne County, Pennsylvania, together with various branches thereof connecting it with different anthracite coal mines. This lease was subsequently modified by agreement made May 29, 1883, between the Lehigh Coal and Navigation Company, this defendant, and the Philadelphia and Reading Railroad Company, and these two agreements were afterwards modified by a third, dated June, 1887, between the Lehigh Coal and Navigation Company and this defendant. Copies of the said lease and the two agreements modifying the same are hereto annexed, marked "Exhibits B, C, and D," respectively, and form part of this answer.

Under these agreements it is provided amongst other things that the aggregate rental, which is fixed at one-third of the gross receipts from the operation of the demised premises, shall never in any year, after May 1, 1883, be less than $1,414,400, and that whenever it shall exceed the sum of $2,043,300, after 1892, the surplus over one-third of the gross receipts shall be received by this defendant.

This lease constitutes a valuable asset of this defendant so
26 long as it continues to transport the coal of the Lehigh and Wilkes-Barre Coal Company in interstate commerce. Like its stock in the Lehigh and Wilkes-Barre Coal Company aforesaid it is included in the assets covered by its said general mortgage. The lease would be valueless and involve this defendant in serious loss if it could not continue to transport over the leased railroad the coal mined by the Lehigh and Wilkes-Barre Coal Company.

(10) This defendant alleges that its gross earnings during its last fiscal year, ending June 30, 1907, were $25,687,403.37, of which $19,417,930.47 were derived from merchandise and anthracite coal traffic. Of the $19,417,930.47 gross earnings derived from merchan-

dise and anthracite coal traffic, $9,312,268.04 was derived from the transportation of anthracite coal and $10,105,662.43 from the transportation of other commodities. During this period the receipts from anthracite coal transported by this defendant represented over 48 per cent of its entire freight receipts.

Its capitalization is as follows:

Stock	$27,436,800
Funded debt	54,260,000

Of the aforesaid amount of gross earnings derived from the transportation of anthracite coal, the greater part was received by this defendant for the transportation of such coal for the Lehigh and Wilkes-Barre Coal Company, a majority of whose stock is owned by it.

Substantially the same proportionate part of this defendant's earnings in previous years has been derived from the transportation of anthracite coal, and substantially the same proportionate part of these earnings have come from the Lehigh and Wilkes-Barre Coal Company.

27 More than seventy-five per cent of the anthracite coal transported by this company during its last fiscal year ending June 30, 1907, and in previous years, constituted interstate commerce, of which the greater part was coal produced by the Lehigh and Wilkes-Barre Coal Company.

In addition to the portion of its earnings directly derived from the transportation of anthracite coal for the said coal companies in which it has a stock interest, a very large part of its earnings are derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of the said coal companies. If this defendant were deprived of the earnings derived from the transportation of the coal of the said coal companies, its business could not be operated except at a very great net loss.

(11) This defendant alleges that throughout its corporate existence the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. Its railroad lines have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at great expense to meet the increasing demands of the markets of the United States for this coal in reliance upon the rights and franchises conferred by the statutes of New Jersey and Pennsylvania, aforesaid, and upon the prospective earnings from the transportation of anthracite coal in interstate commerce. Large factories and other industries have been established and cities and towns have grown up on its lines in New Jersey in reliance upon its continued ability to supply them with anthracite coal for fuel and power.

The value of its property is and at all times has been dependent
28 upon its revenue from such transportation of anthracite coal, and this value would be greatly impaired if it could not so

transport such coal from the mines of the coal companies in which it has a stock interest.

A very large proportion of the anthracite coal produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined markets over the railroads of this defendant, and many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic, and transportation uses, both without and within the State of Pennsylvania.

This defendant purchased an interest in the capital stock of aforesaid companies engaged in mining and dealing in coal, as hereinbefore set forth, for the purpose of securing to itself the transportation of the product of such companies in interstate commerce, and has expended large sums of money in extending its lines and constructing branches and sidings to the collieries of said coal companies, and in providing other facilities in order to receive and so transport the product of their collieries.

The value of the stocks of said companies is largely dependent upon the right and ability of this defendant to transport the coal owned or produced by them out of Pennsylvania to markets in other States, and such stocks would be greatly depreciated in value
29 if this defendant should be prohibited from transporting the product of said companies in interstate commerce.

It has also expended large sums in coal trestles, coal pockets, terminal facilities, storage yards, docks, and wharves at the ports of New Jersey and New York, in and about New York Harbor, for its present and prospective anthracite coal business.

If it should be deprived of the right to transport in interstate commerce the coal mined by the coal companies in which it has a stock interest, the value of such lines and branches and of these coal trestles, coal pockets, terminal facilities, storage yards, docks, and piers would be to a large extent destroyed.

(12) This defendant, further answering, says that anthracite coal is an article of prime necessity and is universally used for domestic purposes throughout New England and the Middle Atlantic States, and to a great extent throughout other sections of the country. The source of the entire supply, save a few small deposits of inferior quality, is located within the State of Pennsylvania, and the deposits extend over an area of only about 484 square miles, divided for trade purposes into three "regions," the Wyoming (sometimes called the Lackawanna) region, the Lehigh region, and the Schuylkill region. Ninety per cent, approximately, of the entire unmined area of anthracite coal is owned or controlled by the following named com-

panies, or by "subsidiary coal companies," so called, that is, companies in which they have an entire or controlling stock interest, viz, the Reading Company, the Pennsylvania Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the Leehigh Valley Railroad Company, the Central Railroad Company of New Jersey, the Delaware and Hudson Company, the Erie
30 Railroad Company, and the New York, Ontario and Western Railroad Company, and from seventy to seventy-five per cent of the annual supply of anthracite coal in the United States is, and for many years past has been, produced either directly by said companies, as in the case of the Delaware, Lackawanna and Western Railroad and Delaware and Hudson companies, or through the agency of the said "subsidiary" coal companies.

The entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905, the latest normal year in which there was no strike and for which complete statistics are at hand, was as follows:

New England States	8,692,504	tons
New York	18,125,419	"
New Jersey	7,212,341	"
Supply coal to railroads	4,643,426	"
Southern States	2,080,088	"
Western States	6,904,314	"
Canada	2,187,450	"
Other foreign countries	42,533	"
Pacific coast	1,743	"
Pennsylvania	11,520,383	"
	61,410,201	tons

Approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the railroads named from Pennsylvania to markets in other States and Canada. Approximately the same proportion of the entire production of anthracite coal has been so transported from Pennsylvania to other States and countries for many years before 1905 and ever since. The total output of anthracite coal for the year 1906 was 55,698,595 tons.
31 That for the year 1907 exceeded 68,000,000 tons. That part of the output of anthracite not consumed in the State of Pennsylvania is carried chiefly to tide water at New York Harbor, and is thence transported by water and by railroad to points in New England and the Middle Atlantic States, where the great bulk of the anthracite output is consumed. New York Harbor is the principal distributing point for anthracite coal.

(13) This defendant, while insisting that the inter-state transportation of coal by it, which has been mined or produced by the aforesaid coal companies, is not prohibited by the act of Congress, approved

June 29, 1906, further states and shows to the court that the clause of said act which it is averred it has violated because of the interstate transportation of such coal, is violative of and repugnant to the Constitution of the United States in the following particulars:

(a) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the several coal companies hereinbefore mentioned; but on the contrary, undertakes to absolutely prohibit transportation thereof, and therefore is not a "regulation" of interstate commerce, but a "prohibition" of such commerce; and consequently is not within the scope of the commerce clause of the Constitution.

(b) That the effect of said clause will constitute a taking of the defendant's property, corporate rights, and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.

32 (c) That said clause is "class legislation," unduly and unjustly discriminative in its results, in that it expressly permits railroad companies to transport in interstate commerce timber and the manufactured products thereof which may be manufactured or produced by any such company, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "class legislation," in that it arbitrarily denies to one class of common carriers under the act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities, but imposes no such restrictions or prohibition on other common carriers under said act and its amendments.

(d) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate, as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to such carriers to constitute a denial of the equal protection of the law.

(e) That the effect of said law is to prevent the transportation by interstate commerce, out of the State of Pennsylvania, of all the anthracite coal owned by railroad companies or by coal companies in the stock of which they have an interest, comprising between seventy and seventy-five per cent of the entire production of anthracite

33 coal, the greater part of which is and for many years has been transported to the ports of New York and New Jersey, and to cause the same, so far as it continues to be transported, to be brought for shipment to the ports of Pennsylvania, whereby preference would be given to the ports of one State over those of other States, contrary to article 1, section 9, clause 6, of the said Constitution.

And this defendant having fully answered all material allegations in said bill of complaint contained, prays that it may be hence dis-

missed with its reasonable costs in this behalf most wrongfully sustained.

[SEAL] THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By GEO. F. BAER, *President.*

Attest:
G. O. WATERMAN,
Secretary.
JACKSON E. REYNOLDS,
Solicitor.
ROBERT W. DE FOREST,
Counsel.

STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this 10th day of June, 1908, personally appeared before me, the undersigned, a notary public of the State of Pennsylvania, in the said county of Philadelphia, George F. Baer, who being by me duly sworn according to law, deposes and says that he is president of the Central Railroad Company of New Jersey, and that the facts set forth in the foregoing answer of said company are correctly and truly stated according to the best of his knowledge, information, and belief.

GEO. F. BAER.

34 Sworn to and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.

[SEAL.] GEORGE GOWEN PARRY,
Notary Public.

Commission expires Jan. 16th, 1911.

35

36

37 *General mortgage of the Central Railroad Company of New Jersey to the Central Trust Company of New York, trustee, dated July 1, 1887, to secure $50,000,000 bonds.*

39 THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

GENERAL MORTGAGE.

Indenture made the first day of July, eighteen hundred and eighty-seven, between the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, herein called the "Railroad Company," party of the first part, and the Central Trust Company of New York, trustee, herein called the "Trustee," party of the second part.

Whereas, the Railroad Company is indebted to various individuals and corporations for the following amounts, amongst others:

(1) First mortgage bonds, dated December 15, 1868, due February 1, 1890, bearing interest at the rate of 7 per cent per annum, secured

by mortgage of even date therewith, to John C. Green and Moses Taylor, trustees, of which there are now outstanding bonds of the par value of $5,000,000.

40 (2) Convertible bonds, dated November 1, 1872, due November 1, 1902, bearing interest at the rate of 7 per cent per annum, secured by the so-called "Consolidated mortgage," dated September 1, 1874, to the New York Guaranty and Indemnity Company, trustee, and by the so-called "Adjustment mortgage," dated May 1, 1878, to John S. Kennedy, John Edgar Johnson, and Jacob D. Vermilye, trustees, of which there are now outstanding bonds of the par value of $4,400,000.

(3) Consolidated bonds, dated September 1, 1874, due July 1, 1899, bearing interest at the rate of 7 per cent per annum, secured by the mortgages last above mentioned as securing the convertible bonds, of which there are now outstanding bonds of the par value of $15,000,000.

(4) Adjustment bonds, dated May 1, 1878, due May 1, 1903, or at any time prior thereto at the option of the Railroad Company, bearing interest at the rate of 7 per cent per annum, secured by mortgage of even date therewith, to John S. Kennedy, John Edgar Johnson, and Jacob D. Vermilye, trustees, whereof there are now outstanding bonds of the par value of $5,254,000.

(5) Convertible debenture bonds, dated September 15, 1883, due May 1, 1908, bearing interest at the rate of 6 per cent per annum, whereof there are now outstanding bonds of the par value of $3,264,000.

(6) Bonds of the Newark and New York Railroad Company, payment of which has been assumed by the Central Railroad Company of New Jersey, dated July 1, 1867, due July 1, 1887, bearing interest at the rate of 7 per cent per annum, of which there are now outstanding bonds of the par value of $600,000.

41 (7) Bonds of the Lehigh Coal and Navigation Company, due December 15, 1897, bearing interest at the rate of 6 per cent per annum, amounting in the aggregate to $2,310,000, payment of which has been assumed by the Central Railroad Company of New Jersey pursuant to the agreement between said companies made March 31, 1871.

(8) Certificates of the following named car trust associations, whereof there are now outstanding certificates of the par value affixed to the name of each car trust association, viz.:

Name.	Amount of certificates outstanding.
The Railroad Car Trust of Philadelphia	$52,800.00
The New Jersey Car Trust Association (Limited)	50,000.00
Central New Jersey Car Trust Association	80,000.00
Guarantee Car Trust Association	700,000.00
Central Railroad Company of New Jersey Car Trust Association	823,000.00

And whereas, the railroad company is obligated to pay as portion of its fixed charges, interest, or dividends at the rate of not less than 6 per cent per annum on the following bonds and stocks:

(1) Bonds of the New Jersey Southern Railway Company, dated July 15, 1879, due July 15, 1899, bearing interest at the rate of 6 per cent per annum, secured by mortgage of even date therewith, to Henry Day, Frederick W. Downer, and Henry S. Little, trustees, whereof there are now outstanding bonds of the par value of $1,590,600.

(2) Bonds of the Long Branch and Sea Shore Railroad
42 Company, dated December 1, 1869, due December 1, 1899, bearing interest at the rate of 7 per cent per annum, secured by mortgage to George B. Upton, Henry L. Gaw, and Abraham Browning, trustees, whereof there are now outstanding bonds of the par value of $200,000.

(3) Stock of the New York and Long Branch Railroad Company of the par value of $2,000,000, entitled to semiannual dividends at the rate of 7 per cent per annum, of which stock of the par value of $1,500,000 is owned by the Railroad Company, and stock of the par value of $500,000 is owned by various individuals and corporations, subject, however, to the right of the Railroad Company to purchase the same on notice, at par and accrued dividends.

(4) Stock of the South Branch Railroad Company of the par value of $438,300, entitled to quarterly dividends at the rate of 6 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

(5) Stock of the West End Railroad Company of the par value of $43,700, entitled to quarterly dividends at the rate of 10 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

(6) Stock of the Newark and New York Railroad Company of the par value of $87,350, entitled to quarterly dividends at the rate of 7 per cent per annum, all of which the Railroad Company is entitled to purchase on notice, at par and accrued dividends.

And whereas, the board of directors of the Railroad Company
43 have deemed it expedient, for the purpose of paying off the aforesaid and other obligations of the Railroad Company, and for the purpose of purchasing said stocks and bonds in order to reduce its fixed charges, and for other lawful purposes, to borrow money and issue bonds, not exceeding $50,000,000 in amount, payable not more than one hundred years from the date hereof, in gold coin of the United States of or equivalent to the present standard of weight and fineness, or in sterling money of Great Britain, bearing interest at such rates as may be fixed at the period of issue from time to time, but not exceeding 5 per cent per annum, with coupon interest payable semiannually, and registered interest payable quarterly, such bonds to be secured by general mortgage covering all the property of the Railroad Company, including all the securities representing the control of the necessary constituent companies, and all equipment now

subject to special car trust liens, so conditioned as to preserve to the new bonds the protection of all existing liens by including in such general mortgage all bonds secured by prior mortgages which may be exchanged for said general mortgage bonds, and to give the additional security of all new property acquired by the proceeds thereof.

And whereas to that end the board of directors of the Railroad Company have duly authorized and directed an issue of coupon and registered bonds to an amount not exceeding fifty million dollars, payable on the first day of July, 1987, and bearing interest from the first day of July, 1887, at a rate not exceeding five per cent per annum, payable semiannually as to the coupon bonds on the first days of January and July in each year, and payable quarterly as to the registered bonds on the first days of January, April, July, and
44 October in each year, to be sealed with the corporate seal of the Railroad Company, signed by its president or vice-president and secretary, and duly authenticated by the certificate of the trustee under this mortgage securing payment thereof, such coupon bonds to be for $1,000 each and to have interest coupons thereto attached with the signature of the treasurer of the Railroad Company engraved thereon, and such registered bonds to be in denominations of $500, $1,000, $5,000, $10,000, and $50,000, which coupon bonds are to be numbered from 1 to the highest number thereof issued, and which registered bonds are to be lettered differently, according to their denomination, and those of each denomination numbered from 1 to the highest number of such denomination issued, those of the denomination of five hundred dollars being indicated by the numeral "D," those of the denomination of one thousand dollars by the numeral "M," those of the denomination of five thousand dollars by the numeral "V," those of the denomination of ten thousand dollars by the numeral "X," and those of the denomination of fifty thousand dollars by the numeral "L." Said bonds, coupons, and certificates are to be substantially in the forms following, respectively:

(Form of coupon bond.)

$1,000. United States of America. No. —.

The Central Railroad Company of New Jersey. General mortgage 5% one hundred year gold bond.

Principal payable July 1, A. D. 1987. Interest payable semiannually, January 1st and July 1st.

For value received the Central Railroad Company of New
45 Jersey promises to pay to the bearer hereof, at its office in the city of Jersey City, or at its office or agency in the city of New York, on the first day of July, 1987, one thousand dollars in gold coin of the United States of or equivalent to the present standard of weight and fineness, and on presentation and surrender of the annexed coupons, as they shall severally become due, to pay interest on such principal sum, in like gold coin

at the rate of five per cent per annum, payable semiannually on the first days of January and July in each year, at the said offices or agency until such principal shall be paid.

This bond is one of an issue of coupon and registered bonds, limited in the aggregate to $50,000,000, the payment of the principal and interest of which is equally secured by a mortgage or deed of trust of even date herewith, conveying unto the Central Trust Company of New York, in trust, the railroad property, equipment, and franchises of the said Railroad Company, and other property described and mentioned in said mortgage or deed of trust, upon the terms and conditions therein set forth.

The holder of this bond may at any time convert the same into a registered bond of like amount upon surrender hereof at the said office or agency in the city of New York.

If default be made in the payment of any interest on any of said bonds, the principal hereof may be made due and payable as provided in said mortgage or deed of trust.

The principal and interest of this bond are payable without any deduction for any taxes now or hereafter levied by the United States or by any State, county, or municipal authority, which the said company may be required to deduct therefrom, the company hereby agreeing to pay the same.

46 This bond shall not be valid until authenticated by the certificate of the trustee endorsed hereon.

In witness whereof the Central Railroad Company of New Jersey has caused its corporate seal to be hereunto affixed and attested by its secretary, and this bond to be signed by its president, or vice-president, this first day of July, 1887.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

[SEAL.] By , *President.*

Attest:

, *Secretary.*

(Interest coupon.)

$. No. .

On the first day of (January or July) , the Central Railroad Company of New Jersey will pay to bearer at its office or agency in Jersey City or in the city of New York twenty-five dollars in gold coin of the United States, being six months' interest then due on its general mortgage bond No. .

, *Treasurer.*

(Trustee's certificate.)

This bond is one of the issue of bonds within mentioned, secured by the mortgage or deed of trust, dated July 1, 1887, executed by the Central Railroad Company of New Jersey to the undersigned

47 as trustee, which has been duly recorded, and the holder hereof is entitled to the benefit of the trust therein created.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustee,*

By , *President.*

(Form of registered bond.)

United States of America.

$. No. .

Registered bond certificate.

The Central Railroad Company of New Jersey. General mortgage 5% one hundred-year gold bond.

Principal due July 1, A. D. 1987.

Interest payable quarterly—January 1st, April 1st, July 1st, and October 1st.

For value received, the Central Railroad Company of New Jersey promises to pay to at its office in the city of Jersey City, or at its office or agency in the city of New York, on the first day of July, 1987, dollars in gold coin of the United States, of or equivalent to the present standard of weight and fineness, and to pay interest on such principal sum in like gold coin at the rate of five per cent per annum, payable quarterly on the first days of January, April, July, and October in each year, at the said offices or agency until such principal shall be paid.

This bond is one of an issue of coupon and registered bonds, limited in the aggregate to $50,000,000, the payment of the
48 principal and interest of which is equally secured by a mortgage or deed of trust, dated July 1, 1887, conveying unto the Central Trust Company, of New York, in trust, the railroad property, equipment, and franchises of the said Railroad Company, and other property described and mentioned in said mortgage or deed of trust, upon the terms and conditions therein set forth.

This bond is transferable only on the books of the said Railroad Company by the registered owner in person or by attorney upon surrender hereof.

If default be made in the payment of any interest on any of said bonds, the principal hereof may be made due and payable as provided in said mortgage or deed of trust.

The principal and interest of this bond are payable without any deduction for any taxes now or hereafter levied by the United States, or by any State, county, or municipal authority, which the said company may be required to deduct therefrom, the company hereby agreeing to pay the same.

This bond shall not be valid until authenticated by the certificate of the trustee endorsed hereon.

In witness whereof, the Central Railroad Company of New Jersey has caused its corporate seal to be hereunto affixed and attested by its secretary, and this bond to be signed by its president, or vice-president, this day of .

[SEAL.] THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

By , *President.*

Attest:

, *Secretary.*

49 (Trustee's certificate.)

This bond is one of the issue of bonds within mentioned, secured by the mortgage or deed of trust, dated July 1, 1887, executed by the Central Railroad Company of New Jersey to the undersigned as trustee, which has been duly recorded, and the holder hereof is entitled to the benefit of the trust therein created.

CENTRAL TRUST COMPANY OF NEW YORK, *Trustee*,
By , *President*.

And whereas, the execution of this mortgage or deed of trust has been duly authorized by the board of directors of the Railroad Company to secure the payment of said bonds and of the interest thereon,

Now, therefore, this indenture witnesseth that the said the Central Railroad Company of New Jersey, party of the first part, in consideration of the premises and of one dollar to it paid by the said Central Trust Company of New York, party of the second part, receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all the bonds aforesaid at any time outstanding, has given, granted, bargained, sold, aliened, remised, released, conveyed and confirmed, assigned, transferred and set over, and by these presents does give, grant, bargain, sell, alien, remise, release, convey and confirm, assign, transfer and set over unto the said party of the second part, its successors, heirs and assigns, forever, all and singular the railroads, property, franchises, rights, and privileges of the Railroad Company, which are more particularly described as follows:

50 First. All the railroads of the Railroad Company, viz, its railroad from the Hudson River, in the county of Hudson, to the Delaware River, in the county of Warren, in the State of New Jersey; also its branch railroad from Jersey City, in the county of Hudson, to the city of Newark, in the county of Essex; also its branch railroad from the city of Elizabeth, in the county of Union, to the city of Perth Amboy, in the county of Middlesex; which branch railroads were purchased and are owned by it, by the authority conferred upon it by its charter; also all its right, title, and interest in and to the telegraph lines on and along said railroads and branches; also all lands, grants of lands, lands under water, water rights, rights of way, buildings, improvements, tenements, and hereditaments now owned by it and used or necessary to retain for future use for operating the said railroads, branches, or any of them; together with all rights of way and trackage over other lines than the line of said company, station grounds, tracks, side tracks, switches and spurs, bridges, viaducts, culverts, fences and other structures, water stations, station houses, engine houses, car houses, woodhouses, warehouses, machine shops, workshops, ferry houses, wharves, docks, piers, superstructures, erections, furniture, and fixtures; also all rails, ties, machinery, tools, implements, fuel, material, and supplies whatsoever, now or hereafter owned by the Railroad

Company, or now or hereafter acquired and used for the locating, constructing, operating, renewing, replacing, repairing, and maintaining said railroads and telegraph lines, or any part thereof, or which are necessary to retain for future use for such purposes; together, also, with all betterments, additions, improvements, repairs, renewals, and replacements made to, on, or upon said railroads and telegraph lines, or any part or portion thereof, and all outstanding claims and dues, books, maps, surveys, profiles, engineers'
51 notes, vouchers, receipts, muniments of title, and letters patent, as well as all other papers and documents relating to said railroads or to the business thereof; together with all and singular the corporate rights, privileges, and franchises of the Railroad Company, acquired or to be acquired, connected with or relating to the said railroads, or any of them; and together with all the streets, ways, alleys, passages, waters, water courses, easements, rights, liberties, privileges, hereditaments, and appurtenances whatsoever unto any of the hereby granted and mentioned premises and estates belonging and appertaining or to belong and appertain, and the reversions and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, claim, and demand of every nature and kind whatsoever of the said party of the first part, as well at law as in equity, of, in, and to the same and every part and parcel thereof.

Second. The four tracts, lots or parcels of land next hereinafter described, all situate in the county of Hudson in the State of New Jersey, as hereinafter stated, that is to say:

1st. All that certain tract or parcel of land and premises situate in the city of Jersey City: Beginning at a point in the centre line of Washington street, distant two hundred and ninety (290) feet northerly from the centre line of the Central Railroad of New Jersey; thence (1st) northerly through the centre line of Washington street a distance of one hundred and fifty-five (155) feet, more or less, to a point twenty-three hundred and thirteen (2,313) feet southerly from the southerly side of Grand street; thence (2d) north seventy-three degrees and fifty minutes west (N. 73°, 50′ W.), as the needle pointed in 1872, and parallel with Grand street, to the
52 centre line of Jersey avenue; thence (3d) southerly along the centre line of said avenue, one hundred and sixty-five (165) feet, more or less, to a point distant two hundred and ninety (290) feet northerly at right angles from the centre line of the Central Railroad of New Jersey; thence (4th) westerly and parallel with the centre line of said railroad, five hundred (500) feet, more or less, to the original high-water mark on the west shore of Communipaw Bay, or cove; thence (5th) southeasterly along said high-water mark to a point distant fifty (50) feet northerly at right angles from the centre line of the Central Railroad of New Jersey; thence (6th) easterly and parallel with the centre line of said railroad to the centre line of Jersey avenue; thence (7th) northerly along the centre line of said avenue two hundred and forty-seven (247) and sixty-two one-hun-

dredth ($\frac{65}{100}$) feet to the end of the third course in this description; thence (8th) easterly and parallel with the centre line of said Central Railroad to the centre line of Washington street, the point or place of beginning.

2d. Also all that other certain tract or parcel of land and premises partly above and partly below the tide waters of New York Bay, situate in the city of Jersey City, described as follows: Beginning at a point in the centre line of Washington street, distant two hundred and ninety (290) feet southerly from the centre line of the Central Railroad of New Jersey; thence (1st) southerly along the centre line of Washington street, two hundred and eighty-three (283) and four-tenths ($\frac{4}{10}$) feet to the bulkhead put down by the Central Railroad Company of New Jersey on the riparian commissioners' exterior line for solid filling; thence (2d) diverging from the centre line of Washington street produced, sixty-two degrees and eighteen minutes
53 (62° 18′) to the southeast, one thousand three hundred and eight-five (1,385) feet, more or less, to the new exterior line for piers established by the riparian commissioners of the State of New Jersey, October first, eighteen hundred and seventy-four; thence (3d) returning to the place of beginning, and running westerly and parallel with the centre line of the Central Railroad of New Jersey to the centre line of Jersey avenue; thence (4th) southerly along the centre line of Jersey avenue four hundred and seven (407) and thirty-six one hundredths ($\frac{36}{100}$) feet; thence (5th) southeasterly and parallel with the second course in this description, three thousand three hundred and twenty-five (3,325) feet, more or less, to the exterior line for piers aforesaid; thence (6th) easterly along said exterior pier line, two thousand five hundred and thirty-five (2,535) feet, to the end of the second course in this description.

Also, and it is intended to include in the foregoing descriptions all the lands lying between the south line of the first tract and the north line of the second tract last hereinbefore described, and the lands lying east of said first and second tracts and the land between the same extending to the exterior line for piers on the Hudson River and New York Bay.

3d. Also all that other certain tract or parcel of land and premises situate in the city of Bayonne, described as follows: Beginning at a point on the southeast side of the right of way of the Central Railroad of New Jersey, and in the division line between lands formerly belonging to John J. Van Buskirk on the northeast, and Elizabeth Young and Christopher, her husband, on the southwest; thence (1st) southeasterly along said division line four hundred and
54 eighty-seven (487) feet, more or less, to lands now or formerly of Richard Cadmus; thence (2d) southwesterly along said Richard Cadmus' land two hundred and sixty-eight (268) feet, more or less, to a point in the centre of the north branch of the Platty Kill Creek, said point being the end of the second course in the conveyance from Richard Cadmus and wife and Hartman Vreeland and wife to the Central Railroad Company of New Jersey by deed dated

the 24th day of February, 1864, and recorded in book 107 of deeds, pages 72, &c.; thence (3d) southeasterly along the centre of said north branch one hundred and seventy-two (172) feet to a point; thence (4th) southwesterly still along the centre of said north branch one hundred and ninety (190) feet; thence (5th) still along the centre of said north branch, the general course being southerly, seventeen hundred and twenty (1,720) feet, more or less, to the intersection of the centre line of the Platty Kill Creek and its north and south branches; thence (6th) up the centre of the south branch of the Platty Kill Creek, its general course being northwest along the southerly line of lands conveyed by Peter C. Westervelt and wife to the Central Railroad Company of New Jersey, by deed dated November the 9th, 1862, and recorded in book 97 of deeds, page 396, one thousand three hundred and seventy (1,370) feet, more or less, to a point; thence (7th) still along the last-mentioned line, north sixty-nine degrees and forty-four minutes west (N. 69° 44′ W.), three hundred and seventy (370) feet, more or less, to a point; thence (8th) south forty degrees and four minutes west (S. 40° 04′ W.) one hundred and thirty-six (136) feet to a point, which point is the most northerly corner of the lot of land conveyed by John J. Van Buskirk and wife to the Central Railroad Company of New Jersey, by deed dated July 29th, 1863, recorded in book 102 of deeds, page 37; thence (9th) southeast-
55 erly along the northeasterly line of said lot three hundred and seventy (370) feet, more or less, to lands formerly belonging to E. M. Patterson; thence (10th) southwesterly along the southeasterly line of said lot and the southeasterly side of a lot conveyed by John Van Buskirk, jr., and wife to the Central Railroad Company of New Jersey, by deed dated December 7th, 1863, and recorded in book 106 of deeds, page 199, three hundred and seventy-eight (378) feet, more or less, to the southerly corner of the last-mentioned lot; thence (11th) north forty-eight degrees and sixteen minutes west (N. 48° 16′ W.), nine hundred and five (905) feet, more or less, to the southeasterly side of the right of way of the Central Railroad Company of New Jersey; thence (12th) northeasterly along the southeasterly side of the right of way of said company, two thousand and seventy-five (2,075) feet, more or less, to the point or place of beginning.

4th. Also all that other certain tract or parcel of land and premises situate in the city of Bayonne, described as follows: Beginning at a point in the high-water line of the Kill von Kull River, distant eight hundred (800) feet northeasterly at right angles from the centre line of coal pier No. 1 belonging to the Central Railroad Company of New Jersey; thence (1st) northwesterly and parallel with the centre line of said coal pier No. one, eleven hundred and thirty-five (1,135) feet, more or less, to one of the division lines of the property formerly belonging to Nicholas, James, and John Van Buskirk; thence (2d) northwesterly along said division lines, four hundred and sixty-five (465) feet, more or less, to a point where a right angle would strike the intersection of the centre lines of the Platty Kill Creek,

and its north and south branches; thence (3d) northeasterly and
56 at right angles to the last-mentioned line, three hundred and seventy (370) feet, more or less, to the intersection of the centre lines of the Platty Kill Creek, and its north and south branches; thence (4th) southeasterly along the centre line of the Platty Kill Creek, ten hundred and twenty-five (1,025) feet, more or less, to a point distant fifteen hundred (1,500) feet northeasterly at right angles from the centre line of coal pier No. 1 aforesaid; thence (5th) southeasterly and parallel with the centre line of said coal pier No. 1, ten hundred and ninety-five (1,095) feet to the high-water line of the Kill von Kull River; thence (6th) southwesterly along said high-water line, seven hundred (700) feet at right angle to the last mentioned line, to the point or place of beginning.

Together with the lands under water in the Kill von Kull in front of the above described tract between the high-water line and the exterior line for solid filling and for piers, respectively.

Third. A certain lease made by the New York and Long Branch Railroad Company to the Railroad Company, bearing date the sixth day of October, eighteen hundred and seventy-three, by which the said the New York and Long Branch Railroad Company leased its railroad from its intersection near Perth Amboy, with the Perth Amboy branch of the Railroad Company, on the north side of the Raritan River, and thence to Long Branch, in the county of Monmouth, for and during the continuance of the charters of both of the parties to said lease, and during the continuance of any renewals of both of said charters, and during the continuance of any re-charter of both of the companies parties to said lease, at and for certain rents, and on certain terms and conditions in said lease specified, and also all the leasehold estate, right, title, and interest vested in or in
57 any wise belonging unto the Railroad Company, in or to the demised premises by virtue of the said lease; subject, however, to the terms of a certain agreement by and between the Central Railroad Company of New Jersey, the New York and Long Branch Railroad Company, the New Jersey Southern Railway Company, and the Pennsylvania Railroad Company, dated January 3rd, 1882. Also fifteen thousand (15,000) shares of the capital stock of the New York and Long Branch Railroad Company, amounting at par to fifteen hundred thousand dollars, now belonging to the Railroad Company.

Fourth. A certain lease made by the South Branch Railroad Company to the Railroad Company, bearing date the eighteenth day of March, eighteen hundred and sixty-two, by which the said South Branch Railroad Company did lease to the Railroad Company, its railroad from a point on the Central Railroad of New Jersey, at Somerville, to and into the town of Flemington, in the county of Hunterdon, New Jersey, for and during the continuance of the charters of both the parties to the last mentioned lease and for and during the continuance of any recharter of both of the companies to the said last mentioned lease, for and upon certain rents to be paid by the

Railroad Company to the said last mentioned lessor, and upon certain terms and conditions in the said last mentioned lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company, in and to the said last mentioned railroad, by virtue of the said last mentioned lease, or otherwise, in any way.

Fifth. A certain tripartite agreement made between the Delaware and Bound Brook Railroad Company, the North Pennsylvania Railroad Company, and the Railroad Company, for a continuous
58 line of travel between New York and Philadelphia, bearing date the thirtieth day of March, eighteen hundred and seventy-six, and also all the rights, privileges, benefits, and advantages of the Railroad Company, by virtue of the said tripartite agreement.

Sixth. Bonds made and heretofore issued by the Lehigh and Wilkesbarre Coal Company to the amount of six millions one hundred and sixteen thousand dollars, including all coupons thereon which may remain from time to time unpaid, being the same bonds mentioned in the third item of the agreement for the equitable adjustment of the affairs of the Central Railroad Company of New Jersey without a foreclosure, dated 23d February, 1878.

Seventh. One hundred and thirty-two thousand shares of the capital stock of the said Lehigh and Wilkesbarre Coal Company of the par value of fifty dollars each, amounting in the aggregate, at par, to six millions six hundred thousand dollars, now belonging to the Railroad Company.

Eighth. Thirty thousand shares of the capital stock of the American Dock and Improvement Company of the par value of one hundred dollars each, amounting in the aggregate, at par, to three millions of dollars, now belonging to the Railroad Company.

Ninth. Eight thousand five hundred shares of the capital stock of the High Bridge Railroad Company of the par value of one hundred dollars each, amounting in the aggregate, at par, to eight hundred and fifty thousand dollars, now belonging to the Railroad Company.

Tenth. Three thousand shares of the capital stock of the Longwood Valley Railroad Company of the par value of one hundred
59 dollars each, making in the aggregate, at par, three hundred thousand dollars, now also belonging to the Railroad Company.

Eleventh. A certain lease bearing date the thirty-first day of March, A. D. eighteen hundred and seventy-one, made by the Lehigh Coal and Navigation Company to the Railroad Company, by which the said Lehigh Coal and Navigation Company did lease and demise unto the Railroad Company all the railroads of the said "The Lehigh Coal and Navigation Company within the State of Pennsylvania, including their bridge across the Delaware River, as follows, to wit:

"The Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of New Jersey, to Union Junction, in Luzerne County, Pennsylvania, where it connects with the railroad built by the Union Coal Company, a distance of one hundred and five miles, more or less. Also the railroad known as the Nanticoke Railroad,

situate in said Luzerne County, extending from the Lehigh and Susquehanna Railroad at Ashley to the Newport mines, a distance of eight and one-half miles, more or less, with a branch from the same extending to the Lee mines, a distance of two miles, more or less, extending also from Ashley to Gardner's switch, a distance of four and one-half miles, more or less, also extending from Union Junction to the Everhart mines, a distance of three miles, more or less, and also extending from Mill Creek to the Enterprise mines, a distance of four miles, more or less; also the branch railroad in the County of Luzerne, known as the Nescopec Branch, extending from White Haven to Upper Lehigh, a distance of nine miles, more or less;
60 also the Nesquehoning Valley Railroad, situate in the counties of Carbon and Schuylkill, extending from Nesquehoning Junction to Tamanend, where it connects with the Catawissa Railroad, a distance of sixteen and one-half miles, more or less; also the Trescekow Railroad, in the counties of Schuylkill, Carbon, and Luzerne, extending from the Catawissa Railroad at Silver Brook to the Honey Brook mines, a distance of six and one-half miles, more or less; also the branch railroad in the counties of Northampton and Lehigh, known as the Coplay Branch, extending from Laubach station to the furnaces of the Thomas Iron Company, a distance of one mile, more or less; also the branch railroad in the county of Lehigh, extending from the railroad near Bethlehem, across the Lehigh River to a connection with the North Pennsylvania Railroad at South Bethlehem, a distance of fourteen hundred and twenty-eight feet, more or less; also the inclined planes in Luzerne County, with all the machinery connected therewith, extending from Ashley to Solomon's Gap station, a distance of three miles, more or less; together with all sidings, station houses, machine shops, and other appurtenances of said roads and branches, and also all and singular the roadways and also all the franchises of the Lehigh Coal and Navigation Company for maintaining and working the same and taking tolls thereon, and for demanding and receiving compensation for the use of the same; excepting and reserving out of the said demise the Nesquehoning tunnel, and the railroads or railways laid therein, and extending beyond the same, and also all railroads and railways extending from breakers into mines. To have and to hold the premises by said lease demised to said party of the first part, its successors and assigns, from the first day of April, eighteen hundred and seventy-one, for
61 and during the continuance of the charters of said companies, and any renewals of the same, under and subject nevertheless to all the mortgages existing on the said demised premises. Provided, however, that the term of the lease of the Nesquehoning Railroad above mentioned, shall not extend beyond the term of nine hundred and ninety-nine years, from the fourth of November, eighteen hundred and sixty-eight, less one day," at and for certain rents and conditions, in the said last-mentioned lease specified, and also all the leasehold estate, right, title, and interest vested in or in any wise

belonging unto the said party of the first part in and to the said last-mentioned and demised premises, or any part thereof, by virtue of the said last-mentioned lease or otherwise.

Also a certain agreement modifying said lease, bearing date the 28th day of June, 1887, made between the Lehigh Coal and Navigation Company and the Railroad Company.

Twelfth. All the locomotives, tenders, passenger cars, baggage cars, freight cars, coal cars, and all other engines, cars, carriages, rolling stock, equipments, and all contracts and agreements for the purchase thereof; also all tools and machinery owned or to be owned by the Railroad Company, and all renewals thereof by substitution, repair, or otherwise, and used or necessary to retain for future use on any of the railroads included in this indenture of mortgage, or on any railroad, any interest in which as owner, lessee, stockholder, or otherwise, is hereby conveyed, assigned, and transferred to the said party of the second part.

Also all the tolls, rents, revenues, issues, profits, and income from said railroads and property, and all the corporate and other rights,
privileges, franchises, and appurtenances of or belonging to
62 the Railroad Company, and now owned, acquired, or possessed,
or that may be hereafter owned, acquired, or possessed by the Railroad Company, including every privilege of exemption and immunity from taxation.

Thirteenth. All the tug-boats, ferry-boats, steamboats, floats, barges, and other floating equipment now belonging to the Railroad Company, and also every ferry and right of ferriage belonging or in any wise appertaining to the Railroad Company, its successors or assigns, or used in connection with the aforesaid railroads, or with any of them; and also all the lands and real estate of the Railroad Company, situate in the city of New York, on the west side of West street, opposite to, or nearly opposite to the foot of Liberty street, now belonging to the Railroad Company, and used as and for its ferry, and for its transportation and other business carried on and in connection with said ferry, with the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

Fourteenth. Eight hundred and fourteen shares of the capital stock of the Constable's Hook Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to eighty-one thousand four hundred dollars.

Fifteenth. Seven hundred and ninety-six shares of the capital stock of the Manufacturers' Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to seventy-nine thousand six hundred dollars.

Sixteenth. One thousand seven hundred and seventy-three shares
of the capital stock of the Lake Hopatcong Railroad Company,
63 of the par value of one hundred dollars each, amounting in the
aggregate at par to one hundred and seventy-seven thousand three hundred dollars.

Seventeenth. Fifteen thousand nine hundred and six shares of the preferred capital stock of the New Jersey Southern Railway Company, of the par value of one hundred dollars each, amounting in the aggregate at par to one million five hundred and ninety thousand six hundred dollars.

Eighteenth. Two thousand four hundred shares of the capital stock of the Tom's River Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to two hundred and forty thousand dollars.

Nineteenth. Six thousand shares of the capital stock of the Vineland Railroad Company, of the par value of one hundred dollars each, amounting in the aggregate at par to six hundred thousand dollars.

Twentieth. All of the hereinbefore recited issues of bonds, stocks, and certificates, for the purchase of which bonds are reserved as herein provided, which may from time to time be transferred and delivered to the trustee under the terms of this mortgage, viz:

Name of securities.	Total par value of amount outstanding.
First mortgage bonds of the C. R. R. Co. of N. J	$5,000,000
Convertible bonds of the C. R. R. Co. of N. J	4,400,000
Consolidated bonds of the C. R. R. Co. of N. J	15,000,000
Adjustment bonds of the C. R. R. Co. of N. J	5,254,000
64 Bonds of the Newark & New York R. R. Co	600,000
Bonds of the New Jersey Southern Railway Co	1,590,600
Bonds of the Long Branch & Seashore R. R. Co	200,000
Bonds of the Lehigh Coal and Navigation Company	2,310,000
Stock of the New York & Long Branch R. R. Co	500,000
Stock of the South Branch R. R. Co	438,300
Stock of the West End R. R. Co	43,700
Stock of the Newark and New York R. R. Co	87,350
Certificates of the Railroad Car Trust of Philadelphia	52,800
Certificates of the New Jersey Car Trust Association (Limited)	50,000
Certificates of the Central New Jersey Car Trust	80,000
Certificates of the Guarantee Car Trust	700,000
Certificates of the Central Railroad Company of New Jersey Car Trust	823,000
	37,129,750

Twenty-first. The interest of the Railroad Company in a certain lease made by the Dover and Rockaway Railroad Company, bearing date April 26th, 1881, to the Longwood Valley Railroad Company, the entire capital stock of which is owned by the Railroad Company, by which lease the Dover and Rockaway Railroad Company leased its railroad for and during the continuance of the charters of both parties to the said lease, for and upon certain rents to be paid to the said lessor, and upon certain conditions in the said lease particularly

specified, and also all the leasehold estate, right, title, and interest of the Railroad Company in and to the said last-mentioned railroad, by virtue of the said last-mentioned lease, or otherwise, in any way.

65 Twenty-second. A certain lease made by the Ogden Mine Railroad Company to the said party of the first part, bearing date November 4th, 1881, by which the said Ogden Mine Railroad Company leased its railroad to the Railroad Company, for and during the continuance of the charters of both parties to the said last-mentioned lease, for and upon certain rents to be paid by the Railroad Company to the said last-mentioned lessor, and upon certain conditions in the said last-mentioned lease particularly specified, and also all the leasehold estate, right, title, and interest of the Railroad Company, in and to the said last-mentioned railroad, by virtue of the said last-mentioned lease, or otherwise, in any way.

Twenty-third. All the property, real, personal, and mixed, which may at any time hereafter be acquired by the Railroad Company, with the proceeds of bonds secured hereby.

To have and to hold all and singular the property hereinbefore described, real, personal, and mixed, and all the railroads, premises, property, rights, franchises, and estates hereby conveyed, or intended to be conveyed, with all and singular the reversions, remainders, tolls, rents, revenues, issues and profits, privileges and appurtenances, now or hereafter belonging or in anywise appertaining thereto, unto the said party of the second part, its successor and successors, heirs and assigns forever, in trust, nevertheless, under the terms and provisions hereinafter set forth, for the persons and corporations, firms and partnerships, and for their benefit, security, and protection, who shall hold the aforesaid coupon and registered bonds, or any or either of them, and for the enforcing of the payment thereof, when

66 payable in accordance with the true intent and meaning of the stipulations of this mortgage and of said bonds and interest coupons, and without preference of any of said bonds over any of the others by reason of difference in the rates of interest, in the time of the issue or negotiation thereof, or otherwise. Provided however, and these presents are upon the express condition, that if the Railroad Company, its successors or assigns, shall well and truly pay, or cause to be paid, unto the holders of said bonds and interest coupons to be issued as aforesaid, the principal and interest to become due at the times and in the manner stipulated in said bonds and in said interest coupons, according to the true intent and meaning thereof, and shall well and truly keep, perform, and observe all and singular the covenants, promises, and conditions in said bonds and in this mortgage expressed, to be kept, performed, and observed by the Railroad Company, then this mortgage and the estate and rights hereby granted shall cease, determine, and be void, otherwise to be and remain in full force.

It is hereby declared, covenanted, and agreed, by and between the parties hereto, and the Railroad Company for itself, its successors and assigns, doth hereby covenant and agree to and with the respec-

tive persons and corporations, firms and partnerships, who shall hold the bonds and interest coupons aforesaid, or any or either of them, that the further trusts, uses, purposes, conditions, and covenants for and upon which the rights, franchises, and property, real and personal, hereinbefore described, are conveyed to, and are to be held and disposed of by the trustee, are as follows:

First. The Railroad Company will fully and entirely pay off
67 and satisfy the whole of the said bonds, principal, and interest, according to the terms thereof, without delay and without deductions from either said principal or interest for any taxes, assessments and governmental or other charges now or hereafter lawfully imposed upon the premises, franchises, and property hereby conveyed, or intended so to be, or upon the said bonds or any interest thereon, either by the United States, or by any State, county, or municipal authority, which the Railroad Company may be required to deduct therefrom. When and as the interest coupons annexed to the bonds secured hereby mature and are paid, they shall be cancelled. No purchase or sale of any of the said coupons, or interest, nor any advance or loan upon the same, and no redemption of the said coupons, or interest, by or on behalf of the Railroad Company, shall, as between the purchasers or assignees of such coupons or interest and the holders of said bonds, operate as keeping the said coupons or interest alive or in force as a lien upon the mortgaged premises against the holders of said bonds, after the sale or assignment of said coupons or interest separate from the bonds from which such coupons are detached or on which such interest shall accrue. Until default shall be made in the payment of the principal or interest of the bonds hereby secured, or of some of them, or in respect to something herein required to be done, observed, kept, or performed by the Railroad Company, it and its successors and assigns shall be permitted, except as herein otherwise specially provided, to possess, manage, operate, and enjoy the railroads, equipment, and other property, rights, and franchises hereby conveyed, or intended so to be, and to receive and use the tolls, income, rents, revenues, issues, and profits thereof.

Second. If default shall be made in the payment of any
68 interest on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, then and thereupon the principal sum of all of said bonds shall, at the option of the trustee, become immediately due and payable, anything in said bonds or herein to the contrary notwithstanding; and, if requested to do so by a majority in interest of the holders of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, or by vote at a meeting duly held, it shall be the duty of, and it is hereby made obligatory upon, the trustee to declare said entire principal sum due and payable as aforesaid, and the same shall thereupon become immediately due and payable; and a majority in interest of such bondholders may in like manner direct the trustee to refrain from making such declaration,

upon such terms and conditions as such majority shall deem proper; and a majority in interest of such bondholders may in like manner annul or reverse the declaration if already made by the trustee, and such principal sum shall thereupon cease to be due, anything herein contained to the contrary notwithstanding; but the action of the trustee or of the bondholders, in case of any default, shall not affect or impair the right of a majority in interest of such bondholders, in manner aforesaid, at any time while such default continues, to direct the trustee to declare such principal sum due, nor shall it in anywise affect any subsequent default on the part of the Railroad Company, or impair any right resulting therefrom.

Third. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, or
69 in the performance of any other covenant of the Railroad Company herein contained, it shall be lawful for the trustee, at any time after payment or performance shall have been duly demanded, in writing, such default continuing, to proceed to enforce the rights of the trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court for that purpose, as they, being advised by counsel learned in the law, shall deem most expedient for the interests of such bondholders.

Fourth. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, it shall be lawful for the trustee, such default continuing, either personally, or by its agent or agents, attorney or attorneys, to enter into and upon all of the property, franchises, rights, and privileges hereby conveyed or intended so to be, and each and every part thereof, and to exclude the said company, its agents and servants, wholly therefrom, and having and holding the same to use, operate, manage, and control said railroads and other mortgaged premises, regulate the tolls for the transportation of passengers and freight thereon, and conduct the business thereof, either personally or by its superintendent, managers, receivers, agents, servants, or attorneys, to the best advantage of the interests as well of the public as of the holders of bonds secured hereby, in accordance with law. Such right of entry shall include the right to vote on all the shares of stock included in this mortgage, and to perform any acts and to make and execute any requests, requisitions, or other instruments as holders of the bonds included therein. Upon such
70 entry it shall be lawful for the trustee from time to time to insure or keep insured, at the expense of the trust estate, the rolling stock, tools, and machinery, and other property, buildings, bridges, and structures erected or provided for use in connection with said railroads, and whereof they shall become possessed as aforesaid, in the same manner and to the same extent as is usual with railroad companies; and likewise to make from time to time, at the expense of the trust estate, all necessary or proper repairs, renewals, and re-

placements thereto and thereon, as well in respect of the rolling stock or equipment as in respect of the railroad and appurtenances, and other property as may seem to it judicious; and to collect and receive all tolls, freights, incomes, rents, revenues, issues, and profits of the same, and every part thereof, and after deducting the expenses of operating said railroads and other mortgaged premises, and conducting the business thereof, and of all repairs, renewals, replacements, and all payments which may be made for taxes, assessments, insurance, and other proper charges upon the said premises and property, or any part thereof, as well as a just and reasonable compensation for its own services and compensation to all agents, clerks, servants, and other employees by it properly engaged and employed, the trustee shall apply the moneys arising as aforesaid to the payment of the interest in arrear (if any) or which shall after such entry become due and payable on the bonds outstanding and secured hereby, ratably to the person or parties entitled to receive the same, without any discrimination or preference between them on account of the date and dates of maturity or of the rate of interest of such bonds, or the times of their actual issue or otherwise.

Whenever, after entry as aforesaid, the net income from the
71 mortgaged property under the management of the trustee has been sufficient to pay all the interest in arrear on the bonds outstanding and secured hereby, the trustee shall, upon requisition in writing of the Railroad Company, restore said property to the Railroad Company, to possess, manage, operate, and enjoy the same, in like manner as before said entry. But such restoration shall not in any way affect the right of the trustee to enter, as herein provided, for any subsequent default.

Fifth. If default shall be made in the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after payment shall have been duly demanded in writing, it shall be the duty of, and it is hereby made obligatory upon, the trustee, upon requisition of one-eighth in interest of the holders of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in writing, signed and proved as hereinafter provided, and upon reasonable indemnity as hereinafter provided, to proceed forthwith to enforce the rights of the trustee and of the bondholders under this mortgage, by foreclosure or by any other appropriate proceedings in any proper court or otherwise, according to such requisition.

Sixth. If default shall be made in the performance of any covenant of the Railroad Company herein contained other than the payment of any money, principal or interest, on any of the bonds hereby secured, and such default shall continue for ninety days after performance shall have been duly demanded in writing, it shall be the duty of, and it is hereby made obligatory upon, the trustee, upon like requisition of one-eighth in interest of the holders of the bonds hereby secured and then outstanding, and upon indemnity
72 as aforesaid, to proceed forthwith to enforce the rights of the

trustee and of the bondholders under this mortgage,. by foreclosure or by any other appropriate proceedings in any proper court, or otherwise, according to such requisition, subject to the power of a majority in interest of the holders of the said bonds, by requisition in writing signed and proved as hereinafter provided, or by vote at a meeting duly held, to instruct and require the trustee to waive such default and withdraw such proceedings, if begun, or to enforce the rights of the trustee and the bondholders by reason of such default, according to such requisition of said majority; provided that no action of the trustee or bondholders, or both, in waiving such default or otherwise, shall extend to or be taken to affect any subsequent default or to impair the rights resulting therefrom.

Seventh. Upon the filing of a bill in equity, or other commencement of foreclosure or other appropriate proceedings in any proper court, to enforce the rights of the trustee and of the bondholders under this mortgage, unless satisfactory cause to the contrary shall be shown, the trustee shall be entitled to the appointment by such court of a receiver or receivers of the property hereby mortgaged, and of the earnings, income, rents, revenues, issues, and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

Eighth. In case of any default on its part, as aforesaid, the Railroad Company shall not and will not set up, claim, or seek to take advantage of any appraisement, valuation, stay, extension, or redemption law now existing or which may hereafter exist in any State wherein any part of the mortgaged property is situated, in order to prevent or hinder the enforcement or foreclosure of this mort-
73 gage, or the absolute sale of the railroads, equipment, and other property, rights, privileges, and franchises hereby conveyed, or the final and absolute putting into possession thereof, immediately after such sale, of the purchaser or purchasers thereat, but hereby waives the benefit of all such laws.

Ninth. In case of any sale of the mortgaged property under the provisions hereof, any purchaser at such sale shall be entitled, in making settlement for or payment of the purchase money bidden, to turn in towards the payment thereof any of the bonds and matured and unpaid interest secured hereby held by such purchaser, counting such bonds and interest for that purpose at the sum which shall be payable to the holder thereof out of the net proceeds of such sale, as his just share of such net proceeds, after allowing for the proportion of payment which may be required in cash for the costs and expenses of the sale; and if such share of net proceeds shall be less than the amount then due upon such bonds, to make such settlement by receipting on such bonds the amount to be credited thereon.

Tenth. The Railroad Company, for itself and all persons and corporations lawfully claiming through or under it, or who may at any time become holders of liens junior to the lien of this mortgage, hereby expressly waives and releases all right to have the mortgaged property marshaled upon any sale thereof under the provisions of

this mortgage; and the trustee hereunder and any court in which foreclosure of this mortgage is sought, shall have the right, in their discretion, to sell the entire mortgaged property of every description, as a whole, subject to the right of a majority in interest of the holders of the bonds hereby secured then outstanding, by requisition
74 in writing or by vote at a meeting duly held, to direct the trustee to sell said property in such manner as they may deem best.

Eleventh. The rights and remedies secured to the holders of the said general mortgage bonds by this mortgage and the trusts therein declared, shall, as against the mortgaged premises and property and every part thereof, be exclusive of all other rights and remedies, and no part of the mortgaged premises shall be levied upon, taken in execution, or sold under any judgment or decree obtained by the holder or holders of any of the said bonds or interest thereon against the Railroad Company for the payment of either principal or interest of the bonds hereby secured, unless such judgments or decrees shall have been entered for the purpose of enforcing the trusts herein contained, it being intended for the better securing the largest possible price for the mortgaged premises and property in the event of the sale thereof that the mode of sale hereinbefore provided shall be exclusive of all others.

Twelfth. The Railroad Company shall and will pay and discharge all taxes, assessments, and governmental or other charges lawfully imposed upon the premises, franchises, and property hereby conveyed, or intended so to be, or upon any part thereof, and all such taxes, assessments, and charges upon the bonds secured hereby or any interest thereon, as the Railroad Company may be required to deduct therefrom, and will not suffer any matter or thing whatsoever whereby the lien hereof might or could be impaired.

Thirteenth. The Railroad Company shall maintain always, during the currency of the bonds secured hereby, a public office or agency
75 in the city of New York for the transfer and registration of the name and post-office address of the owner or owners of the registered bonds provided for in this mortgage, and shall always keep in said office proper books for such registration, which shall, at any proper time, be made by a transfer agent of the Railroad Company on demand of the owner of any such bonds entitled to such transfer and registration presenting the same, and recording with such transfer agent his name and post-office address; and the holder of any coupon bonds secured hereby may, at any proper time, surrender the same at said office for an equivalent amount of the registered bonds of the Railroad Company; all such transfers, registrations, and exchanges of bonds to be without any charge or expense therefor to such owner or holder. Such books shall at all proper times be open to the inspection of the trustee, and to the holder or holders of not less than $500,000 of bonds, whenever requested.

Fourteenth. Whenever and as often as any contingency shall arise on which the action of the holders of bonds secured hereby shall be controlling, or in which the said bondholders have by the provisions

hereof any discretionary voice or power, the trustee hereunder may, and at the written request of the holder or holders of not less than $500,000 of such bonds, or of the railroad company, shall, call a meeting of the holders of the bonds secured hereby at the time outstanding in manner hereinafter provided; and until otherwise prescribed by said bondholders, such meetings shall be held at the city of New York, and notice of the objects, time, and place of such meeting shall be given by publishing the same in a newspaper of good circulation in the city of New York, twice a week for four successive weeks (the last publication to take place on the day in such notice men-
76 tioned for such meeting), and by depositing in the post-office in the city of New York at the time of, or previous to, the first publication of such notice a written or printed copy thereof, properly enveloped and directed, postage prepaid, to each and every registered owner or owners of any one or more of said bonds, at his or their registered address; and in case the said trustee shall fail to call such meeting in manner aforesaid within ten days after a request in writing therefor shall have been made by the holder or holders of not less than five hundred thousand dollars ($500,000) of such bonds, or by the Railroad Company, or if said trustee shall have resigned or been removed, or otherwise have become incapacitated, the president of said Railroad Company or the holder or holders of said bonds to the amount aforesaid may call such meeting in manner aforesaid; provided further, that the expense of publishing and giving such notice shall be a liability of said Railroad Company hereunder, and may be defrayed if necessary out of any trust funds in the hands of the trustee; and that nothing herein contained shall be held to require the trustee to incur any personal liability in the calling and holding of such meeting; and at any meeting a majority in interest of the holders of said bonds outstanding may prescribe and establish such rules and by-laws as they may deem proper for the calling of future similar meetings, and the regulation of proceedings thereof, and alter, repeal, or amend the same at pleasure. And it is hereby declared and agreed that at any meeting so convened the holders of said bonds shall be competent to exercise, in person or by proxy, all the powers and authorities conferred upon them by these presents, and that holders of the amount of bonds necessary for any action or requisition shall constitute a quorum for such action
77 or requisition; provided, that less than a quorum may adjourn from time to time, and that each holder of a bond or bonds shall be entitled to one vote for every $1,000 of the principal sum mentioned in his bond or bonds, and that a majority of votes represented shall govern in all cases wherein a majority in interest of all bonds outstanding is not hereby required.

And it is hereby declared and provided that at any meeting of bondholders held in pursuance of the provisions hereof, any bondholder present may require the ownership of bonds by the persons claiming to be such owners to be evidenced by the production of those bonds, excepting in the case of bonds standing registered in the name

of such holder, and that whenever, under any provisions of this indenture, effect is to be given to the election, act, appointment, requisition, or assent of a majority, or any specified amount or proportion of the bondholders secured hereby, any person whose interests are to be affected by such action may require that the ownership of such bonds by the person claiming to be such owner, excepting registered bonds as aforesaid, shall be vouched for by the affidavit of such person or his duly authorized agent or attorney having possession of the bonds, stating such ownership of the bonds, and giving their numbers, dates, and amounts; which affidavit shall be received as prima facie evidence of the fact, but subject to the question of its verity, and subject to demand for the production of the bonds in any legal proceeding or controversy.

The trustee or any bondholder attending any such meeting shall have a right to require that any act or resolution of such bondholders affecting the rights or remedies of, or for the benefit of the bondholders, or the duties of the trustee or the interests of the
78 trusts hereby created, shall be authenticated by the signature of all the persons assenting thereto, as well as by a minute of the proceedings at any such meeting.

The term majority in interest as used in this indenture shall be held to mean holders having a majority of votes on bonds issued and outstanding for the time being, according to the number of votes to which each holder is entitled as aforesaid, and not a majority of individuals.

Any request, requisition, or other instrument signed by bondholders pursuant to the provisions of this indenture shall be proved or acknowledged as deeds are proved or acknowledged for record in the States of New Jersey or New York.

Fifteenth. Certificates representing all the stock of the different companies hereby assigned by way of mortgage to the trustee, except fifty shares of the stock of each of said companies, or so many thereof as may be retained by the Railroad Company to qualify directors in each of said companies, shall, as such stock comes under the control of the Railroad Company from time to time, be forthwith transferred to and new certificates issued in the name of the Railroad Company, which certificates shall be stamped with the words "This certificate is deposited with and held by the trustee pursuant and subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887."

The Railroad Company shall duly execute a transfer endorsed on such certificates in the following form: "For the consideration set forth in the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887, said company does hereby bargain, sell, assign, and transfer unto the trustee of said mortgage for
79 the time being, all the capital stock named in the within certificate, and does hereby constitute and appoint the trustee its true and lawful attorney irrevocable, for and in its name and stead,

but to its use to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like power; provided, however, that the powers hereby granted shall not be exercised by the trustee until after it shall have proceeded to enforce its rights, and those of the bondholders under said mortgage, by foreclosure, entry, or otherwise, according to the terms thereof."

The said certificates so transferred shall be delivered to and deposited with the trustee, but no certificate for the shares of stock represented thereby shall be issued to the trustee until after it shall have proceeded to enforce its rights and those of the bondholders under this mortgage by foreclosure, entry, or otherwise, according to the terms hereof.

The stamping of such certificates shall be entered upon the transfer book and register of each of said companies issuing the same.

The Railroad Company, its successors and assigns, until such proceedings shall have been taken, shall have the right to sell or transfer the shares of stock hereinbefore excepted from assignment to such persons as it shall deem fit, but in trust for and subject to this mortgage, to enable the persons to whom such transfers shall be made to serve as directors in the said companies, respectively, but such transfers shall be of no force and effect after such proceedings shall have been taken. The certificates of stock so sold or transferred shall be stamped as follows: "This certificate is held subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887."

80 The Railroad Company will, upon the request of the trustee, procure the execution of an agreement with the trustee by each of said companies, whereof a majority of the stock is mortgaged, that it will not hereafter authorize or execute any mortgage or incumbrance of or upon any of its property until thirty days after written notice of its intention to authorize and execute the same has been served on the Railroad Company and the trustee, and not then if written objection to such mortgage or incumbrance shall be made and served on such company by either the Railroad Company or the trustee, on the ground that such mortgage or incumbrance will impair the security of these presents.

All dividends on any of the said stocks hereby mortgaged shall belong and be paid to the Railroad Company so long as and whenever it shall be in possession of the Central Railroad of New Jersey, in conformity with the provisions of this mortgage.

No assignment of such dividends by the Railroad Company in advance of their payment shall affect the right of the trustee to receive the same after it shall have proceeded to enforce its rights and those of the bondholders under this mortgage.

There shall be no return, cancellation, or special transfer of the certificates of stock pledged by the "Adjustment mortgage" of the

Railroad Company, dated May 1, 1878, until after the satisfaction of said mortgage.

The assignment of the aforesaid shares of stock shall not prevent the consolidation and merger of any one or more of the companies, the stock of which is hereby mortgaged, with any other or others of said companies or with the Central Railroad Company of New Jersey, or the purchase of the railroad and property of any one
81 or more of said companies by the Central Railroad Company of New Jersey, but such consolidation and merger or purchase may be made under any existing or future laws, anything in this mortgage contained to the contrary notwithstanding.

Upon such consolidation and merger or purchase, the Railroad Company shall duly execute and deliver a supplemental mortgage conveying to the trustee all the railroad and other property so consolidated and merged or purchased, to be held by it under the terms hereof, with like effect as if specifically described herein, and the trustee shall, upon the request of the Railroad Company, deliver up to it all the certificates of stock of the company so consolidated and merged or the railroad of which has been purchased, which may have been deposited under this mortgage.

Sixteenth. All the bonds of this company or other companies hereby assigned by way of mortgage to the trustee, as they come under the control of the Railroad Company from time to time, shall be deposited with the trustee, stamped with the words "This bond is deposited with and held by the trustee pursuant and subject to the terms of the general mortgage of the Central Railroad Company of New Jersey, dated July 1, 1887," and shall remain in its custody and possession; yet so long as no proceedings shall have been taken by the trustee to enforce its rights and those of the bondholders under this mortgage, by foreclosure, entry, or otherwise, according to the terms hereof, the trustee, as the holder of said bonds, shall have no right, against the written objection of the Railroad Company, to do or perform any act or to make or execute any request, requisition, or other instrument which, by the terms of the mortgages securing such bonds the owners thereof shall be entitled to perform, make,
82 or execute, but all the rights of the owners of such bonds may, at the option of the Railroad Company and upon its request, remain with and be exercised by the Railroad Company, its successors and assigns, and the trustee shall at any time and from time to time, on the request of the Railroad Company, make and deliver to the Railroad Company powers of attorney or proxies authorizing and empowering the Railroad Company, its successors and assigns, to do and perform any and all lawful acts and to make or execute all lawful requests, requisitions, or other instruments which the owners of said bonds could do, perform, make, or execute if the said bonds were registered in their name and were in their custody and possession.

So long as and whenever the Railroad Company shall be in possession of the Central Railroad of New Jersey, in conformity with

the provisions of this mortgage, all coupons that may be attached to said bonds, shall, as they fall due, be delivered to the Railroad Company and any interest which may be or become due and payable thereon shall belong and be paid to it; provided however, that coupons now or hereafter in default upon the bonds of the Lehigh and Wilkesbarre Coal Company shall be held by the trustee, subject to the lien of this mortgage, until the obligor shall be ready to pay the same, when they shall be delivered to the Railroad Company for collection as in other cases.

The bonds pledged in the adjustment mortgage of the Railroad Company, dated May 1, 1878, shall not be deposited with the trustee, or stamped pursuant to the terms hereof, until after the satisfaction of said mortgage.

Seventeenth. In case the trustee shall have proceeded to enforce its rights and those of the bondholders under this mortgage,
83 by foreclosure, entry, or otherwise, according to the terms hereof, and such proceedings shall have been discontinued or abandoned, or shall have been determined adversely to the trustee, the Railroad Company shall be restored to the same position and rights which it had as to the stocks and bonds mortgaged hereby before such proceedings were taken, and the trustee shall, upon the written request of the Railroad Company, do, make, execute, acknowledge, and deliver such acts, deeds, instruments, and assurances in the law as may be reasonably advised or required to effectuate such purpose.

Eighteenth. Any or all of the bonds of this company or other companies and any or all the certificates of car trust associations hereby assigned by way of mortgage to the trustee shall, upon the request of the Railroad Company, be surrendered by the trustee for extension, payment, and cancellation, or either, according to such request, and any or all of the mortgages given to secure said bonds may be satisfied, anything herein contained to the contrary notwithstanding, provided, however, that such surrender for cancellation shall not be made in the case of any issue of bonds or certificates all of which have not been deposited with the trustee, except on proof that the security of this mortgage will not be thereby diminished or impaired; and provided further that all moneys received in payment for the bonds of other companies shall be applied in like manner as is prescribed by the twentieth article of this mortgage respecting the proceeds of any part of the mortgaged premises that may be sold.

Nineteenth. The trustee shall certify and deliver to the Railroad Company from time to time on its written request all the bonds secured by this mortgage, except an amount of bonds equal to
84 the par value of the hereinafter named bonds, stocks, and certificates at any time outstanding and not made subject to the lien of this mortgage, which bonds, stocks, and certificates are in-

tended to be either purchased from time to time and made subject to the lien of this mortgage, or to be paid off and cancelled, viz:

Name of securities.	Total par value of amount outstanding.
First mortgage bonds of the C. R. R. Co. of N. J	$5,000,000
Convertible bonds of the C. R. R. Co. of N. J	4,400,000
Consolidated bonds of the C. R. R. Co. of N. J	15,000,000
Adjustment bonds of the C. R. R. Co. of N. J	5,254,000
Convertible debenture bonds of the C. R. R. Co. of New Jersey	3,264,000
Bonds of the Newark & New York R. R. Co	600,000
Bonds of the New Jersey Southern Railway Co	1,590,600
Bonds of the Long Branch & Sea Shore R. R. Co	200,000
Bonds of the Lehigh Coal and Navigation Company	2,310,000
Stock of the New York & Long Branch R. R. Co	500,000
Stock of the South Branch R. R. Co	438,300
Stock of the West End R. R. Co	43,700
Stock of the Newark and New York R. R. Co	87,350
Certificates of the Railroad Car Trust of Phil'adelphia	52,800
Certificates of the New Jersey Car Trust Association (Limited)	50,000
Certificates of the Central New Jersey Car Trust	80,000
Certificates of the Guaran'ee Car Trust	700,000
Certificates of the Central Railroad Company of New Jersey Car Trust	823,000
Total	40,393,750

85 The general mortgage bonds so excepted from certification and delivery shall, nevertheless, be certified by the trustee and delivered to the Railroad Company from time to time upon its written request in exchange for an equal amount of any of the said bonds, stocks, and certificates as they shall be so purchased and made subject to the lien of this mortgage, or as the same shall be paid off and cancelled, or upon deposit with the trustee of moneys sufficient to pay the entire amount due thereon; provided, however, that there shall always remain unissued and uncertified an amount of said general mortgage bonds equal at par to the par value of such of said bonds, stocks, and certificates as have not been either cancelled or deposited with the trustee under the terms of this mortgage, or for the payment of which moneys have not been deposited, as aforesaid.

Twelfth. If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to exchange for other property or to sell any part of the mortgaged premises, it shall be lawful for the trustee, and it is hereby authorized and directed to release such part of said mortgaged premises from the lien and operation of this mortgage, unless within thirty days after notice in writing to be given by the Railroad Company to the trustee, specifying the property intended to be exchanged or sold and the price or other consideration to be received therefor, the trustee shall serve upon the Railroad Company objections thereto in writing, on the ground that such price or other consideration is not a fair and just equivalent for the property to be exchanged or sold. In case of the service of such written objections and continued difference of opinion between the Railroad Company and the trustee as to
86 the adequacy of such price or other consideration, it shall be

lawful for them, and they are hereby authorized and empowered to appoint an impartial arbitrator or arbitrators to determine the adequacy of such price or other consideration, and in case such arbitrator or arbitrators shall determine that such price or other consideration is a fair and just equivalent for the property to be exchanged or sold, the trustee, notwithstanding such written objections, shall execute and deliver such release.

The proceeds of any sale so made shall be applied by the Railroad Company at its option to the improvement of any remaining part of the mortgaged premises or to the purchase of other property, real or personal, or to the purchase of the general mortgage bonds secured hereby, which bonds so purchased shall forthwith be cancelled, and all property so purchased, as also all property that may be acquired in exchange as aforesaid, shall be subject to all the trusts, including that of sale or exchange, hereby declared, and shall be conveyed in mortgage by the Railroad Company to the trustee to be so held.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to lease any part or parts of the mortgaged premises, it shall be lawful for the trustee, and it is hereby authorized and directed to consent to such leases, and to join therein in such manner as to make this mortgage subject thereto, or to execute any agreements that may be necessary to that end, unless within thirty days after notice in writing to be given by the Railroad Company to the trustee, specifying the property intended to be leased, the trustee shall serve upon the Railroad Company objections thereto in writing, upon the ground that such lease will impair the security of this mortgage and the value of the
87 mortgaged premises, in which case like proceedings may be taken as in the case of objections to any proposed sale or exchange with like effect if the arbitrator or arbitrators shall determine that the proposed lease does not impair the security of this mortgage, and the value of the mortgaged premises.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to compromise, adjust, or settle any disputed title or claim to any part of the mortgaged premises, it shall be lawful for the trustee, and it is hereby authorized and directed to release and discharge such part of the mortgaged premises from the lien of this mortgage, unless within thirty days after notice in writing to be given by the Railroad Company to the trustee, the trustee shall serve upon the Railroad Company objections thereto in writing, on the ground that such compromise, adjustment or settlement would impair the security of this mortgage, in which case like proceedings may be taken with like effect as in the case of objections to any proposed lease. Any consideration received upon such compromise, adjustment or settlement shall be applied in like manner as the consideration received upon any exchange or sale.

If the Railroad Company, its successors or assigns, shall at any time during the continuance of these presents desire to make any change in the location of any of the tracks or of any of the station

houses, or other buildings or structures upon any part of the mortgaged premises, it shall be lawful for it so to do, and the trustee, upon conveyance to it under the terms of this mortgage of such new tracks, station houses, buildings or other structures, and the premises on which the same may be erected, shall, at the request of the Broadila Company, release the former tracks, station houses,
88 buildings and other structures and the premises on which they were erected, from the lien of this mortgage, and execute and deliver any and all instruments necessary and proper to effect such purpose.

Twenty-first. This mortgage shall be a continuing lien to secure the full and final payment of all bonds to be issued from time to time as herein provided, not exceeding $50,000,000 in amount, irrespective of the date of issue, rate of interest or form of bond, or whether payable in gold coin of the United States or sterling money of Great Britain; and the certificate of the trustee, substantially in the form provided herein, on any bond issued under the corporate seal of the Railroad Company upon the security of this mortgage, shall be conclusive evidence that the lawful holder of the said bond is entitled to share in the security of this mortgage.

Twenty-second. It shall be lawful for the Railroad Company, anything herein contained to the contrary notwithstanding, to cancel any lease included under this mortgage whenever all the stock of the lessor company shall be deposited with the trustee under the terms hereof, and to agree to any modification or change in the terms of any contract or lease included herein, whenever such modification or change shall, in the opinion of its board of directors, be advantageous to its interests; and such contract or lease so modified shall be subject to this mortgage with like effect as if the change or modification had been made prior to the execution hereof.

Twenty-third. It is hereby mutually covenanted and agreed between the parties hereto, that the trustee need not take any
89 action which, by the terms of this mortgage, is made obligatory upon it in the execution of the trusts hereby created, if, in its opinion, such action will be likely to involve it in personal expense or liability, unless one or more of said bondholders shall, as often as required by the trustee, give it reasonable indemnity against the same, anything herein to the contrary notwithstanding; that the trustee, and its agents, attorneys and counsel, shall be entitled to a reasonable compensation for all services properly rendered in pursuance of the provisions of this mortgage, or in connection with the trusts hereby created, to be paid by the Railroad Company, or out of the income or proceeds of the mortgaged property; and that the trustee may resign and discharge itself of the trust hereby created, by notice in writing to the Railroad Company, to be given at least three months before such resignation shall take effect, or within such shorter time as shall be accepted by the Railroad Company as adequate.

The said trustee may be removed by a vote of the majority in interest of the holders of all the aforesaid bonds at any time outstanding voting, in person or by proxy, the said vote being had at a meeting duly held of the said bondholders, to be specially called for this purpose. In case at any time hereafter the said trustee, or any trustee hereafter appointed, shall resign, or be removed as herein provided, or by a court of competent jurisdiction, or otherwise, or shall become incapable or unfit to act in the said trust, a successor or successors to such trustee shall be appointed by the holders for the time being of a majority in amount of the said bonds then outstanding by instrument in writing signed and proved as herein provided, or by the vote of a meeting duly held of the holders of the said bonds. Provided, nevertheless, and it is hereby agreed and
90 declared, that in case it shall at any time hereafter prove impracticable, after reasonable exertions, to appoint in the manner hereinbefore provided a successor in the event of a vacancy which may have happened in said trust, application in behalf of all the holders of the bonds secured hereby may be made, by the holders of one-eighth of the aggregate amount of bonds outstanding, to any court of competent jurisdiction in which any part of the aforesaid property may be situated, for the appointment of a new trustee.

The trustee so appointed shall thereupon become vested with all the estate, property, rights, powers, and trusts granted to or conferred upon the party of the second part by these presents, and all the rights and powers requisite to enable it to execute the purposes of this trust, without any further assurance or conveyance, and with like effect as if named as trustee herein, and the trustee so resigning, or being removed, shall, on the written request of the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee, upon the trusts herein expressed, all the property, privileges, rights, and franchises which may at that time be held upon the said trusts.

Twenty-fourth. The Railroad Company shall and will at any time, upon the request of the trustee, do, make, execute, acknowledge, and deliver all such further acts, deeds, and assurances in the law as may reasonably be advised or required for effectuating the intention of this mortgage, and for the better assuring and confirming unto the trustee and its successors in the trust hereby created, upon the trusts and for the purposes herein expressed, all and singular the railroads, equipment, and other property, rights and franchises hereby
91 conveyed or intended so to be, whether now owned or possessed, or hereafter acquired by the Railroad Company; and shall and will deliver to the trustee certificates representing all the stock of the different companies, stock of which is included in this mortgage, which may from time to time hereafter be acquired and owned by it, to be held by the trustee under the terms hereof; and shall and will execute and deliver with these presents, and from time to time hereafter when occasion shall require, and when requested by the trustee, such bills of sale and transfers, and other documents, in due form of law, as may be necessary and proper under the laws of

the United States, to vest in the trustee all and every of the tugboats, ferryboats, floats, barges, and other floating equipment hereby mortgaged, or intended so to be, to the end that the title of said party of the second part may be duly registered and recorded according to the laws of the United States.

Twenty-fifth. The word "trustee," as used in this mortgage, shall be held and construed to mean the trustee, party of the second part, or its successor or successors for the time being, and such successor or successors shall be vested with, and be entitled to exercise, all the estate, property, rights, powers, and trusts hereby granted to or conferred upon the party hereto of the second part.

Twenty-sixth. Upon payment of the principal and interest of all the general mortgage bonds secured hereby or upon deposit with or to the satisfaction of the trustee of the entire amount of such principal and interest remaining due, the trustee shall forthwith enter satisfaction of this mortgage upon the records, and transfer and deliver up all bonds and stocks deposited with it pursuant to
92 the terms hereof, and shall do, make, execute, and deliver such deeds, acts, instruments, or assurances as may, in the opinion of the counsel of the Railroad Company, be necessary to vest all the mortgaged premises and property in the Railroad Company as of its former estate therein.

In witness whereof, the said The Central Railroad Company of New Jersey has caused to be hereunto affixed its common or corporate seal, and the president of said company, by virtue of the authority vested in him, has hereunto affixed his signature, and the Secretary of the said company has duly attested the execution hereof in duplicate, this the day and year first above written.

[Seal C. R. R. Co. of N. J.]

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
By J. ROGERS MAXWELL, *President.*

Attest:

SAM'L KNOX, *Secretary.*

Signed, sealed, and delivered in the presence of—

ALEX. T. MCGILL, Jr.,
JOHN L. CONOVER.

93 The Central Trust Company of New York, trustee named in the foregoing mortgage or deed of trust, do hereby accept the trusts therein contained, and do hereby covenant and agree to perform the same.

In witness whereof, the said company has caused its corporate seal to be hereunto affixed, duly attested, the day and year in said mortgage first written.

[Seal C. T. Co. of N. Y.]

THE CENTRAL TRUST COMPANY OF NEW YORK,
By G. SHERMAN, *Vice-President.*

Attest:

C. H. P. BABCOCK, *Secretary.*

94 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, Alexander T. McGill, junior, chancellor of the State of New Jersey, personally appeared Samuel Knox, of full age, who being by me duly sworn according to law, on his oath, saith: That he is secretary of the Central Railroad Company of New Jersey; that J. Rogers Maxwell is president of the same; that the seal affixed to the foregoing mortgage is the common seal of the company, and that the said J. Rogers Maxwell, by authority of a resolution of the board of directors of said company as such president, signed said mortgage and affixed said seal thereto, and delivered the said mortgage as the voluntary act and deed of the said corporation for the uses and purposes therein expressed, and that he, the said Samuel Knox, did at the execution thereof witness and attest the same and subscribe his name as a witness thereto.

SAM'L KNOX.

Sworn and subscribed at Jersey City, New Jersey, before me, the date aforesaid, which to me is satisfactory proof of the due execution of said mortgage.

ALEX. T. MCGILL, JR.,
Chancellor of the State of New Jersey.

95 STATE OF NEW JERSEY,
County of Hudson, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, George W. Cassedy, a commissioner of the State of Pennsylvania, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and recorded therein, personally appeared the above-named J. Rogers Maxwell, president of the above-named corporation, who, being duly sworn according to law, on his oath, saith: That he was personally present at the execution of the above-written instrument, and saw the common seal of the said The Central Railroad Company of New Jersey duly affixed thereto; that the seal so affixed is the common seal of the said The Central Railroad Company of New Jersey; that the above-written mortgage was duly sealed and delivered by him, as and for the act and deed of the said corporation of The Central Railroad Company of New Jersey, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to said mortgage as the president of said corporation, in attestation of the due execution and delivery of said mortgage, is of this deponent's proper handwriting.

J. ROGERS MAXWELL.

Sworn and subscribed to before me at Jersey City, New Jersey, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Commissioner's seal.] GEO. W. CASSEDY,
Commissioner for Pennsylvania in New Jersey.

96 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me personally came Samuel Knox, secretary of the Central Railroad Company of New Jersey, with whom I am personally acquainted, who being duly sworn according to law, saith: That he resides in the city of Elizabeth, New Jersey; that he was at the date of the foregoing mortgage, and is now, secretary of the Central Railroad Company of New Jersey; that he knows the common seal of said Railroad Company; that the seal affixed to the above mortgage is the common seal of said Railroad Company; that the seal affixed to the above mortgage was so affixed by order of the board of directors of said Railroad Company; that he signed his name thereto as secretary by the like order of said board of directors; that he is well acquainted with J. Rogers Maxwell, and knows him to be the president of said Railroad Company; that the signature of said J. Rogers Maxwell subscribed to said mortgage is in the genuine handwriting of said J. Rogers Maxwell, and was thereto subscribed by order of the board of directors of said Railroad Company, in his presence.

SAM'L KNOX.

Sworn and subscribed before me, at the city of New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Notarial seal.] ARCHIBALD C. WEEKS,
Notary Public, Kings County.

Certificate filed in New York County.

97 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, a master of the Court of Chancery of the State of New Jersey, personally appeared C. H. P. Babcock, of full age, who, being by me duly sworn according to law, on his oath, saith: That he is secretary of the Central Trust Company; that George Sherman is vice-president of the same; that the seal affixed to the foregoing acceptance of trust is the common seal of the company, and that the said George Sherman, as such vice-president, signed said acceptance of trust and affixed said seal thereto, and delivered the same as the voluntary act and deed of the said corporation for the uses and purposes therein

expressed, and that he, the said C. H. P. Babcock, did at the execution thereof witness and attest the same and subscribe his name as a witness thereto.

C. H. P. BABCOCK.

Sworn and subscribed at the city of New York, before me, the date aforesaid, which to me is satisfactory proof of the due execution of said acceptance of trust.

JOHN L. CONOVER,
Master in Chancery of New Jersey.

98 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me, Charles Edgar Mills, a commissioner of the State of Pennsylvania, duly appointed and qualified according to the laws thereof to take acknowledgments, etc., to be used and recorded therein, personally appeared the above-named George Sherman, vice-president of the above-named corporation, who, being duly sworn according to law, on his oath, saith: That he was personally present at the execution of the above-written instrument, and saw the common seal of the said The Central Trust Company duly affixed thereto; that the seal so affixed is the common seal of the said The Central Trust Company; that the above-written acceptance of trust was duly sealed and delivered by him, as and for the act and deed of the said corporation of The Central Trust Company, for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to said mortgage as the vice-president of said corporation, in attestation of the due execution and delivery of said acceptance of trust, is of this deponent's proper handwriting.

G. SHERMAN.

Sworn and subscribed to before me at New York City, New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

[Commissioner's seal.] CHARLES EDGAR MILLS,
Commissioner for Pennsylvania in New York.

99 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered, that on this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-seven, before me personally came C. H. P. Babcock, secretary of the Central Trust Company, with whom I am personally acquainted, who, being duly sworn according to law, saith: That he resides in the city of New York; that he was, at the date of the foregoing acceptance of trust, and is now, secretary of the Central Trust Company; that he knows the common seal of said Trust Company; that the seal affixed to the above acceptance of trust is the common seal of said Trust Company; that he is well acquainted with George Sherman, and

knows him to be the vice-president of said Trust Company; that the signature of said George Sherman subscribed to said acceptance of trust is in the genuine handwriting of said George Sherman and was thereto subscribed in his presence.

C. H. P. BABCOCK.

Sworn and subscribed before me, at the city of New York, the day and year aforesaid.

In witness whereof I have hereto set my hand and official seal.

ARCHIBALD C. WEEKS, [Notarial seal.]
Notary Public, Kings County.

Certificate filed in New York County.

100 Recorded in the office of the register of the city and county of New York, in liber 2223 of mortgages, page 50, on the 28 day of Sept., A. D. 1887, at 3 o'clock p. m. Min.

Witness my hand and official seal.

[SEAL.] JAMES J. SLEVIN, *Register.*

Received in the office of the register of the county of Hudson, N. J., at 12 o'clk., Sept. 19, 1887, a. m., and recorded in book 200 of mortgages for said county on page 223, &c.

[SEAL.] GEO. B. FIELDER, *Register.*

Received in the office of the register of the county of Essex, N. J., on the 19th day of September, A. D. 1887, at 4 o'clock p. m., and recorded in book G 9 of mortgages for said county on pages 567, &c.

[SEAL.] EMIL TOERING, *Register.*

Received in the clerk's office of the county of Union, N. J., on the 20 day of Sept., A. D. 1887, at 11.30 o'clock in the forenoon, and recorded in book 76 of mortgages for said county on pages 1 to 61.

[SEAL.] JNO. L. CROWELL, *Clerk.*

Received in Middlesex County clerk's office on the 20th day of September, A. D. 1887, at 3.45 p. m., and recorded in book 102 of mortgages, pages 7, &c.

[SEAL.] C. M. SLACK, *Clk.*

101 Received in Somerset County clerk's office on the 21st day of September, A. D. 1887, and recorded in book F No. 3 of mortgages for said county, on pages 149, &c.

[SEAL.] WM. A. SCHOMP, *Clerk.*

Received in the clerk's office of the county of Hunterdon, N. J., on the 21st day of September, A. D. 1887, at 3.45 p. m., and recorded in vol. 65 of mortgages for said county, on page 33, &c.

[SEAL.] PETER VOORHEES, *Clerk.*

Received in Warren County clerk's office on the 22d day of September, A. D. 1887, and recorded in book of mortgages, vol. 48, page one, &c., for said county.

[SEAL.] THEO. P. HOPLER, *Clk.*

Received in the office of the secretary of state of the State of New Jersey, on the twenty-second day of September, A. D. 1887, at 3 o'clock p. m., and recorded in book G of corporations, page 82, &c.

[SEAL.] HENRY C. KELSEY, *Secretary of State.*

Received September 22, 1887, at six o'clock p. m., and recorded in Monmouth County clerk's office at Freehold, N. J., in book 125 of mortgages for said county, on page 223.

[SEAL.] JAMES H. PATTERSON, *Clk.*

102 Received in the clerk's office of the county of Morris, New Jersey, on the 23d day of September, A. D. 1887, and recorded in book A 4 of mortgages for said county, on pages 475, &c.

[SEAL.] MELVIN S. CONDIT, *Clerk.*

Received in the clerk's office of the county of Sussex, New Jersey, on the 23d day of September, A. D. 1887, at 3.20 o'clock p. m., and recorded in book H 3 of mortgages, on page 1, &c.

[SEAL.] JOHN H. WELDEN, *Clerk.*

LACKAWANNA COUNTY, *ss:*

Recorded in the office for recording deeds, &c., in and for said county, in mortgage book number 18, page 353, &c.

Witness my hand and seal of office this 24th day of September, 1887.

[SEAL.] ELIEZER D. JENKINS, *Recorder.*

LUZERNE COUNTY, *ss:*

Rec'd in the recorder's office in and for said county, at 5.25 p. m., this 24th September, 1887, recorded in mortgage book No. 54, page 269, &c.

In testimony whereof I have hereunto set my hand and affixed the seal of the said recorder's office the day and year above written.

[SEAL.] JOS. J. MCGUITY, *Recorder.*

103 STATE OF PENNSYLVANIA,
Carbon County, ss:

Recorded in the office for recording of deeds at Mauch Chunk, in and for the said county and State, in mortgage book No. 14, page 12.

Witness my hand and seal of office this 24th day of September, 1887.

[SEAL.] JAMES H. HANDWERK,
Recorder of Deeds, &c.

STATE OF PENNSYLVANIA,
County of Schuylkill, ss:

Recorded on this 26th day of Sept., A. D. 1887, in the office of the recorder of deeds in and for said county, in mortgage book No. 4 O, page 348, &c.

Witness my hand and seal of office the day and year aforesaid.

[SEAL.] A. J. SHORTALL, *Recorder.*

LEHIGH COUNTY, *ss:*

Recorded in the office for the recording of deeds, &c., in and for said county, in mortgage book, volume No. 44, page 1, &c.

Witness my hand and seal of office this 27th day of Sept., anno Domini 1887, at 8 a. m.

[SEAL.] HENRY J. GACKENBACH, *Recorder.*

Recorded in recorder's office, Easton, Pa., September 27, 1887, at 11.25 a. m., in mortgage book No. 57, page 334, &c.

Witness my hand & seal.

[SEAL.] GEO. R. HESS, *Recorder.*

104 September 27, 1887, received in Ocean County clerk's office at Tom's River, at five-thirty o'clock p. m., and recorded in book No. 43 of mortgages, page 148.

[SEAL.] WM. I. JAMES, *Clerk.*

Received October 3rd, 1887, at 10.35 a. m., and recorded in the clerk's office of the county of Burlington at Mount Holly, N. J., in book K 3 of mortgages, folio 570.

[SEAL.] LEVI FRENCH, *Clerk.*

Received October 3rd, 1887, at 2.10 p. m., and recorded in the register of deeds office of Camden County at Camden, New Jersey, in mortgage book No. 43, p. 301, &c.

[SEAL.] ROBERT F. S. HEATH, *Register.*

Received October 3rd, 1887, and recorded in the clerk's office of Gloucester County at Woodbury, in book A3 of mortgages, page 210.

[SEAL.] H. C. LOUDENSLAGER, *Clerk,*
Per B.

Received Oct. 4, 1887, and recorded in Salem County clerk's office, in book No. 9 of mortgages, folio 383, &c.

[SEAL.] C. D. COLE, *Clerk.*

105 STATE OF NEW JERSEY,
Cumberland County, ss:

Received October 4, 1887, and recorded in the clerk's office of the county of Cumberland, and recorded in book No. 40 of mortgages, folio 264, &c.

[SEAL.] F. S. GODFREY, *Clerk.*

STATE OF NEW JERSEY,
Atlantic County, ss:

Received Oct. 6, 1887, and recorded in the clerk's office of the county of Atlantic, and recorded in book No. 20 of mortgages, folio 194.

[SEAL.] LEWIS EVANS, *Clerk.*

107–108–109 *Agreement between the Lehigh Coal and Navigation Co. and the Central Railroad Company of New Jersey, dated June 28, 1887.*

110–111 This indenture, made the twenty-eighth day of June, A. D. 1887, between the Lehigh Coal and Navigation Com-

pany of the first part, and the Central Railroad Company of New Jersey, of the second part.

Whereas by deed bearing date March 31, 1871, a copy of which is hereto annexed marked "Exhibit A," a contract was made between the parties to this indenture, among other things, for the lease of the Lehigh and Susquehanna Railroad and branches to the parties of the second part and for the working of the said railroad by the party of the second part in connection with its railroad in the State of New Jersey; and

Whereas the party of the second part in the year 1883, desiring to transfer that contract to the Philadelphia and Reading Railroad Company, a deed bearing date May 29, 1883, a copy of which is hereto annexed marked "Exhibit B," was executed between the parties to this indenture and the Philadelphia and Reading Railroad Company, by which deed the contract and lease then subsisting under the deed of March 31, 1871, was converted into a contract and lease defined by the provisions of the deed of March 31, 1871, as the same were modified by the deed of May 29, 1883, and thereupon by another deed of the same date the contract and lease were transferred by the Central Railroad Company of New Jersey to the Philadelphia and Reading Railroad Company; and

112 Whereas on the first day of January, 1887, the parties of the second part under and by virtue of proceedings in the Circuit Court of the United States took possession of the Lehigh and Susquehanna Railroad and branches, and assumed the control and management of the said railroad and of the property which prior to that time had been held by the Philadelphia and Reading Railroad Company under the contract of March 31, 1871, as modified by that of May 29, 1883; and

Whereas proceedings have been commenced in the Circuit Court of the United States for the Eastern District of Pennsylvania, to declare that the right of the party of the second part to the said contracts and to the lease and control of the Lehigh and Susquehanna Railroad and branches, has ceased and determined; and alternatively to ascertain and declare the terms of the lease and contract under which the said railroad is and shall be held and managed; and

Whereas it is deemed advantageous to both the parties to this indenture that the Lehigh and Susquehanna Railroad and branches should be controlled and worked by the Central Railroad Company of New Jersey, in connection with its railroad from Phillipsburg to tidewater, if the terms and conditions of the contract under which the same is to be done are satisfactory to both parties, and if they can agree on the same:

It is therefore mutually covenanted and agreed, that on and after January 1, 1887, the contract, grant, or agreement by which the Central Railroad Company of New Jersey holds, or claims or can

113 hold or claim any right to the Lehigh and Susquehanna Railroad, or to the control or management of the same, or to any property described in or to any rights created or granted by the deed

of March 31, 1871, or by the deed of May 29, 1883, is set forth and contained in and is defined by the two written instruments above mentioned; and that the terms, conditions, covenants, and agreements of every kind set forth or contained in the deed of May 29, 1883, wherever the same differ from the terms, conditions, covenants, and agreements set forth and contained in the deed of March 31, 1871, shall be taken as the terms, conditions, covenants, and agreements of the contract and lease between the parties to this indenture subsisting on and after January 1, 1887. And all covenants or agreements which by the deed of May 29, 1883, were made on the part of the Philadelphia and Reading Railroad Company, are to be deemed to have been made by and to be performable by the Central Railroad Company of New Jersey, and all conditions, duties, or obligations assumed by the Philadelphia and Reading Railroad Company or imposed on their estate or property, and all rights accruing to that company by the deed of May 29, 1883, are to be deemed to be assumed by and to accrue to the Central Railroad Company of New Jersey, and to be imposed on their estate and right in the premises, contract, and property derived from the Lehigh Coal and Navigation Company; and all rights conferred on the Lehigh Coal and Navigation Company, and all duties and obligations accruing to them, and all conditions and obligations imposed on them, are to be deemed and taken to be as they are defined in the deed of May 29, 1883, when the terms of that instrument differ from those of the deed of March 31, 1871, excepting only that such of the provisions of the third covenant of the deed of May 29, 1883, as relate to the development of the Lehigh and Wilkesbarre Coal Company's lands, and to the mode of com-
114 pensation for a deficiency in the stipulated production of those lands, and to the causing of the production of the said lands to pass to or toward its market over the lines of the Lehigh and Susquehanna Railroad and branches, shall be so modified as to read as follows:

"will cause the development of the anthracite lands that may be owned, leased, or controlled by the Lehigh and Wilkesbarre Coal Company and the Central Railroad Company of New Jersey to proceed pari passu with the general development of the anthracite region of Pennsylvania, and in such manner that the said lands shall produce at least six per cent of the total production of the anthracite region in each year till the year ending December 31, 1896, and thereafter shall produce in each year at least five and one-half per cent of the total production of the anthracite region so long as it shall be possible for them to produce at that rate.

"If the Central Railroad Company of New Jersey and the Lehigh Coal and Navigation Company should differ as to the possibility of maintaining the production of the said lands at the stipulated amount, the question of possibility shall be referred to arbitrators, one to be appointed by the Lehigh Coal and Navigation Company and one by the Central Railroad Company of New Jersey, and the two thus

chosen shall select a third, and their decision, or that of a majority of them, shall be final and conclusive and binding on the parties hereto.

"If in any year prior to the time at which the Central Railroad Company of New Jersey shall be entitled to claim that the anthracite lands aforesaid can no longer produce anthracite in the stipulated ratio, the production of the said lands shall fall below the
115 stipulated amount, the Central Railroad Company of New Jersey shall and will use all means that shall be reasonably possible to make up the deficiency in the production of that year by a corresponding excess of production in the next year over the stipulated production for the said next year; and if the said deficiency of production of the preceding year shall not be so compensated, then the Central Railroad Company of New Jersey shall and will pay to the Lehigh Coal and Navigation Company the sum of money which the Lehigh Coal and Navigation Company would have received from the business of the said preceding year if the guaranteed production of the anthracite lands aforesaid had been made; excepting only that if in any such year in which the Central Railroad Company of New Jersey shall be bound as aforesaid to make up the deficiency of production of the preceding year, the failure to produce sufficient anthracite to make up such deficiency from the anthracite lands aforesaid shall have been caused by the occurrence in such year or in the preceding year of a general strike of workmen, or an extensive fire in the collieries, or an extensive flooding of the collieries, and not by the inability of the collieries to produce the required amount of coal under ordinary circumstances, the Central Railroad Company of New Jersey shall for those years be relieved of its obligation to pay to the Lehigh Coal and Navigation Company the sum of money which the Lehigh Coal and Navigation Company would have received from the business of the said years if the guaranteed production of anthracite had been made; and the Central Railroad Company of New Jersey shall and will cause the production of the anthracite lands aforesaid to pass over the lines of the Lehigh and Susquehanna Railroad
116 and branches to markets that can be reached by way of the said railroad lines, and as far as it can be carried toward such markets over said lines, from which lines it shall not be diverted except for an equivalent that shall be satisfactory to the Lehigh Coal and Navigation Company, and that shall have been accepted by them in writing before such diversion shall be made, the Lehigh Coal and Navigation Company agreeing on its part to consent to such diversion when it shall clearly appear that the interests of the Lehigh and Susquehanna Railroad and branches will be thereby promoted," and

Whereas it is important for the interests of both the parties hereto (as tending to secure enough business for the Lehigh and Susquehanna Railroad and branches to enable the Central Railroad Company of New Jersey to earn sufficient revenues on the Lehigh and Susquehanna Railroad and branches to pay the stipulated rental) that so much as possible of the coal product of the Lehigh Coal and

Navigation Company's lands shall be sent to market over the lines of the Lehigh and Susquehanna Railroad and branches and the Central Railroad of New Jersey, it is agreed between the parties hereto that the proviso in the first of the covenants of the party of the first part in the agreement of March 31, 1871, shall be changed so as to read as follows:

"Provided that one-fourth and no more of the coal to be mined annually by the Lehigh Coal and Navigation Company from lands owned, leased, or controlled by it may be sent to market over railroad lines other than the Lehigh and Susquehanna Railroad and branches in case that by so doing the Lehigh Coal and Navigation Company can realize a larger price or profit than it might have realized
117 from the price at the mines together with its proportion of the freight earnings on such coal on the Lehigh and Susquehanna Railroad and branches if it had been shipped over that railroad; but the Central Railroad Company of New Jersey shall have the option in such cases of buying such coal of the Lehigh Coal and Navigation Company at its mines, paying therefor a price which added to the proportion of the freight earnings on such coal accruing to the Lehigh Coal and Navigation Company shall not be less than that which the Lehigh Coal and Navigation Company would have realized if its coal had been shipped over other lines of railroad. But nothing in this proviso shall be held to limit the shipment of coal by the Lehigh Coal and Navigation Company over the Lehigh and Hudson River Railway to points in the interior of New England, except that the amount of coal shipped by the Lehigh Coal and Navigation Company over the Lehigh and Hudson River Valley Railway, added to the amount that may be sent to market by railroad lines other than the Lehigh and Susquehanna Railroad and branches, shall not in any year exceed twenty-five per cent of the total production of its mines," and

Whereas it is important for the interests of both the parties hereto as tending to the development of the business of the Lehigh and Susquehanna Railroad and branches that an independent connection with the city of Scranton and with the railroads centering there should be secured for the said railroad, it is agreed between the parties hereto that the Lehigh Coal and Navigation Company shall assign to the Central Railroad Company of New Jersey the contract with the Delaware and Hudson Canal Company of January 27, 1887, a copy of which is hereto annexed marked "Exhibit C," under
118 which it has the right to the unrestricted use of the Delaware and Hudson Canal Company's railroad between Union Junction and Minooka Junction, and shall procure a lease to the Central Railroad Company of New Jersey of the railroad which the Wilkesbarre and Scranton Railway Company is building from Minooka Junction to Scranton; and that the Central Railroad Company of New Jersey shall assume all the duties to the Delaware and Hudson Canal Company which under the said agreement of January 27, 1887, were assumed by the Lehigh Coal and Navigation Company, and shall lease the railroad of the Wilkesbarre and Scranton Railway

Company upon terms which shall be generally similar to those of the existing lease of the Lehigh and Susquehanna Railroad and branches, except that the annual rental shall be fixed at the rate of six per cent on the cost of the Wilkesbarre and Scranton Railway as the same shall from time to time appear on the books of the said Railway Company, the Central Railroad Company of New Jersey assuming and paying all taxes that may by any lawful authority be assessed on the property of the Wilkesbarre and Scranton Railway Company, and on the rent or revenue derived by the Lehigh Coal and Navigation Company from said lease, so that the Lehigh Coal and Navigation Company shall receive the rent of six per cent on the cost of the Wilkesbarre and Scranton Railway free of all charges whatever; the lease of the Wilkesbarre and Scranton Railway and the assignment of the contract with the Delaware and Hudson Canal Company being terminable by the party of the first part whenever the lease of the Lehigh and Susquehanna Railroad and branches shall terminate; and that the Central Railroad Company of New Jersey shall operate in connection with the Lehigh and Susquehanna Railroad, the aforesaid roads connecting the Lehigh and Susque-
119 hanna Railroad with the city of Scranton and with the railroads centering there; and

Whereas it has been the purpose of the agreements heretofore made between the parties hereto, as is plainly declared in the deed of March 31, 1871, and elsewhere, that for the public convenience and accommodation and for the interest of the parties hereto, the railroads of the parties hereto, forming a continuous line of railroad from the Wyoming and Lehigh coal fields of Pennsylvania to the waters of the Hudson River at Jersey City, should be worked as one line and under one direction, it is agreed between the parties hereto that if at any time it shall be necessary for the purpose of maintaining the continuity of the said line of railroad and the unity of its management that the Lehigh and Susquehanna Railroad and branches should be operated by the Lehigh Coal and Navigation Company, then the Central Railroad Company of New Jersey shall and will request the Lehigh Coal and Navigation Company to operate the Lehigh and Susquehanna Railroad and branches and the Lehigh Coal and Navigation Company shall accede to the request and shall operate the Lehigh and Susquehanna Railroad and branches for the account of the Central Railroad Company of New Jersey and at its charge and risk so long as it may remain necessary so to do in order to carry out the purpose of the existing agreements. In that event the Central Railroad Company of New Jersey shall furnish the equipment required, and shall in all other respects carry out the provisions of this agreement and of the deeds of March 31, 1871, and of May 29, 1883, the only change contemplated in the duties of the Central Railroad Company of New Jersey being that in the operation of the Lehigh and Susquehanna Railroad and branches it
120 shall act through the Lehigh Coal and Navigation Company instead of through its own officers. And it is further agreed

that when in the opinion of the Central Railroad Company of New Jersey there shall be no longer any necessity for the purposes hereinbefore set forth that the Lehigh Coal and Navigation Company shall continue to operate the Lehigh and Susquehanna Railroad and branches, then the Lehigh Coal and Navigation Company shall surrender to the Central Railroad Company of New Jersey possession of the Lehigh and Susquehanna Railroad and branches and of the equipment belonging to the Central Railroad Company of New Jersey, and the Central Railroad Company of New Jersey shall assume and shall continue the operation of the Lehigh and Susquehanna Railroad and branches under the deeds of March 31, 1871, and of May 29, 1883, and this agreement.

The parties hereto respectively agree that the Central Railroad Company of New Jersey shall and will on or before the first day of January, 1888, deposit with the Fidelity Insurance Trust and Safe Deposit Company of Philadelphia two millions three hundred and ten thousand dollars of the five per cent bonds to be secured by the proposed general mortgage of the Central Railroad Company of New Jersey, and that these bonds shall be pledged for the payment at maturity of two millions three hundred and ten thousand dollars of the gold loan of the Lehigh Coal and Navigation Company falling due December 15, 1897, the payment of the principal and interest on which amount was assumed by the Central Railroad Company of New Jersey in the second of the covenants of the party of the second part in the agreement of March 31, 1871, these bonds being an additional security to that of the equipment which by the agree-
121 ment just recited is charged with the payment of the above recited sum; and this being done, that the Lehigh Coal and Navigation Company shall and will on or before the first day of March, 1888, pay to the Central Railroad Company of New Jersey, in cash, such sum as may then stand to the credit of the Central Railroad Company of New Jersey on the books of the Lehigh Coal and Navigation Company for expenditures made on the Lehigh and Susquehanna Railroad and branches under the provisions of the first of the mutual covenants of the agreement of March 31, 1871, and the Lehigh Coal and Navigation Company shall and will thereafter pay the Central Railroad Company of New Jersey in cash for all expenditures that may be made under the provisions of the first of the mutual covenants of the agreement of March 31, 1871, as aforesaid, within twelve months from the end of the year in which such expenditures shall have been made; provided, that the Central Railroad Company of New Jersey shall not, at the time when such payments may become due, be in default under the provisions of the agreement of March 31, 1871, or of the agreement of May 29, 1883, or of this agreement.

The parties hereto agree that in case of any breach of covenant or contract by the Central Railroad Company of New Jersey, if the same shall not be fully compensated within a reasonable time, the party of the first part may at its option declare the deed of March 31,

1871, and the deed of May 29, 1883, and this agreement to be determined, and may exercise all the remedies for enforcing its rights and for the possession of the demised property as the same are conferred by the deed of May 29, 1883.

The parties hereto agree that if any one claiming under the Central Railroad Company of New Jersey, by virtue of any mort-
122 gage or prior grant or agreement, shall at any time set up or pretend that he is entitled to any property or contract or to any benefit or interest in any property which is the subject of the deed of March 31, 1871, or of the deed of May 29, 1883, or of this agreement, but is not bound by the covenants in the deed of May 29, 1883, or by the terms of this agreement, nothing herein contained or which may be done under this agreement shall in any manner affect the right of the Lehigh Coal and Navigation Company to set up any matters in avoidance of that claim which it might do if this deed had never been executed nor the possession and control of the Lehigh and Susquehanna Railroad and branches enjoyed by the Central Railroad Company of New Jersey or acquiesced in by the Lehigh Coal and Navigation Company after January 1, 1887.

And the parties hereto agree that in case of any difference of opinion between them in relation to any of the provisions of this agreement which may be proper subjects of arbitration, the matters in dispute shall be referred to arbitrators, one to be appointed by the Lehigh Coal and Navigation Company and one by the Central Railroad Company of New Jersey, and the two thus chosen shall select a third, and their decision or that of the majority of them, shall be final and conclusive.

This agreement shall be binding upon the parties hereto during the continuance of the estate granted and the contract made by the deeds of March 31, 1871, and of May 29, 1883, and shall, together with the said deeds, constitute one contract between the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey, but all the rights and duties created by this agreement or under its provisions shall absolutely cease and determine whenever those
123 deeds shall cease and determine for any consideration, whether by limitation or on account of the act or omission of the Central Railroad Company of New Jersey.

In witness whereof, the parties hereto have caused their corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

By order of the board of managers of the Lehigh Coal & Navigation Co.

J. S. HARRIS, *President.*

Attest:
[Seal L. C. & N. Co.] S. SHEPHERD, *Secretary.*

THE CENTRAL R. R. CO. OF NEW JERSEY,
J. R. MAXWELL, *Pt.*

Attest:
[Seal C. R. R. Co. of N. J.] SAML. KNOX, *Sec'y.*

124 STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Be it remembered that on this thirteenth day of July, A. D. one thousand eight hundred and eighty-seven, before me, the subscriber, a notary public in and for said city, personally came and appeared S. Shepherd, esquire, secretary of the foregoing named corporation, the Lehigh Coal and Navigation Company, who, being duly sworn according to law, deposes and says, that he was personally present at the execution of the foregoing indenture, and saw Joseph S. Harris, esquire, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of the said company; and that the name of this deponent subscribed to the said indenture, as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

S. SHEPHERD.

Sworn to and subscribed before me, this the day and year first aforesaid, at Philadelphia.

Witness my hand and seal.

[Notarial seal.] WM. C. ALDERSON,
Notary Public.

125 STATE OF NEW YORK,
City and County of New York, ss.:

Be it remembered, that on this eleventh day of July, A. D. one thousand eight hundred and eighty-seven, before me, the subscriber, a commissioner for the State of Pennsylvania, resident in the State of New York, duly authorized to take the acknowledgment and proof of deeds, personally came and appeared Samuel Knox, esquire, secretary of the foregoing named corporation, the Central Railroad Company of New Jersey, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the foregoing indenture, and saw J. Rogers Maxwell, esquire, president of the said corporation, affix the seal of the said company to the said indenture and deliver the same as the act and deed of the said company; and that the name of this deponent subscribed to the said indenture, as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

SAML. KNOX.

Sworn to and subscribed before me, this the day and year aforesaid, at New York.

Witness my hand and seal.

[Commissioner's seal.] CHARLES EDGAR MILLS,
A Commissioner for Pennsylvania, in New York,
No. 115 Broadway, N. Y. City.

126 "Exhibit A."

Articles of agreement, made this thirty-first day of March, A. D. 1871, between the Lehigh Coal and Navigation Company, a corpora-

tion created by and existing under the laws of Pennsylvania, parties of the first part; and the Central Railroad Company of New Jersey, a corporation created by and existing under the laws of the State of New Jersey, parties of the second part.

Whereas the parties of the first part are the owners of a railroad extending from a point at or near Wilkesbarre, in the State of Pennsylvania, to a point at or near Phillipsburg, in the State of New Jersey, having various branches within the said State, which are hereinafter mentioned, and the parties of the second part are the owners of a railroad beginning at the terminus of the said railroad of the parties of the first part at Phillipsburg aforesaid and extending in the State of New Jersey to a point on the Hudson River, at Jersey City, and the said roads so connected from a continuous line of railroad from the Wyoming and Lehigh coal fields of Pennsylvania, to the Hudson River aforesaid, and it is deemed desirable for the public convenience and accommodation, and for the interest of the parties hereto, that the said railroads should be worked as one line and under one direction.

And whereas the parties of the first part are willing to contract for the working of their said railroad and the branches thereof hereinafter mentioned by the parties of the second part at the cost and risk of the parties of the second part and on fair and equitable
127 terms, and the parties of the second part are willing on such terms to undertake the same:

Now therefore, this agreement witnesseth, that the parties of the first part, in consideration of the premises and of the faithful performance of the covenants and agreements of the parties of the second part hereinafter mentioned and contained, and by the parties of the second part to be kept and performed, have granted, leased, and demised, and by these presents do grant, lease, and demise unto the parties of the second part all the railroads of the parties of the first part within the State of Pennsylvania, including their bridge across the Delaware River at Easton, as follows, to wit:

The Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of New Jersey, to Union Junction, in Luzerne County, Pennsylvania, where it connects with the railroad built by the Union Coal Company, a distance of one hundred and five miles more or less. Also, the railroad known as the Nanticoke Railroad, situated in said Luzerne County, extending from the Lehigh and Susquehanna Railroad at Ashley to the Newport mines, a distance of eight and one-half miles more or less, with a branch from the same extending to the Lee mines, a distance of two miles more or less; extending also from Ashley to Gardner's Switch, a distance of four and one-half miles more or less; also extending from Union Junction to the Everhart mines, a distance of three miles more or less; and also extending from Mill Creek to the Enterprise mines, a distance of four miles more or less. Also, the branch railroad in the county of Luzerne known as the Nescopec Branch, extending from
128 White Haven to Upper Lehigh, a distance of nine miles more

or less. Also, the Nesquehoning Valley Railroad, situated in the counties of Carbon and Schuylkill, extending from Nesquehoning Junction to Tamanend, where it connects with the Catawissa Railroad, a distance of sixteen and one-half miles more or less. Also, the Tresckow Railroad, in the counties of Schuylkill, Carbon, and Luzerne, extending from the Catawissa Railroad at Silver Brook to the Honey Brook mines, a distance of six and one-half miles more or less. Also, the branch railroad in the counties of Northampton and Lehigh known as the Coplay Branch, extending from Laubach station to the furnaces of the Thomas Iron Company, a distance of one mile more or less. Also, the branch railroad in the county of Lehigh extending from the railroad near Bethlehem, across the Lehigh River, to a connection with the North Pennsylvania Railroad at South Bethlehem, a distance of fourteen hundred and twenty-eight feet more or less. Also, the inclined planes in Luzerne County with all the machinery connected therewith, extending from Ashley to Solomon's Gap station, a distance of three miles more or less; together with all sidings, station-houses, machine shops, and other appurtenances of said roads and branches; and also all and singular the roadways, and also the franchises of the parties of the first part for maintaining and working the same and taking tolls thereon and for demanding and receiving compensation for the use of the same. Excepting and reserving out of this demise the Nesquehoning Tunnel and the railroads or railways laid therein and extending beyond the same; and also all railroads and railways extending from breakers into mines.

To have and to hold the said demised railroad and premises unto the parties of the second part, their successors and assigns, from the first day of April next ensuing the date hereof for and
129 during the continuance of the charters of the said companies and of any renewals of the same; under and subject nevertheless to all the mortgages existing on the said demised premises: Provided, however, that the term of the lease of the Nesquehoning Railroad above mentioned shall not extend beyond the term of nine hundred and ninety-nine years from the 4th of November, 1868, less one day.

And the parties of the second part, in consideration of the premises and of the faithful performance of the covenants and agreements of the parties of the first part hereinafter mentioned and contained to be kept and performed by the parties of the first part, have covenanted and agreed, and by these presents do covenant and agree, to and with the parties of the first part as follows, to wit:

First. That they the parties of the second part shall and will take and well and efficiently operate at their own cost and risk the said demised premises, and all such extensions and additions as may be hereafter made of and to the same under the provisions of this agreement; and shall and will pay to the parties of the first part for the use of the same, at the times hereinafter mentioned, one-third of the gross receipts from the traffic or business of the said demised prem-

ises and extensions and additions thereto, without any other deductions therefrom than are hereinafter mentioned.

Second. The parties of the second part shall and will, on the first day of April next, purchase all the railroad equipment of the parties of the first part mentioned and described in the inventory hereunto annexed, at the prices mentioned or fixed in said inventory,
130 amounting in the aggregate to the sum of two millions three hundred and ten thousand dollars, and in payment of said purchase-money the parties of the second part shall and will assume and pay or discharge at or before the maturity thereof, two millions three hundred and ten thousand dollars of the six per cent bonds of the five millions dollars gold loan of the parties of the first part falling due December 15th, 1897, secured by the mortgage of the demised premises and of said equipment bearing date the 27th of November, 1867, subject to which mortgage this sale is made, the payment or discharges of the said bonds by the parties of the second part to be made by surrender of the same, from time to time, to the trustees of the said last-mentioned mortgage for cancellation, as the said bonds may be purchased or paid by the said parties of the second part, and an equal amount in value of said equipments to be released by the said trustees simultaneously with such surrender, till the whole is released on the surrender of the whole amount of bonds assumed as aforesaid. And the parties of the second part shall and will assume the payment of the interest on said amount of the said bonds from and after the first day of April next, and shall and will pay or provide for the payment of the interest or coupons of said bonds or of such amount thereof as may be from time to time outstanding, as well as the taxes thereon, according to the true intent and meaning of the said bonds. And they also agree to maintain and perpetuate the said equipment and to replace such parts as may be destroyed by accident or use, so far as the same may be required to keep the said equipment not released as aforesaid subject to the said mortgage equal in value to the amount of bonds assumed as aforesaid still outstanding: and the said equipment unpaid for shall be subject to annual inspection by the parties of the first part.

131 Third. The parties of the second part shall and will, on the first day of April next, take and pay for at a fair valuation to be agreed on by the respective superintendents of the parties hereto, all the shop tools and machinery, all tools used in the maintenance of the road, all rails, ties, spikes, and chairs on hand for repairs, and all materials and supplies on hand in the shops or elsewhere, belonging to the parties of the first part.

Fourth. The parties of the second part shall and will, at their own cost and charges, maintain and perpetuate the railroad and premises demised, and shall and will keep and maintain the same in good order and repair and fit for efficient use, and will so return and redeliver up the same at the termination of this lease: Provided, That in case of damage to the said demised premises by freshet to the extent of five thousand dollars or more at any one time, the re-

pairs shall be made promptly by the parties of the second part, but at the cost and expense of the parties of the first part.

Fifth. The parties of the second part shall and will furnish, from time to time, at their own cost, the necessary machinery, rolling stock, and equipment of all kinds required for all the business of the demised premises, and carry on the said business at fair prices and with due reference to the interests of both companies. It being the true intent and meaning of this agreement, that the demised premises shall be so worked and maintained by the parties of the second part as to secure the largest amount of revenue possible therefrom; but they shall not be bound to perform or do any act or thing which may divert from the railroad of the Lehigh Valley Railroad Company business which naturally belongs to the said railroad.

132 Sixth. It being understood that the parties hereto of the first part and the Lehigh Valley Railroad Company are competitors in the general railroad business of the Wyoming and Lehigh valleys, the parties of the second part do further covenant and agree, that the Lehigh Valley Railroad Company shall not, by any act of the parties of the second part, have or obtain any interest in this agreement which shall be at any time asserted or exercised to the detriment of the parties of the first part, or of the revenues derived from the business of the demised premises, or the future increase thereof; but in case of any contract between the parties of the second part and the Lehigh Valley Railroad Company for merger, lease, or other combination of their interests, the annual revenue or gross receipts of the parties of the first part shall never be less than the one-ninth of the aggregate gross receipts derived from the Lehigh Valley Railroad and its branches and the premises hereby demised.

Seventh. The parties of the second part shall and will furnish, from time to time, on reasonable notice, all the cars that may be required by the parties of the first part, or their assigns, to transport the coal that may be mined by them, or their lessees for the time being, on lands of the said parties of the first part, including their collieries shipping through the Nesquehoning Tunnel, and to transport the same as consigned without unnecessary delay. All coal consigned by the parties of the first part, or their assigns, to points not reached by the roads controlled by the parties of the second part, or by the canals of the parties of the first part, shall be delivered by the parties of the second part to such other roads as will enable it to reach its ultimate destination.

133 Eighth. The parties of the second part shall and will furnish, on reasonable notice, all cars that may be required for the transportation of coal from any colliery on the line of the said demised roads, or any roads connecting therewith, destined for shipment at Coalport or Mauch Chunk or other shipping point by the canal of the parties of the first part. The rates on said coal from the collieries to the canal, over the road worked by the parties of the second part, shall not exceed the rates charged at the same time on the same portions of said road on coal from the same collieries when

destined to same points by railroad: Provided, The aggregate charges shall not be less than sixteen cents per ton, and that all expenses of shipping from the cars into boats, maintaining the tracks and sidings at the shipping points on said canal, and transferring the coal by shifting engines at said points, shall be borne by the parties of the first part.

Ninth. The parties of the second part covenant and agree that on all business passing in whole or in part over said demised railroad and branches and in whole or in part over the railroad or railroads owned or controlled by the parties of the second part, the said parties of the second part shall and will credit to the said road and branches hereby demised their full pro rata proportion (according to the distance carried on said roads) of all gross receipts derived from such business, subject only to such terminal and other charges as are usual and general; and in prorating the distances to and from the Wyoming Valley, they shall be computed as if over the "back track," even when the business is carried over the planes.

Tenth. The parties of the second part further covenant and agree that on coal delivered for transportation by the parties of the
134 first part on sidings at the northern end of the Nesquehoning Tunnel, the rates of transportation shall not exceed the rates charged at the same time from Penn Haven to the same points, on coal from the Lehigh region, either by the parties of the second part or by the Lehigh Valley Railroad Company.

Eleventh. The parties of the second part further covenant and agree that the provisions of the contract with the Wilkesbarre Coal and Iron Company, as far as they relate to transportation, shall extend to all coal mined in the Wyoming Valley by the parties of the first part, or from their lands by their lessees or assigns, and to coal from collieries in said valley whose product is controlled under existing contracts by the parties of the first part; and upon the termination of the said contract with the said Wilkesbarre Coal and Iron Company, as therein provided, the parties of the second part shall and will transport the said coal at rates not higher than those charged to other parties shipping coal from said region, such rates, if unsatisfactory, to be submitted to arbitration as hereinafter provided.

Twelfth. The parties of the second part shall and will assume and well and faithfully perform all the obligations of the parties of the first part under contracts set out in the schedule annexed to this agreement, as far as they relate to transportation upon the said demised premises, and so far as they are binding on the said parties of the first part, receiving in consideration therefor all the benefits of the said contracts.

Thirteenth. The parties of the second part shall and will keep in proper books, to be provided by them, full and accurate and separate accounts of the business of the road and its branches hereby
135 demised, which shall be open to the inspection and examination of the parties of the first part at all times, upon reasonable request and notice.

Fourteenth. The parties of the second part covenant and agree that all persons traveling over the roads hereby demised in the prosecution of the business of the parties of the first part, shall be allowed to pass free of charge, subject to the rules and regulations of the parties of the second part applicable to other persons having the like privileges.

And the parties of the first part do hereby covenant and agree to and with the parties of the second part as follows, to wit:

First. That all coal mined by the parties of the first part on lands now owned by them, or that may be hereafter acquired by them, shall be sent to market over the roads of the parties to this agreement, when destined to points or markets reached by the said roads; and when destined for markets not so reached, it shall be sent as far as practicable over said roads, excepting always coal destined for shipment by canal, and excepting all coal covered by contracts now existing and mentioned in the twelfth of the foregoing covenants of the parties of the second part: Provided, That one-fourth of the coal mined annually by the parties of the first part in the Wyoming region may be sent to markets not reached by lines running towards the Delaware River.

Second. The parties of the first part covenant and agree that in case the coal lands now owned and held by them, or that may be hereafter acquired by them shall be sold, leased, or transferred
136 by them to other parties, all such lands shall nevertheless be subject to the provisions of this agreement.

Third. The parties of the first part covenant and agree that the rates for the transportation of coal and other freights upon their canal, between points common to both railroad and canal, shall be arranged from time to time by the parties hereto; and shall conform as nearly as possible to the rates at the time on the railroad between the same points, it being understood that the canal rates may be reasonably below the rates to the same points on the railroad, as heretofore accustomed, so that each shall be used to reach markets and points which can be best supplied by the respective works.

Fourth. The parties of the first part covenant and agree that their corporate rights and privileges shall, at all times, be used in the construction of additional roads and branches when required as herein stipulated, or to aid the parties of the second part in carrying out the provisions of this agreement.

Fifth. The parties of the first part covenant and agree that the parties of the second part shall have the option, at any time within three years from the first day of August next, to lease the canal and its appurtenances, excepting ground and water rents now existing, at a net annual rent of three hundred thousand dollars, assuming in connection therewith the lease of the Delaware Division Canal.

Sixth. The parties of the first part covenant and agree that in case of the nonpayment of interest by them on any of the mortgages now existing on the demised premises, or if necessary to pro-
137 vide the sums due at any time to any sinking fund stipulated

for in any of the said mortgages, the parties of the second part shall have the right to pay directly to the trustees of any such mortgage so much of the rent due and payable to the parties of the first part under this agreement as may be necessary for the said purposes.

Seventh. The parties of the first part covenant and agree that they have full power and authority, under the laws of Pennsylvania, to make and execute this lease, transfer, and contract, so as to fully vest the said demised premises and property in the parties of the second part as herein provided; and that the parties of the second part shall have full right to take, occupy, and use the said railroad, with its appurtenances, under the lease, transfer, and contract.

And it is mutually covenanted and agreed by the parties hereto as follows:

First. That all expenditures required for extending the road or its branches hereby demised, or for additional branches, second track, additional sidings, stations, shops, or other buildings, for improving the alignment of the road at Stony Creek at a cost not exceeding two hundred thousand dollars, and for masonry walls as a protection against freshets, shall be at the expense of the parties of the first part; but no such expense shall be incurred without the consent in writing of the said parties of the first part, which consent shall not be withheld without reasonable cause. All such improvements shall be made by the parties of the second part, and the cost thereof advanced by them if required, they receiving on such advances a
138 semi-annual percentage equivalent to the dividends declared during the same period on the stock of the parties of the first part: Provided, That such percentage shall not be less than seven per cent per annum: And provided also, That the parties of the first part may at any time refund such advances.

Second. That all railroads or railways, with their branches, extensions, sidings, and buildings connected therewith, hereafter constructed under the franchises of the parties of the first part and with the concurrence of both the parties hereto, shall, when and as the same are constructed, be deemed and taken to pass under this agreement as part of the premises hereby demised, and all necessary deeds to carry this covenant into effect shall be executed by the parties hereto upon request of either.

Third. That the parties of the first part shall and will, by and with the consent of the board of managers of the Railroad Car Trust of Philadelphia and of the Lehigh Equipment Trust of Philadelphia, respectively, assign and transfer to the parties of the second part, and the parties of the second part shall and will take by such assignment all the leases of cars and locomotives made by the said trusts, respectively, to the parties of the first part, and all the cars and locomotives mentioned in the said leases, respectively, and described or mentioned in the second inventory hereto annexed. And such assignment being made, the parties of the second part shall and will thereupon assume and pay all the obligations of the parties of the first part under the said trusts and leases, respectively.

Fourth. That all dwelling-houses, except station-houses, are
139 excepted from this lease. But the parties of the second part may at their own cost erect additional houses on any part of the demised premises and receive the rents of such houses to their own use.

Fifth. That all settlements between the parties and payments of rent by the parties of the second part for the said demised premises shall be made monthly on the fifteenth day of the month, or as soon thereafter as possible.

Sixth. That in case of any difference of opinion between the parties hereto in relation to any of the provisions of this contract, or in case either party shall be dissatisfied with the manner in which the business is done by the other party, the matters in dispute shall be referred to arbitrators to be appointed in the usual manner, whose decision or a majority of them shall be final and conclusive.

Seventh. That in case of any breach of covenant on the part of the parties of the second part, their successors or assigns, and notice thereof given by the parties of the first part, or their assigns, to the parties of the second part, if the same cannot or shall not be fully compensated within a reasonable time thereafter, then and in such case the parties of the first part, or their assigns, may, at their option, declare this lease to be terminated and the agreements herein contained to be rescinded, and may thereupon enter on the demised property and premises as and for condition broken and repossess themselves as of their old and former estate, and may resume, take, use, and enjoy all the rights, privileges, and franchises hereby demised or granted as if this agreement had never been made; and this contract shall from thenceforward be deemed and taken to be utterly ended, saving and excepting the right of the parties of the first
140 part or their assigns to sue for and recover, by any proceedings at law or in equity, compensation for all damages for or by reason of any breach or breaches of any covenant or covenants on the part of the parties of the second part, as fully as if this agreement continued in full force, and saving and excepting the rights of the parties of the second part to the previous repayment of all advances made by them for improvements, and also saving and excepting the personal property purchased and paid for by the parties of the second part; but no such option of declaring this lease terminated shall be exercised by the parties of the first part or their assigns while there exists any default under this agreement on their part.

In witness whereof the said parties have caused their corporate seals to be hereunto affixed, duly attested, the day and year first above written.

By order of the board of managers of the Lehigh Coal and Navigation Company.

[L. S.] E. W. CLARK, *President.*

F. MITCHELL, *Secretary.*

[L. S.] CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Per JOHN TAYLOR JOHNSTON, *President.*

Attest:

SAML. KNOX, *Secretary.*

141 "Exhibit B."

Articles of agreement, made this twenty-ninth day of May, 1883, by and between the Lehigh Coal and Navigation Company of the first part, the Central Railroad Company of New Jersey of the second part, and the Philadelphia and Reading Railroad Company of the third part.

Whereas the Lehigh Coal and Navigation Company and the Central Railroad Company of New Jersey entered into certain articles of agreement under date of March 31st, 1871, a copy of which is hereto annexed, marked "Exhibit A;"

And whereas the parties hereto are willing to covenant and agree to and with one another as hereinafter set forth:

Now, therefore, this agreement witnesseth, that the parties hereto have covenanted and agreed, and do hereby covenant and agree, to and with each other as follows:

First. This agreement is to be deemed and taken to have been incorporated into the contract of March 31st, 1871 (but only to be operative from and after June 1st, 1883), as if originally there written, and each party is to have the same remedies as are provided in the original contract for all rights secured by the contract as thus modified, and as if the said original contract had been herein recited and set forth at length as part hereof; and wherever in this agreement the expression

142 "Lehigh and Susquehanna Railroad and branches" is used, it shall be taken to include all the railroads now or hereafter to be operated under the original contract of March 31st, 1871, and this supplemental agreement.

Second. The Central Railroad Company of New Jersey agrees that inasmuch as the Philadelphia and Reading Railroad Company, after it takes possession of the Lehigh and Susquehanna Railroad and branches, will also become responsible for the proper conduct of the business under the provisions of the aforesaid agreement of March 31st, 1871, any breach of the covenants of the original contract or of this supplemental agreement by the Philadelphia and Reading Railroad Company shall have the same effect in all respects as if the breach had been committed by the Central Railroad Company of New Jersey.

Third. The Philadelphia and Reading Railroad Company agrees that it will assume and become liable for the faithful execution of all the covenants in the said agreement contained, and on the part of the said The Central Railroad Company of New Jersey to be kept and performed, and will keep, maintain, and fulfill the same according to their full intent and meaning, and will carry out all other contracts made by or on behalf of the Central Railroad Company of New Jersey, in which the Lehigh Coal and Navigation Company may have an equitable interest; will develop the business of the Lehigh and Susquehanna Railroad and branches in accordance with the provisions of the said agreement of March 31st, 1871, and the terms of this supplemental agreement; and where additional rail-

roads shall be necessary to develop and secure business in the anthracite coal fields east of the line of the Little Schuylkill and Catawissa Railroads, will cause them to be built under the provisions of
143 the first and second mutual covenants of the contract of 1871; will cause the development of the Lehigh and Wilkesbarre Coal Company's lands to proceed pari passu with that of the lands of the Philadelphia and Reading Coal and Iron Company, so that the production of the two coal estates shall bear to each other the numerical relation of twenty-eight for the Lehigh and Wilkesbarre Coal Company to seventy-two for the Philadelphia and Reading Coal and Iron Company, at least until the production of the Lehigh and Wilkesbarre Coal Company's lands shall reach three million tons per annum, beyond which it shall not be required to be increased, but which shall be maintained till it shall be no longer possible to make the said mines produce at that rate; and if the production of the said lands shall in any one year bear a less ratio to the production of the Philadelphia and Reading Coal and Iron Company's lands than the aforesaid ratio, will send such an amount of coal from the Philadelphia and Reading Coal and Iron Company's, or other anthracite coal lands lying west of Tamanend, over the Lehigh and Susquehanna Railroad from Tamanend, as shall bring the coal tonnage-mileage of the Lehigh and Susquehanna Railroad system up to what it would have been if the above stipulation in regard to the production of the Lehigh and Wilkesbarre Coal Company's lands had been carried out, and will cause the production of the Lehigh and Wilkesbarre Coal Company's lands to pass to or towards its market over the lines of the Lehigh and Susquehanna Railroad and branches. And it further agrees that the rates of transportation of coal, or other freight, from or to any property in the anthracite region which may at any time be owned, controlled, or operated by the Lehigh Coal and Navigation Company, shall never be higher than the lowest rates given to any other producer or shipper of anthracite coal for
144 similar consignments and like distances, and that it will join with the Central Railroad Company of New Jersey in carrying out the provisions of the contract between the Central Railroad Company of New Jersey and the Alliance Coal Mining Company, of August 10th, 1881, a copy of which, marked "Exhibit B," is hereto annexed.

Fourth. And the said The Philadelphia and Reading Railroad Company further covenants and agrees that the aggregate rental of the The Lehigh and Susquehanna Railroad, after the date of this agreement, shall never in any year be less than one million four hundred and fourteen thousand four hundred dollars, but if the one-third of the gross receipts from the operation of the Lehigh and Susquehanna Railroad (settlements for which shall be made monthly as heretofore), shall not amount in any year to the said sum, the Philadelphia and Reading Railroad Company will nevertheless pay at the end of the calender year such additional sum as will make the rental of the Lehigh Coal and Navigation Company from the said

Lehigh and Susquehanna Railroad and branches equal thereto; and in consideration of this undertaking, the Lehigh Coal and Navigation Company covenants and agrees that after it shall have received from its one-third of the gross receipts derived from the operation of the said Lehigh and Susquehanna Railroad and branches, during any calendar year prior to December 31st, 1887, the sum of one million seven hundred and twenty-eight thousand seven hundred dollars, or in any calender year thereafter prior to December 31st, 1892, the sum of one million eight hundred and eighty-five thousand eight hundred dollars, or in any calendar year thereafter the sum of
145 two million and forty-three thousand dollars, together with a further sum in each year equal to seven per cent upon the amounts which shall be charged after December 31st, 1882, upon the books of the Lehigh Coal and Navigation Company for payments for right of way, or for expenditures made or to be made by the Central Railroad Company of New Jersey or the Philadelphia and Reading Railroad Company, for construction as shown by the accounts rendered or to be rendered by either of the said corporations under the first and second of the mutual covenants in the original agreement of March 31st, 1871, it will waive, relinquish, and release, and does hereby waive, relinquish, and release the surplus or excess of its one-third share of the said gross receipts to the said The Philadelphia and Reading Railroad Company, but nothing herein contained shall be deemed or taken to release the Lehigh Coal and Navigation Company from paying seven per cent on the amount already advanced by the Central Railroad Company of New Jersey, and on the amounts hereafter expended, and which are repayable by the Lehigh Coal and Navigation Company, as provided by the agreement of March 31st, 1871, until the Lehigh Coal and Navigation Company shall have refunded such advances. And the Central Railroad Company of New Jersey hereby agrees that the sums herein stipulated to be paid and which it agrees may be paid to the Lehigh Coal and Navigation Company shall be in lieu and satisfaction of the rent reserved in the agreement of May 29th, 1883, between the Central Railroad Company of New Jersey and the Philadelphia and Reading Railroad Company (a copy of which, marked "Exhibit C," is hereto annexed) as accruing under the provisions of the agreement of March 31st, 1871; and upon the payment by the Philadelphia and Reading
146 Railroad Company to the Lehigh Coal and Navigation Company, its successors and assigns, of the sums herein stipulated to be paid the said The Philadelphia and Reading Railroad Company shall be relieved from said portion of the rental reserved in the agreement of May 29th, 1883, aforesaid, and the excess or remainder, if any, of said gross receipts, after making the payments herein stipulated to the Lehigh Coal and Navigation Company, shall be retained by the Philadelphia and Reading Railroad Company for its own use and benefit.

Fifth. And the parties hereto further agree, that in case of any difference of opinion between the parties hereto in relation to any

of the provisions of this agreement, or in case either party shall be dissatisfied with the manner in which the business is done by the other party, the matters in dispute shall be referred to arbitrators, one to be appointed by the Philadelphia and Reading Railroad Company and one by the Lehigh Coal and Navigation Company, and the two thus chosen to select a third, and their decision or that of a majority of them shall be final and conclusive.

Sixth. And all the parties hereto agree that in case of any breach of covenant on the part of the parties of the second or third part, if the same shall not be fully compensated within a reasonable time, the party of the first part may at its option declare the agreement of March 31st, 1871, to be terminated and the agreements therein contained and this agreement to be rescinded, and may thereupon enter on the demised premises as and for condition broken and repossess itself of its old and former estate, and may resume, take, use
147 and enjoy all its original rights, privileges, and franchises, as if this agreement and the said agreement of March 31st, 1871, had never been made.

In witness whereof, the parties hereto have caused their corporate seals, duly attested, to be hereunto affixed, the day and year first above written.

Sealed and delivered in the presence of us.

As to the signature of Joseph S. Harris, President.

S. SHEPHERD.

SAML. KNOX.

ALBERT FOSTER.

J. S. HARRIS, *Presdt.*

Attest:
S. SHEPHERD, *Secretary.* [Seal L. C. & N. Co.]

H. S. LITTLE, *President.*

Attest:
SAML. KNOX, *Secy.* [Seal C. R. R. Co. of N. J.]

FRANKLIN B. GOWEN, *Prest.*

Attest:
ALBERT FOSTER, *Secty.* [Seal P. & R. R. R. Co.]

148 "Exhibit C."

This agreement, made this twenty-seventh day of January, A. D. one thousand eight hundred and eighty-seven (1887), between the president, managers, and company of the Delaware and Hudson Canal Company, hereinafter referred to as the Delaware Company, and the Lehigh Coal and Navigation Company, hereinafter referred to as the Lehigh Company.

Whereas the Delaware Company did on the seventh day of November, 1886, take control of the Union Coal Company's railroad, hereinafter called the Union Railroad, which railroad had theretofore

been operated jointly by the Lehigh Company and the Delaware Company, and has furnished the connection between Union Junction, the terminus of the Lehigh and Susquehanna Railroad of the Lehigh Company, and Scranton; and

Whereas the Lehigh Company, itself or through the Wilkes-Barre and Scranton Railway Company, a corporation controlled by it, has purchased ground for terminal facilities at Scranton, and has located and proposes to build a line between Scranton and a point near Minooka Station, hereinafter called Minooka Junction, and proposes also to build or to procure the building of, and to use, when built, a cut-off line from Laurel Run Station on the Lehigh and Susquehanna Railroad of the Lehigh Company, to a connection with the Union Railroad near Pittston Station, at a point hereinafter called Pittston Junction; and

149 Whereas both parties hereto agree that it is desirable to make such use of the existing lines of railroad as to meet the requirements of the public in the matter of transportation, and for this purpose the Delaware Company is willing to grant permanent rights to the Lehigh Company for so much of the said Union Railroad as the Lehigh Company may desire to use as hereinafter provided; and

Whereas the object of this agreement is to furnish the Lehigh Company with a line of railway connecting its present railway at Union Junction with the proposed railway from Minooka Junction to Scranton, and also with the proposed railway from Laurel Run Station to Pittston Junction, over which connecting line its traffic shall pass freely, and from which it cannot be excluded by reason of any adverse interest obtaining control of the management of the Delaware Company's line:

Now this agreement witnesseth:

First. That the Delaware Company has granted, demised, and let, and by these presents doth grant, demise, and let unto the Lehigh Company for a period of nine hundred and ninety-nine years from the date of this agreement, subject to the reasonable regulation and control of the lessor as to the movement and government of trains, the right to pass with its trains and locomotives over the aforesaid line of the lessor between Union Junction and Minooka Junction, and vice versa, with the right to use in connection with such trains all present or future water stations, sidings, and other facilities necessary for the accommodation of such trains and the traffic to be transported by them, as freely as if the lessee was the owner of the

150 railroad hereby demised, paying to the lessor, as rent for the demised premises, forty-two and one-half per cent of the gross earning on all coal, passengers, express, parcel, and freight traffic that shall accrue to such portion of the Union Railroad as it, the lessee, shall use; the total gross earnings in each case being divided in proportion to the actual mileage used of the Union Railway and the Lehigh Company's railroad, provided that if the Lehigh Company shall take water from any of the Delaware Company's water

stations, it shall share in the expense of maintaining such stations in proportion to the consumption of water by each of the parties hereto. But the right to haul such traffic over the Union Railroad by the Lehigh Company's locomotives shall not apply to business originating at points north of Scranton on the Delaware Company's lines, or on the connecting lines forming the extensions thereof and destined to points south of Pittston Junction or Wilkes-Barre on the Lehigh Company's lines, or on connecting lines forming the extensions thereof, or originating at points south of Pittston Junction or Wilkes-Barre on the Lehigh Company's lines, or on connecting lines forming extensions thereof and destined to points north of Scranton, on the Delaware Company's lines, or on connecting lines forming extensions thereof; all of which business shall be hauled by the Delaware Company's locomotives as provided in section third.

Second. The Lehigh Company shall have the right to make a connection between the Union Railroad tracks and the tracks of the line to be built from Laurel Run Station to Pittston Junction, and also a connection between the Union Railroad tracks and the tracks of the Spring Brook Railway near Moosic Station; and also a connection between the Union Railroad tracks and the tracks of the
151 Lackawanna and Bloomsburg Railroad at such point between Moosic and Minooka as may be agreed on with the Delaware, Lackawanna and Western Railroad Company, it being the true intent of this stipulation to enable the Lehigh Company to secure business from the roads just named; but this right of connecting is not intended to permit it to secure business from other points on the Delaware Company's lines by means of lateral or auxiliary tracks leading thereto from the said Lackawanna and Bloomsburg Railroad and the said Spring Brook Railway, nor to take over the Union Railroad business which, having originated at points south of the parallel of latitude passing through Wilkes-Barre, shall reach Wilkes-Barre by other roads than the Lehigh and Susquehanna Railroad, and shall be destined to points on the Union Railroad east of Wilkes-Barre or to other points on the Delaware Company's lines.

Third. It is agreed for the present that through freight traffic originating at or destined to points on the Delaware Company's lines north of Scranton or on connecting lines forming extensions of the Delaware Company's lines and through freight traffic destined to or originating at points on the Lehigh Company's line south of Wilkes-Barre or on connecting lines forming extensions of the Lehigh Company's lines shall be exchanged at Wilkes-Barre and shall be hauled by the Delaware Company's locomotives over the Union Railroad, and that the Delaware Company, for all such freight hauled by its locomotives over the Union Railroad, shall be entitled in the division of the through rate to be credited with at least forty miles from Wilkes-Barre, though the distance so hauled may have been less; and similarly, that on all freight so exchanged and hauled by the Lehigh Company's locomotives south of Wilkes-Barre, the
152 Lehigh Company shall be entitled to be credited with at least

forty miles; but it is further agreed that after the cut-off line from Laurel Run station to Pittston Junction shall have been completed the said exchange shall be made at Pittston Junction, in which case each party hereto shall, as before, be entitled to at least forty miles in the division of the through freight rate. But nothing in this section shall be so construed as to require the Lehigh Company to receive less in the division of the freight rate on business of the western cooperative lines than it now receives, except it should assent to such a change.

Fourth. Each party hereto will provide its own time-tables for the running of such trains over its lines as it may desire in carrying out the provisions of this agreement, it being understood that the Delaware Company's trains are to have preference over the Lehigh Company's trains of the same class on the Union Railroad.

Fifth. It is agreed that the parties hereto will extend each to the other as good facilities and rates in every respect as it accords to the most favored of the lines with which it may become connected.

Sixth. Each of the parties hereto shall be permitted to examine such of the books and records or other documents or papers of the other party as may be necessary to verify or confirm settlements proposed or made in accordance with the terms of this agreement.

Seventh. It is intended that the rights of trackage hereinbefore granted by the Delaware Company to the Lehigh Company shall continue during the term of this agreement; and that the suc-
153 cessors and assigns of either of the parties hereto shall have the rights and privileges and shall be charged with the duties herein assumed by the parties to this agreement, but the basis of compensation to the Delaware Company for the use of the railroad and other facilities specified in the first section, and the basis of the minimum distances to be charged by either party on through freights as specified in the third section, may be readjusted on the first day of January, 1892, and each five years thereafter: Provided, That either of the parties hereto shall give ninety days' notice to the other before the expiration of each period of its desire for such readjustment. The basis on which such readjustments shall be made shall be the usual railroad practice existing at the time of such readjustments, and if the two parties shall not be able to agree on this question or on any other question arising under this agreement, the matters in dispute shall be referred to arbitrators, one to be appointed by the Delaware Company and one by the Lehigh Company, and the two thus chosen to select a third, and their decision or that of a majority of them shall be final and conclusive.

Eighth. The Lehigh Company shall have the right to assign its interest in this contract to the Central Railroad Company of New Jersey for the term during which that company shall be the lessee of the Lehigh and Susquehanna Railroad of the Lehigh Company, and the Central Railroad of New Jersey shall thereupon be entitled to have and exercise all the rights and privileges herein granted by this agreement to the Lehigh Company; and the Lehigh Company,

upon the termination of the said lease of the Lehigh and Susquehanna Railroad to the Central Railroad Company of New Jersey, shall have the right to resume its rights under this agreement
154 as fully as if they had never been assigned to any other company, but neither of the parties hereto shall have the right to otherwise assign any of its rights under this agreement without the consent in writing of the other party.

Ninth. In case of accident to the trains passing over any part of the Union Railroad that may be used by the Lehigh Company, the Lehigh Company and the Delaware Company shall each be held liable for any damage done by such accidents occurring through the neglect or misconduct of its own employés or through the failure or defect of its own equipment. The Delaware Company shall be liable for any damage done through the failure or defect of its roadway or the appurtenances thereto. When damage occurs to the property of the parties hereto through the joint negligence of their employés, neither party shall have recourse against the other, but where damage occurs to the public and one of the parties is compelled to pay the same, the other party contributing to such negligence shall contribute equally to such loss.

Tenth. In case either of the parties hereto shall willfully violate the terms of this agreement, the other party may terminate the same upon giving six months' notice of its election to do so.

Eleventh. It is agreed that if at any time hereafter the Lehigh Company shall construct or operate any other line beyond Scranton, except as herein provided, this agreement shall cease and determine.

In witness whereof the said parties hereto have caused their
155 respective corporate seals, duly attested, to be hereunto affixed the day and year first above written.

Sealed and delivered in the presence of the president, managers, and company of the Delaware and Hudson Canal Company, by

[SEAL.] (Signed) R. M. OLYPHANT, *President.*

Attest:

(Signed) J. C. HARTT, *Treasurer.*

By order of the board of managers of the Lehigh Coal and Navigation Company,

[SEAL.] (Signed) J. S. HARRIS, *President.*

(Signed) S. SHEPHERD, *Secretary.*

STATE OF NEW YORK,

City and County of New York, ss:

On this fourth day of February, 1887, before me personally came James C. Hartt, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of New York; that he was the treasurer of the president, managers, and company of the Delaware and Hudson Canal Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by

order of the board of managers of the said company; and that he signed his name thereto by the like order as treasurer of the said company; and the said James C. Hartt further said that he
156 was acquainted with R. M. Olyphant, and knew him to be the president of said company; that the signature of the said R. M. Olyphant, subscribed to the said instrument, was in the genuine handwriting of the said R. M. Olyphant, and was thereto subscribed by the like order of the said board of managers, and in the presence of him, the said James C. Hartt.

[SEAL.] (Signed) F. M. OLYPHANT,
(30)
Notary Public, New York County.

STATE OF NEW YORK,
City and County of New York, ss:

I, James A. Flack, clerk of the city and county of New York, and also clerk of the Supreme Court for the said city and county, the same being a court of record, do hereby certify that F. M. Olyphant, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the fourth day of February, 1887.

(Signed) JAMES A. FLACK, *Clerk.*

157 STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

Be it remembered, that on this fifth day of February, A. D. one thousand eight hundred and eighty-seven (1887), before me the subscriber, a notary public in and for said city, personally came and appeared S. Shepherd, secretary of the foregoing named corporation, the Lehigh Coal and Navigation Company, who, being duly sworn according to law, deposes and says that he was personally present at the execution of the foregoing indenture, and saw J. S. Harris, president of the said corporation, affix the seal of the said company to the said indenture, and deliver the same as the act and deed of the said company; and that the name of this deponent, subscribed to the said indenture as a witness thereto, and as secretary of the said corporation, in attestation of the due execution and delivery of said indenture, is of this deponent's own proper handwriting.

Sworn to and subscribed before me this the day and year first aforesaid. Witness my hand and seal.

(Signed) S. SHEPHERD.

[SEAL.] (Signed) WM. C. ALDERSON, *Notary Public.*

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

Recorded in the office for recording deeds, &c., in and for said county, in deed book No. 262, page 480.

Witness my hand and official seal, at Wilkes-Barre, this fifteenth day of February, 1887.

[SEAL.] (Signed) JOSEPH J. MCGINTY, *Recorder.*
Per TERRY, *Dept.*

158 LACKAWANNA COUNTY, *ss:*

Recorded in the office for recording of deeds, &c., in and for said county, in deed book No. 43, page 339, &c.

Witness my hand and seal of office this twenty-fourth day of March, A. D. 1887.

[SEAL.] (Signed) ELIEZER D. JENKINS, *Recorder.*

163 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT. *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	April session, 1908. No. 89. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FOREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. Equity. U. S. *v.* The Central Railroad Company of New Jersey. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

164 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT. *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	April session, 1908. No. 89. In Equity.

The complainant in this cause hereby joins issue with the defendant, The Central Railroad Company of New Jersey, and will submit

the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. Equity. U. S. *v.* The Central Railroad Company of New Jersey. Replication. Filed June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found in the record of the case of the United States ex rel., the Attorney-General of the United States, plaintiff in error, *vs.* The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.]

241 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* CENTRAL RAILROAD OF NEW JERSEY.	April sessions, 1908. In Equity. No. 89.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. U. S. v. Central Railroad of New Jersey. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

242 No. 89. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT. *vs.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.	

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of

errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
243 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce, and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and therefore constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

244 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. In Equity. The United States of America vs. The Central Railroad Company of New Jersey. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

245 No. 89. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated October sixth, 1908.

246 (Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. In Equity. United States of America v. The Central Railroad Company of New Jersey. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted.

Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

247 No. 89. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, defendant.

Before DALLAS, C. J.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 89. April session, 1908. In Equity. United States of America vs. The Central Railroad Company of New Jersey. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

248 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Central Railroad Company of New Jersey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

Service accepted.

JOHN G. JOHNSON,
Per JOS. BAYARD,
Attorney for Appellee.

249 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America *v.* The Central Railroad Company of New Jersey, No. 89, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-three.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

250 (Indorsement on cover:) File No. 21363. E. Pennsylvania. C. C. U. S. Term No., 567. The United States of America, appellant, *vs.* The Central Railroad Company of New Jersey. Filed October 10th, 1908. File No. 21363.

10367
92

65592

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 568.

MINNESOTA STATE LIBRARY.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21864)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 568.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Bill of complaint	2	1
Appearance for defendant	18½	5
Answer	19	6
Stipulation as to submission on bill and answer	51	21
Replication	52	21
Opinions (omitted in printing)	53	....
Gray, J. (omitted in printing)	54	....
Dallas, J. (omitted in printing)	108	....
Buffington, J. (omitted in printing)	113	....
Decree	129	22
Assignment of errors	130	22
Petiton for appeal	133	24
Order allowing appeal	135	25
Citation and service	136	25
Clerk's certificate	137	26

61431—08——1

1 APRIL SESSION, 1908.

Charles J. Bonaparte. United States of America
91 *vs.*
Robert W. de Forrest, John G. Johnson. Delaware, Lackawanna and Western Railroad Company.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July.
1908, June 5. Order for the appearance of Robert W. de Forrest and John G. Johnson, esquires, for defendant filed.
1908, June 12. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 91. April sessions, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, DEFENDANT.

Bill of complaint.

Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April sessions, 1908. No. 91. In Equity.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, DEFENDANT.

To the honorable the judges of said court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against the Dela-

ware, Lackawanna and Western Railroad Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "Delaware, Lackawanna and Western Railroad Company," herein designated and called "the defendant," is a corporation created, organized and existing under the laws of the State of Pennsylvania, having its principal office in the State of New
5 York, at the city of New York, and also an office in the said State of Pennsylvania, at the city of Scranton, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Lackawanna and Luzerne, in the said State of Pennsylvania, and owns, and has an interest in, the anthracite coal
6 therein or thereupon and mined, and being mined, therefrom: and said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the authority of the defendant.

(4) That, apart from the coal lands, coal mines, and coal held and owned by the defendant, as hereinbefore stated, the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lackawanna Valley Coal Company and of the Glen Alden Coal Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Lackawanna and Luzerne: but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated,

in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been
7 for a long time past, the vice-president of the defendant, and certain of the directors of each of said coal companies being officers of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein: and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(5) That, moreover, apart from the coal lands, coal mines, and coal hereinbefore mentioned and described, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Temple Iron Company, a corporation of the said State of Pennsylvania, which holds, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania, which said coal lands and coal mines are being operated, as they have been continu-
8 ously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors, one of whom is president of the defendant and another of whom is a director of the defendant, as they have been, respectively, for a long time past. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal company by a board of directors, some of whom are officers of the defendant, as hereinbefore stated, the operations of said last-mentioned coal company in the mining of anthracite coal are being carried on, as they have been in the past, by and under the authority of the defendant as well as by and under the authority of other persons or corporations.

(6) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal,

9 when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(7) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "Act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any
10 State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(8) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(9) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, man-
11 ufactured, mined, or produced by it or under its authority,"

and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "Delaware, Lackawanna and Western Railroad Company," may make full answer under oath to all the allegations herein; and that an injunction be granted to enjoin and prohibit the said "Delaware, Lackawanna and Western Railroad Company" from further transporting, in interstate commerce, the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ or subpoena, to be directed to the said "Delaware, Lackawanna and Western Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honor-
12 able court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to perform and abide by such order, direction, and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

18½ In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* DELAWARE, LACKAWANNA & WESTERN R. R. Co.	April session, 1908. No. 91.

Enter our appearance for defendant in the above case. June 5th.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorney for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 91. April session, 1908. U. S. of America *vs.* Delaware, Lackawanna & Western R. R. Co. Order for appearance. Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

19 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, defendant. } In Equity.

Answer of defendant, The Delaware, Lackawanna and Western Railroad Company.

JOHN L. SEAGER,
Solicitor.
W. S. JENNEY,
Of Counsel for Defendant.

Filed June 12, 1908. Henry B. Robb, clerk. By L., deputy clerk.

21 In the Circuit Court of the United States, for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, defendant. } April sessions, 1908. No. . In Equity.

Answer of defendant, The Delaware, Lackawanna and Western Railroad Company.

The defendant, The Delaware, Lackawanna and Western Railroad Company, for answer to the bill of complaint of the complainant herein, respectfully shows:

I.

The defendant admits that it is a corporation, duly organized and incorporated under and by virtue of the laws of the State of Pennsylvania, having its principal office in the city of New York and also an office at Scranton, in the State of Pennsylvania.

22 That it owns lines of railroad in the State of Pennsylvania extending from the center of the Delaware River at the boundary line of the State of New Jersey, in a northwesterly direction, across the State of Pennsylvania, to the boundary line between the State of Pennsylvania and the State of New York, with a branch line of railroad extending from Scranton, in the State of Pennsylvania, to Northumberland, in the State of Pennsylvania. That all the lines of railroad owned by it are wholly within the State of Pennsylvania.

Defendant also admits and alleges that as lessee it operates various lines of railroad in the States of New Jersey and New York, includ-

ing the following: The New York, Lackawanna and Western Railway extending from Binghamton to Buffalo, in the State of New York; the Cayuga & Susquehanna Railroad extending from Owego to Ithaca, in the State of New York; the Oswego and Syracuse Railroad extending from Syracuse to Oswego, in the State of New York; the Greene Railroad and the Utica, Chenango and Susquehanna Valley Railway, which, together, extend from Chenango Forks to Utica and Richfield Springs, in the State of New York; the Valley Railroad extending from the New York State line at the terminus of defendant's railroad, to Binghamton, in the State of New York; the Morris & Essex Railroad extending from Phillipsburg, in the State of New Jersey, to Hoboken, in the State of New Jersey; the Warren Railroad extending from the center of the Delaware River, at the southeasterly terminus of defendant's railroad, to Hampton Junction, in the State of New Jersey; together with other branch lines in the States of New York and New Jersey.

23 Defendant also admits and alleges that the Syracuse, Binghamton & New York Railroad Company is a corporation duly organized under and by virtue of the laws of the State of New York, and is engaged in the operation of a railroad from Binghamton, in the State of New York, to Syracuse, in the State of New York, connecting with other lines leased and operated by the defendant. Defendant also admits and alleges that with the assent of the Syracuse, Binghamton & New York Railroad Company it operates its trains for the carriage of passengers and freight over said railroad.

Defendant admits that it is and has been since long prior to May 1, 1908, engaged as common carrier in the transportation of passengers and freight, in interstate commerce, over the railroads so owned, leased, and operated by it, to and from the city of New York, and to and from Hoboken, in the State of New Jersey, through the States of New Jersey, Pennsylvania, and New York, to and from Buffalo, Oswego, and Utica, in the State of New York, and intermediate points upon the lines of the railroads hereinbefore set forth.

Defendant also admits that for many years it has owned extensive tracts of coal lands in the State of Pennsylvania. That it has also leased large tracts of coal lands in the State of Pennsylvania, and that it is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it. Defendant also admits that for many years last past, and particularly since May 1st, 1908, it has been and now is daily engaged in the interstate transportation of a commodity, to wit, anthracite coal, owned by it,

24 and in which it has a direct interest, being the coal mined by it as aforesaid, which it transports over the lines of railroad owned, leased, and operated by it as aforesaid, and that it intends to continue such transportation in the future.

It further admits that the coal thus transported by it, and intended to be transported by it in the future, as aforesaid, is and will be an article or commodity other than timber and the manufactured products thereof, and except as hereinafter stated and alleged is not and

will not be an article or commodity necessary and intended for its own use in the conduct of its business as a common carrier.

Defendant further admits that it is and has been since long prior to May 1, 1908, the owner of substantially all of the capital stock of the Lackawanna Valley Coal Company and the Glen Alden Coal Company, mentioned in the petition herein, and that it thus controls and has been controlling the election of directors of said companies, certain persons who are officers of defendant being, as they have been for some time past, directors of each of said coal companies. It denies that either of said coal companies hold, or have held since defendant acquired the stock thereof as aforesaid, by conveyances or leases or otherwise, any anthracite coal mines or anthracite coal lands, with the exception of about 1.74 acres owned by said Glen Alden Coal Company. It denies that since defendant acquired its stock in said companies coal has been mined or produced by either of them, or mined or produced from the land held by the Glen Alden Coal Company aforesaid. Defendant further admits that it is and has been
25 since long before May 1, 1908, the owner of part of the capital stock of the Temple Iron Company mentioned in the said petition, which company holds by conveyances and leases made prior to May 1, 1908, anthracite coal lands and mines in Pennsylvania, which said coal lands and mines are being operated and have been continuously since long before May 1, 1908, in the mining of anthracite coal by and under the management of the board of directors, one of whom is an officer and the other a director of defendant, as they have been, respectively, for a long time past. That from time to time since the first day of May, 1908, and at the present time, of the anthracite coal so mined and being mined by the said Temple Iron Company, there has been and there is being loaded at the mines of said company and transported in interstate commerce large quantities of anthracite coal over the lines of railroad owned and leased by this defendant. This defendant denies that it has managed the said Temple Iron Company, or that the operations of the said company in the mining of anthracite coal are or have been carried on by and under the authority of the defendant.

Defendant denies that its ownership of capital stock of said coal company, or its participation in the election of the board of directors thereof constitutes an interest direct or indirect on its part in the anthracite coal mined by said company and transported over defendant's lines of railroad as aforesaid, or constitutes ownership on defendant's part in the coal mines or coal lands of said coal company, within the meaning of section I of the act of Congress of February 4, 1887, as amended.

26 II.

Further answering, the defendant alleges that an act of the general assembly of the State of Pennsylvania was duly passed and approved by the governor April 7, 1832, providing for the incorporation of the Ligett's Gap Railroad Company, and authorizing said company, when

incorporated, to construct a railroad from a point in Cobb's Gap, near Scranton, in the State of Pennsylvania, "to a point on the New York State line in Susquehanna County, passing through the coal region on the Lackawanna and Ligett's Gap." Defendant prays leave to refer to said act for greater certainty.

Pursuant to the provisions of such act, the Ligett's Gap Railroad Company was duly incorporated, and by its charter, duly issued under the seal of the Commonwealth of Pennsylvania, March 19, 1849, it was created a corporation and vested with certain rights, powers, and privileges. Defendant prays leave to refer to said charter for greater certainty.

By a further act of the general assembly of the State of Pennsylvania, duly passed and approved by the governor April 14, 1851, certain additional rights, powers, and privileges were conferred upon said Ligett's Gap Railroad Company. Section 4 thereof provided:

"That it shall and may be lawful for the said company to purchase and hold a reasonable amount of coal lands; Provided, that the amount so held shall in no case exceed 1,000 acres."

By the same act the name of the Ligett's Gap Railroad Com-
27 pany was changed to "The Lackawanna and Western Railroad Company." Section 5 thereof provided:

"* * * by and under which name, style, and title the said company shall use, exercise, and possess all the rights, privileges, powers, and franchises to which they are now by law entitled * * * the property and franchises of said company hereby merging and vesting by virtue of this act, in the name, designation, and style of 'The Lackawanna and Western Railroad Company.'"

Defendant alleges that an act of the general assembly of the State of Pennsylvania was duly passed and approved by the Governor April 7, 1849, providing for the incorporation of The Delaware and Cobb's Gap Railroad Company, and authorizing such company, when incorporated, to construct a railroad beginning at the river Delaware at or near the Delaware Water Gap, and thence by a practicable route, terminating at or near Cobb's Gap, in the county of Luzerne or Wayne. Defendant prays leave to refer to said act for greater certainty. That said company was duly incorporated and its charter issued under the seal of the Commonwealth December 4, 1850. By acts of the general assembly of the State of Pennsylvania, duly approved April 12, 1851, and April 23, 1852, said company was granted by the State of Pennsylvania certain additional rights, powers, and privileges. Defendant prays leave to refer to said charter and acts, and each and every of them, for greater certainty.

An act of the general assembly of the State of Pennsylvania was duly passed and approved by the governor March 11, 1853, providing for the consolidation of the aforesaid Lackawanna and Western Railroad Company and the Delaware and Cobb's Gap Rail-
28 road Company. By section 1 of said act it was provided:

"That all and singular the property and corporate powers, rights, and privileges of both companies be consolidated and united

under said merger, except so much of said powers, rights, and privileges as conflict, in which case the conflicting portions of the act incorporating the Delaware and Cobb's Gap Railroad Company, and its several supplements, are hereby repealed, and all provisions of law relative to the Lackawanna and Western Railroad Company not herein altered or supplied shall remain in full force, and so that by virtue of said merger of said companies and the provisions hereof said Lackawanna and Western Railroad Company may make and construct a continuous line of railroads from Great Bend to the Delaware River, without necessity for transshipment."

By section 5 of said act the corporate name of the Lackawanna and Western Railroad Company was changed to the Delaware, Lackawanna and Western Railroad Company. Defendant prays leave to refer to said act for greater certainty.

Defendant alleges that pursuant to the terms of the aforesaid grants, and prior to the year 1855, it duly constructed its railroad as aforesaid from the Delaware River on the boundary line of the State of New Jersey, in a northwesterly direction, through the State of Pennsylvania to the boundary line of the State of New York near Great Bend, Pennsylvania, and that it has been engaged in the operation of said railroad continuously since its construction as aforesaid.

29 The Lackawanna and Bloomsburg Railroad Company was duly incorporated under an act of the general assembly of the State of Pennsylvania, duly approved April 5, 1852, and was granted various rights, powers, and privileges by acts of the general assembly of the State of Pennsylvania, duly passed and approved February 19, 1849; March 3, 1853; and April 5, 1855. That under said acts said company was duly authorized to construct and operate a railroad from the city of Scranton to the city of Northumberland, in the State of Pennsylvania. That said railroad was duly constructed during the years 1852 to 1856, and pursuant to an act of the general assembly of the State of Pennsylvania, duly passed and approved by the governor May 16, 1861, entitled "An act relating to railroad companies," it was by a joint agreement dated June 16, 1873, consolidated and merged into the defendant, the Delaware, Lackawanna and Western Railroad Company. By virtue of the said act of the general assembly, and the said merger, the defendant acquired all the rights, powers, privileges, franchises, and property conferred upon or vested in or which belonged to the Lackawanna and Bloomsburg Railroad Company aforesaid. Defendant prays leave to refer to said acts for greater certainty, and also to the agreement of merger and certificates of the merging companies filed in the office of the Secretary of the Commonwealth of Pennsylvania, June 17, 1873.

By an act of the general assembly of the State of Pennsylvania, duly passed and approved April 19, 1856, the Northwestern Coal and Iron Company was duly incorporated. By section 1 of said act said company was vested by the general assembly of the State of Pennsylvania with the power

30 "to take and hold land and real estate on lease and in fee simple, in Butler County and in Armstrong County, and to mine, prepare for market, sell and dispose of the cannel and bituminous coal, iron ores, fire clay, and other minerals on their lands, and to manufacture iron * * * or other products of their minerals or lands, and to convey the said minerals or the products thereof to market, with power to grant leases of the said lands or any portion thereof; Provided, that the amount of land owned by said company shall not at any time in the aggregate exceed 3,000 acres."

By section 2 of said act said company was authorized "to construct such lateral or branch railroads, not exceeding twenty miles in length." Defendant prays leave to refer to said act for greater certainty.

By an act of the general assembly of the State of Pennsylvania duly passed and approved April 19, 1856, the name of said Northwestern Coal and Iron Company was changed to the Buffalo Coal and Iron Company, which said company was, by an act of the general assembly of the State of Pennsylvania duly passed and approved January 26, 1860, granted certain rights, powers, and privileges, including the right to acquire lands, as provided in the original act, in the county of Luzerne, State of Pennsylvania, and by said act the name of said company was changed to the Continental Coal Company.

By an act of the general assembly of the State of Pennsylvania duly passed and approved March 13, 1865, the corporate name of the Continental Coal Company was changed to the Keyser Valley Railroad Company, and said Keyser Valley Railroad Company
31 was by said act duly granted certain powers, rights, and privileges, including the right to use, exercise, and possess all the property, rights, privileges, powers, and franchises theretofore granted to it, and granted by the general laws of the Commonwealth to railroad companies. Defendant prays leave to refer to said act for greater certainty. On November 9, 1865, the said Keyser Valley Railroad Company was, pursuant to the provisions of the act of May 16, 1861, hereinafter set forth, duly merged into the defendant, the Delaware, Lackawanna and Western Railroad Company, and the defendant then became lawfully vested with all the rights, powers, and property of both companies. Defendant prays leave to refer to the original agreement of merger and certificates filed in the office of the secretary of the Commonwealth, December 27, 1865, for greater certainty.

The Scranton Coal Company was incorporated in the State of Pennsylvania, October 15, 1854, pursuant to the provisions of an act of the general assembly of said State, duly passed and approved April 7, 1849, entitled "An act to encourage manufacturing operations in this Commonwealth" and the supplements thereto. In its articles of incorporation it is certified, "That the objects for which said company has been formed are the mining of coal and preparing for market the produce of their mines and vending the same." That pursuant to the provisions of the act of April 7, 1849, said company

was duly authorized to purchase, hold, and convey any real or personal estate whatever, necessary or convenient to enable the said company to carry on the business or operations named in such certificate, not exceeding 2,000 acres.

32 By an act of the general assembly of the State of Pennsylvania, duly passed and approved April 11, 1867, the said Scranton Coal Company was consolidated with the Steuben Coal Company, and said Steuben Coal Company was granted certain rights, powers, and privileges, including the right to hold, possess, use and enjoy all the property of the said Scranton Coal Company, and the rights, privileges, and franchises granted to it. Defendant prays leave to refer to said act, and the certificates of ratification thereof filed with the secretary of the Commonwealth, October 9, 1867, for greater certainty.

The said Steuben Coal Company was duly incorporated under an act of the general assembly of the State of Pennsylvania, duly approved May 18, 1865, by which it was granted certain rights, powers, and privileges, including the right, by section 4 thereof, to—

"Purchase, lease, and hold coal and other lands in the county of Luzerne, not exceeding at any one time 3,000 acres, with power to mortgage, sell, lease, or otherwise dispose of the same or any part thereof; and the capital of the said company may be employed in purchasing, mining, vending, and transporting to market coal and other minerals."

By section 7 of said act the said company was duly authorized to maintain an office for the sale of coal and the transaction of other business either in the city of Philadelphia, Pa., or in the city of New York, N. Y. Defendant prays leave to refer to said act for greater certainty.

The Granby Coal Company was duly incorporated under and by virtue of an act of the general assembly of the State of Penn-

33 sylvania, duly passed and approved April 15, 1867, by which it was granted certain rights, powers, and privileges, including the right to purchase, lease, and hold coal lands in the county of Luzerne, not exceeding at one time 5,000 acres, with power to sell the same and to use the capital of said company in purchasing, mining, vending, and transporting to marked coal and other minerals. By section 11 of said act it was authorized to construct, use, and operate a railroad or railroads not exceeding ten miles in length in said county of Luzerne.

The Nanticoke Coal and Iron Company was duly incorporated under and by virtue of an act of the general assembly of the State of Pennsylvania, duly passed and approved April 13, 1864, by which it was granted certain rights, powers, and privileges, including the right to purchase, lease, and hold coal land in the county of Luzerne, not exceeding at any one time 5,000 acres, with power to sell or lease the same and use the capital of said company in purchasing, mining, vending, and transporting to market coal and other minerals. De-

fendant prays leave to refer to said acts of April 15, 1867, and April 13, 1864, for greater certainty.

By general acts of the general assembly of the State of Pennsylvania, duly passed and approved May 16, 1861, and April 13, 1868, respectively, entitled "An act relating to railroad companies" and "An act authorizing the merger and consolidation of coal companies," the aforesaid Steuben Coal Company and the aforesaid Granby Coal Company were on June 1, 1868, duly merged and consolidated into the Nanticoke Coal and Iron Company, which was under and pursuant to the provisions of said acts duly vested with all the
34 rights, powers, privileges, and property of both the said companies and of their constituent companies. The said general act of April 13, 1868, authorized coal companies having coal lands or mining privileges in the counties of Schuylkill and Luzerne, in the State of Pennsylvania, to merge and consolidate their corporate rights, powers, privileges, property, and franchises into any other company owning real estate in either of said counties, "being a coal or mining company, or a coal and iron company, or a company having mining privileges." Said act also provided that such merger "be made in accordance with the provisions of the act of May 16, 1861, above referred to, and when so made all the property, rights, franchises, and privileges of the company so merged shall, by virtue of such merger, be thereby transferred to and vested in the company into which such merger shall be made." Under and by virtue of the provisions of the said acts, the said Nanticoke Coal and Iron Company was duly consolidated and merged into the defendant, the Delaware, Lackawanna and Western Railroad Company, on or about June 23, 1870. Defendant prays leave to refer to the certificate of the merging companies duly filed in the office of the secretary of the Commonwealth of Pennsylvania, August 12, 1870, and August 17, 1870, for greater certainty.

By an act of the general assembly of the State of Pennsylvania, duly passed and approved March 22, 1855, certain powers, rights, and privileges were conferred upon the defendant by the State of Pennsylvania, and it was by section 4 of said act duly authorized to "increase the quantity of their coal lands to an amount not exceeding (with those already acquired) 2,000 acres, and to hold said
35 coal lands, and to mine, purchase, transport, and vend coal."

By section 5 of said act the defendant was duly authorized to "make agreements and contracts with corporations and individuals in the States of New York and New Jersey, expedient and necessary in the prosecution of their business in transporting and vending anthracite coal."

By an act of the general assembly of the State of Pennsylvania duly passed and approved April 4, 1854, the defendant was duly authorized to subscribe to the capital stock of the Warren Railroad Company, in the State of New Jersey, and lease said railroad, and to purchase and hold in the States of New York and New Jersey "lands necessary for depot purposes and the shipping of coal."

By an act of the general assembly of the State of Pennsylvania duly passed and approved March 8, 1856, the defendant was authorized to borrow money, and to purchase anthracite coal mined from other lands than those owned by it, provided its charge for the transportation of anthracite coal upon its road shall not exceed two cents per ton per mile. The defendant was also by said act duly authorized to purchase and hold near Elizabethport, in the State of New Jersey, "such quantity of land as may be necessary for depot, wharfage, and coal-yard accommodations for its business, not exceeding fifty acres." It was also, by said act, authorized to lease the Warren Railroad. Defendant duly complied with the conditions of said act.

By an act of the legislature of the State of New Jersey, duly passed and approved March 5, 1857, the defendant was duly authorized and empowered by the State of New Jersey to purchase
36 and hold at or near Elizabethport, in the county of Essex, State of New Jersey, "such quantity of land as may be necessary for depot, wharfage, and coal-yard accommodations for their business, not exceeding fifty acres." It was also authorized to lease the Warren Railroad in the State of New Jersey.

By an act of the legislature of the State of New York, duly passed and approved April 5, 1864, the defendant was duly authorized by the State of New York to purchase and hold lands in said State "necessary for depot, wharfage, and coal-yard accommodations for their business, and for no other purpose, not exceeding ten acres in any one locality."

Defendant also alleges that under and pursuant to the provisions of various acts of the States of New York and New Jersey it has been for many years last past, and now is, duly authorized and empowered to hold lands in said States necessary for it to hold in connection with the transportation and sale of its anthracite coal in said States, and to transport, store, and sell coal therein.

By an act of the general assembly of the State of Pennsylvania entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," approved April 15, 1869, this defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of this Commonwealth by the purchase of their capital stock and bonds or either of them. Defendant prays leave to refer to said acts for greater certainty, and alleges that it acquired the stock of the coal companies alleged in the complaint pursuant to the provisions of said act prior to the year 1899.

37 III.

Further answering, the defendant alleges that at the time of the construction of its railroad from the State of New Jersey to the State of New York, through the State of Pennsylvania, prior to the year 1856, said portion of the State of Pennsylvania traversed by its

said railroad was an almost unbroken wilderness, mountainous and largely uninhabited, and its said railroad was constructed to enable it to carry to market and so vend its anthracite coal owned by it as aforesaid. Prior to the construction of any portion of said railroad this defendant, pursuant to legislative authority hereinbefore set forth, duly owned in fee coal lands to the amount of one thousand acres. Additional coal lands were then owned by other stockholders of the defendant. No railroads were then constructed from said coal lands to points where the coal to be mined therefrom could be advantageously sold, so that it became necessary to construct said railroad in order to enable the defendant and its stockholders to dispose of the coal from the lands so held by them. Subsequently, from time to time, the defendant acquired, pursuant to the authority of law hereinbefore cited, additional coal lands. At the time of the completion of its said railroad from the State of New Jersey to the State of New York as aforesaid, and prior to the year 1856, it had acquired coal lands to the extent of two thousand acres. The defendant in the year 1851 first engaged in the mining of coal, and thereafter, from year to year, expended large sums of money in the erection of collieries and breakers, and generally in connection with its business of extracting coal from its coal mines aforesaid and preparing
38 the same for market. It first transported coal over its railroad in the year 1851, during which year it transported 6,000 tons from its mines over that portion of its railroad then constructed. Thereafter, from year to year, it increased its mining operations. In the year 1855 it transported over its said railroad 131,000 tons of its coal. Thereafter, from time to time, various stockholders of the defendant, and others on its behalf, organized in the State of Pennsylvania the various coal companies hereinbefore named, which acquired coal lands subsequently transferred to the defendant. All such companies were organized pursuant to legislative authority hereinbefore set forth, and lawfully acquired coal lands to the amount hereinafter stated, all of which coal lands subsequently, pursuant to the legislative authority hereinbefore set forth, were lawfully acquired by the defendant. That all of said coal companies hereinbefore named, including the Keyser Valley Railroad Company, the Scranton Coal Company, the Steuben Coal Company, the Granby Coal Company, and the Nanticoke Coal and Iron Company, acquired large holdings of coal lands, which upon their merger and consolidation with this defendant were lawfully vested in it. That it thereby acquired, prior to the year 1871, in addition to the 2,000 acres of coal land lawfully theretofore held by it, approximately 15,000 additional acres of coal land, which it has since lawfuly owned in fee. That said lands contained large deposits of anthracite coal of great value. That prior to said date, and pursuant to legislative authority hereinbefore cited, it had also acquired by lease several thousand acres of coal lands, which it has since held, and from which it has mined and

sold yearly large amounts of coal. Defendant alleges that all
39 of the coal lands so acquired by it were contiguous to its lines of railroad in the State of Pennsylvania aforesaid, and upon being acquired by the defendant were connected by side tracks with its railroad.

IV.

Further answering the complaint, defendant alleges that having so lawfully acquired large holdings of coal lands in the State of Pennsylvania as aforesaid, and for the purpose of obtaining lines of railroad by and over which it might transport such coal to market, it acquired by lease the various lines of railroad hereinbefore set forth in the States of New Jersey and New York. In order to sell its coal in the city of New York it acquired lines of railroad in the State of New Jersey, connecting with its railroad at the Delaware River. In order to market its coal in Canada it acquired lines of railroad exending northerly through New York State to Lake Ontario. In order to sell its coal in the western markets it acquired a line of railroad extending to the city of Buffalo, connecting there with other railroads extending thence westerly and with boat lines on the Great Lakes.

The railroads so acquired by the defendant as aforesaid are the following:

The Cayuga & Susquehanna Railroad Company, which was incorporated under and pursuant to the laws of the State of New York, April 18, 1843, and authorized to construct and operate a railroad from Cayuga Lake, at the city of Ithaca, in the State of New York, to the Susquehanna River at or near the village of Owego. This railroad was duly leased to the defendant by an instrument in writing dated April 21, 1855, to the original of which the
40 defendant hereby refers for greater certainty. By the special charter granted to this company by the State of New York duly passed and approved April 8, 1851, the company was, by section 3 of said act,

"Authorized and empowered to make contracts with any corporations or individuals whereby a sufficient supply of coal may be secured for the use and benefit of said company or to be distributed by them; and it shall and may be lawful for said company to employ so much of its capital for the purpose of mining, transporting, and vending coal, and in the purchase of such real estate not exceeding five thousand acres of coal land and personal property as they may deem necessary for the purpose aforesaid."

Pursuant to the authority thus conferred said company acquired four hundred and fifty-two acres of coal lands in Pennsylvania adjacent to defendant's railroad. That under and by virtue of the said lease and an agreement contemporaneous therewith this defendant acquired the right to exercise, use, and enjoy all the charter rights, powers, and privileges of said company, including the right

to mine and take coal from the lands acquired as aforesaid, and to transport and vend the same for the defendant's use and benefit, and defendant has since mined, transported, and sold coal therefrom. That by the terms of said lease this defendant obligated itself to pay to the stockholders of the said Cayuga & Susquehanna Railroad Company the sum of $70,000 per year, which was afterwards reduced to the sum of $54,600 per year, during the term of the corporate charter of the said company, and it also agreed to pay all taxes
41 and obligations of the said company, and to keep in repair and maintain and operate its railroad.

That said railroad was acquired to enable the defendant to ship its coal via said railroad in connection with boats on Cayuga Lake, to connect with the Erie Canal, by means of which its coal might be transported to various markets.

The railroad so next acquired by the defendant was that of the Warren Railroad Company, which was duly incorporated under and by virtue of an act of the State of New Jersey, duly passed and approved February 12, 1851, by virtue of which said company was authorized to construct a railroad from a point on the Delaware River connecting with the line of the defendant to a point to intersect with the railroad of the Central Railroad Company of New Jersey at or near New Hampton, in the county of Hunterdon, with a branch to Belvidere, in the county of Warren, New Jersey. By an act of the legislature of the State of Pennsylvania, duly passed and approved April 4, 1854, and an act of the legislature of the State of New Jersey, duly passed and approved March 5, 1857, the defendant company was duly authorized to lease the railroad of the aforesaid Warren Railroad Company. By virtue of such authority a lease in writing was duly made and executed by the said company to the defendant, dated October 1, 1857, whereby the defendant was authorized to operate the railroad of the Warren Railroad Company for and during the legal existence of said company, to the original of which said lease the defendant prays leave to refer for greater certainty. That by the terms of this lease the defendant duly obligated itself to pay, perpetually, dividends upon the capital
42 stock of the Warren Railroad Company, and interest upon its bonds, and to operate the railroad of said company in perpetuity, and to pay the taxes and other obligations of the said company, and to keep in repair and maintain its railroad. That the annual fixed charge of the defendant on account of the lease of said Warren Railroad Company is the sum of $174,790.

That thereafter during the years 1868 to 1882 defendant duly acquired by lease the railroads hereinbefore named of the following companies, all of which were corporations duly incorporated pursuant to the laws of the State wherein their lines were constructed, viz: the Morris & Essex Railroad Company, the Valley Railroad Company, the Oswego & Syracuse Railroad Company, the Utica, Chenango and Susquehanna Valley Railroad Company, the Greene

Railroad Company, and the New York, Lackawanna and Western Railway Company.

That by the terms of the leases of all of said lines the defendant obligated itself in perpetuity to pay dividends upon the capital stock of said companies, all their taxes and outstanding obligations, including interest on their bonds, and to operate and maintain their railroads. That on account of the obligations so assumed defendant has yearly paid large sums of money, and its fixed charges for interest on stocks and bonds of said companies for the year 1907, including the Warren and Cayuga and Susquehanna aforesaid, was the sum of $5,155,697, and for taxes the sum of $1,163,916.95.

V.

That the contracts and leases aforesaid were all lawfully made by the defendant, and were made in good faith, and were made to
43 enable the defendant to transport over said railroads its anthracite coal as aforesaid whereby it could obtain sufficient revenues to pay the obligations assumed by it under said contracts and leases aforesaid. Since the dates of said leases, up to the present time, the defendant has continuously operated all of said railroads, and has conformed in all respects to the terms of the contracts and leases hereinbefore set forth. It has expended yearly very large sums of money in equipment thereon and in betterments and improvements thereof. Over said lines the defendant has yearly transported many thousand tons of its coal. Out of a total of about 8,700,000 tons of coal produced by the D., L. & W. in the year 1907 from its lands owned in fee and leased upward of 6,700,000 tons were transported over its lines of railroad in interstate commerce. In other years the amount of said coal thus transported was in a similar proportion to the total amount thus produced. From 40% to 60% of the annual transportation earnings of the defendant from the operation of said leased lines aforesaid have been derived from the carriage of its anthracite coal thereover.

VI.

Defendant further avers that for the purpose of facilitating the handling, transportation, and sale of its coal, and relying upon the charter powers hereinbefore set forth, it acquired, prior to June 29, 1906, at many points, and at large cost, not only on the lines owned by it as aforesaid, but upon the lines leased and operated by it, extensive terminal facilities, storage yards, depots, docks and wharfs.

That for the said purpose it constructed, prior to said date,
44 not only on its own lines, but upon said leased and controlled lines, at many points, and at large cost, coal trestles, coal pockets, transshipping plants, and other facilities.

That defendant has expended and laid out large sums of money in the construction, improvement, and betterment of the railroads so owned, leased, and controlled by it.

Defendant now owns in fee and by lease anthracite coal lands, acquired by it pursuant to the legislative authority hereinbefore cited, containing many million tons of unmined coal, and prior to said date, at great cost, erected thereon and now owns, collieries, breakers, buildings, machinery, appliances, and fixtures, and at great cost purchased and installed thereon, prior to said date, and now owns, equipment to enable it to advantageously mine said coal, all of which is of great value. That relying upon its charter rights, as aforesaid, defendant, prior to said date, entered into contracts with various and sundry persons and corporations to sell them its coal, delivered at various points in various different States of the United States, which said contracts are still in force, and under the terms of which the defendant is obligated to sell its coal to such persons and corporations delivered as aforesaid, for long terms of years.

That the ownership by the defendant of its coal and the revenues derived from the transportation of same to market has enabled it to expend millions of dollars in betterments and improvements of its railroads, so that the public is now in the enjoyment of the benefits of a modern railroad, with modern construction and equipment.

45 VII.

Defendant further alleges that it necessarily uses, itself, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal of the size of pea or smaller, annually, and will require more for such use in the future; that in the year 1907 defendant mined from the lands owned by it in fee, approximately, 5,600,000 tons of coal of all sizes, of which about 2,000,000 tons were of the size of pea or smaller; that coal of the size of pea or smaller is the most economical for the purposes aforesaid, and the larger sizes are not adapted to and cannot be used for such purposes; that defendant's locomotives are nearly all anthracite-burning engines, and are so constructed as to require small sizes of coal in the economical operation of the same; that should defendant be forbidden to transport and market the sizes of coal larger than pea, which it does not require and cannot use, in the preparation of which for market the smaller sizes are made, great waste would occur and an enormous loss would result to the defendant.

VIII.

Defendant therefore alleges that the portion of the first section of the act to regulate commerce approved February 4, 1887, as amended by an act of Congress approved June 29, 1906, referred to in said petition and commonly called the "commodity clause," is invalid, in that if enforced it would deprive defendant of the use and enjoyment of property lawfully acquired, without compensation,
46 and without due process of law, in violation of the fifth amendment of the Constitution of the United States.

That defendant's rights to acquire its holdings of coal land, its rights to mine coal and to transport the same to market, and its

leases of other railroads, were acquired many years prior to the enactment of the so-called interstate commerce act and many years prior to the enactment of the amendment thereto known as the said commodity clause; that the investments aforesaid, made in good faith in reliance upon such rights and in the expectation of the continuance thereof, have resulted in vested rights which cannot be impaired or taken away.

That said commodity clause is invalid in that the same constitutes a prohibition of and upon interstate commerce; that it is not a regulation thereof, and is not within the power of Congress under the commerce clause of the Constitution of the United States.

That said commodity clause is further invalid and in violation of the eighth amendment of the Constitution of the United States in that it imposes, by section ten of the act, excessive fines and punishment for its violation, and that such fines and punishment are so excessive as to ordinarily operate to deter railroads from testing the validity of the said clause. Defendant ships over its lines of railroad in interstate commerce about thirty trains of coal daily, composed of many cars containing coal produced by it as aforesaid, in which it has a direct interest, consigned to different destinations, which said coal was not and is not necessary and intended for the use of defendant in the conduct of its business as a common carrier; that the
47 said commodity clause is further invalid and violative of the fifth amendment of the Constitution of the United States, in that it unlawfully discriminates between persons and common carriers, visiting upon corporations, which are railroad companies, its prohibition and penalties and exempting other persons and carriers therefrom; that said clause further unlawfully discriminates between common carriers of different classes of commodities, in that it visits upon common carriers of coal and all other commodities except timber its prohibition and penalties and exempts common carriers of timber and the products thereof therefrom.

Wherefore defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained, and that it have such other and further relief in the premises as to this honorable court may seem just and in accordance with equity.

DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY,
[SEAL.] By A. D. CHAMBERS, *Secretary.*

JOHN L. SEAGER,
Solicitor.
WILLIAM S. JENNEY,
Of Counsel for Defendant.

48 SOUTHERN DISTRICT OF NEW YORK, *ss:*

WILLIAM H. TRUESDALE, being duly sworn, deposes and says that he is an officer, to wit, president of the defendant, The Delaware, Lackawanna and Western Railroad Company; that he has read the

foregoing answer and that the same is true to the best of his knowledge, information, and belief.

W. H. TRUESDALE.

Sworn to before me this 9th day of June, 1908.

[SEAL.] JOSEPH FRILL,
Notary Public, New York County.

51 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, defendant.	April session, 1908. No. 91. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney General.

JOHN G. JOHNSON.
Atty. for Deft.

ROBERT W. DE FOREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 91. April session, 1908. Equity. U. S. v. Delaware, Lackawanna & Western Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk. L.

52 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company, defendant.	April session, 1908. No. 91. In Equity.

The complainant in this cause hereby joins issue with the defendant, Delaware, Lackawanna and Western Railroad Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 91. April session, 1908. Equity. U. S. v. Delaware, Lackawanna and Western Railroad Company. Replication. Filed June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. The Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.]

129 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* DELAWARE, LACKAWANNA & WESTERN Railroad Co.	April sessions, 1908. In Equity. No. 91.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is orderd and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk*.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 91. U. S. vs. Delaware, Lackawanna & Western Railroad Company. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

130 No. 91. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD Company, defendant.	

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern

District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generaly known as the "Commodities
131 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "Commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "Commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "Commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

132 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "Commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 91. April session, 1908. In Equity. United States of America vs. Delaware, Lackawanna and Western Railroad Company. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

133 No. 91. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, defendant.

To the honorable the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled case on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

Dated October sixth, 1908.

134 (Endorsed:) U. S. C. C., E. D. of Penna. No. 91. April session, 1908. In Equity. United States of America *vs.* Delaware, Lackawanna and Western Railroad Company. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General. J. Whitaker Thompson, U. S. attorney. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

135 No. 91. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, defendant.

Before DALLAS, C. J.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 91. April session, 1908. In Equity. United States of America vs. Delaware, Lackawanna and Western Railroad Company. Order of court allowing appeal. Filed October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

136 UNITED STATES OF AMERICA, *ss.:*

The President of the United States to Delaware, Lackawanna and Western Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*
Service accepted.
JOHN G. JOHNSON,
Per J. B. BAYARD,
Attorney for Appellee.

137 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America v. Delaware, Lackawanna and Western Railroad Company, No. 91, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.]

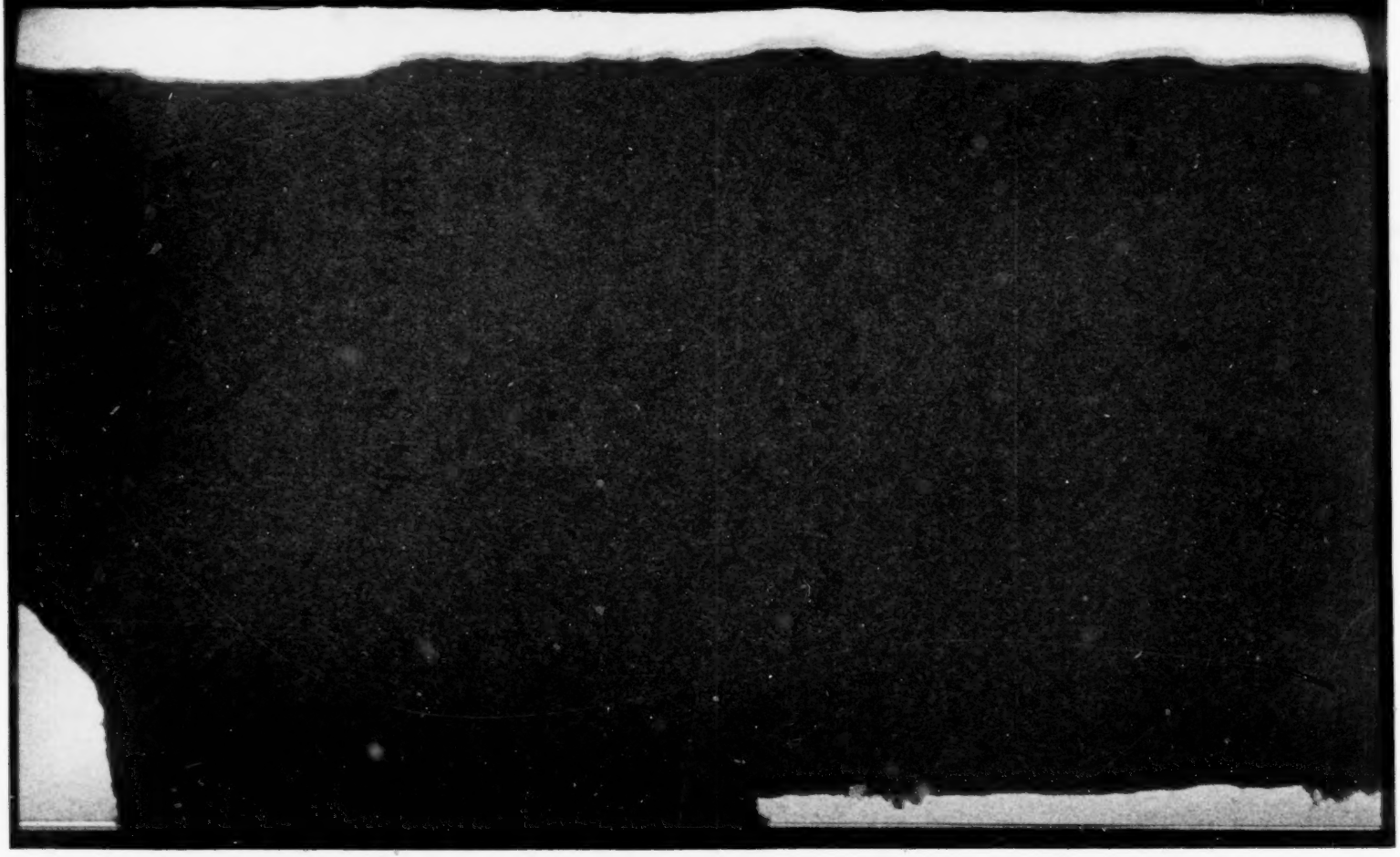
HENRY B. ROBB,
Clerk of C. C.

(Indorsement on cover:) File No., 21364. E. Pennsylvania. C. C. U. S. Term No., 568. The United States of America, appellant, vs. Delaware, Lackawanna & Western Railroad Company. Filed October 10th, 1908. File No., 21364.

O

TRANSCRIPT OF RECORD

(21485)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 569.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Bill of complaint	2	1
Appearance for defendant	14	5
Answer	15	5
Stipulation as to submission on bill and answer	31	12
Replication	32	12
Decree	109	13
Assignment of errors	110	13
Petition for appeal	113	15
Order allowing appeal	115	16
Citation and service	116	16
Clerk's certificate	117	17

1 APRIL SESSION, 1908.

Charles J. Bonaparte,
95
Robert W. deForrest,
John G. Johnson.

United States of America
vs.
The Pennsylvania Railroad Company.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July.
1908, June 5. Order for the appearance of Robert W. deForrest and John G. Johnson, esquires, for defendant filed.
1908, June 10. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant filed reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 95. April sessions, 1908. In equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

Bill of complaint.

(Filed June 5, 1908, Henry B. Robb, clerk. By L., deputy clerk.)

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

April sessions, 1908. No. 95. In equity.

To the Honorable, the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against The Pennsyl-

vania Railroad Company, a railroad company hereinafter more particularly described. And therefore your orator complains and says:

(1) That the said "The Pennsylvania Railroad Company," herein designated and called "the defendant," is a corporation created, organized, and existing under the laws of the State of Pennsylvania, having its principal office in that State, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

(2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Summit Branch Mining Company and of the Susquehanna Coal Company, corporations in the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Luzerne, Northumberland, Dauphin, and Schuylkill, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, nearly all of whom are, in the case of each of said coal companies, as they have been for some time past, officers of the defendant. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(4) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Mineral Railroad and Mining Company, a corporation of the said State of Pennsylvania, which holds, by
7 conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Luzerne, Northumberland, Dauphin and Schuylkill, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of a board of directors nearly all of whom are, as they have been for some time past, officers of the defendant. That, by virtue of such stock ownership, the defendant owns in part, and has an interest in, said last mentioned coal lands and coal mines and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last mentioned coal company by officers of the defendant, as hereinbefore stated, the operations of said last mentioned coal company, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant.

(5) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for
8 transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when so loaded as aforesaid, has been, and is being, carried and transported in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey and other States for sale and delivery at the markets of the said States of New Jersey, New York and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(6) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the trans-

portation of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "Act to regulate commerce" as said
9 section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(7) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(8) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of
10 the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole, or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "The Pennsylvania Railroad Company," may make full answer under oath to all the allegations herein; and that an injunction be granted to enjoin and prohibit the said "The Pennsylvania Railroad Company" from further transporting, in interstate commerce, the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orator a writ of
11 subpœna, to be directed to the said "The Pennsylvania Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises, and to perform and abide by such order, direction and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney General.

14 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA *vs.* PENNSYLVANIA R. R. COMPANY.	April session, 1908. No. 95.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FORREST,
JOHN G. JOHNSON,
per F. MARKO RIVINUS,
Attorneys for Defendant.

To clerk of said court.

(Endorsed:) U. S. C. C., E. D. of Penna., No. 95, April session, 1908. U. S. of America *v.* Pennsylvania R. R. Company. Order for appearance. Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

15 No. 95. April sessions, 1908.

In the Circuit Court of the United States, Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, COMPLAINANT. *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	Bill in equity.

Answer of the Pennsylvania Railroad Company.

FRANCIS I. GOWEN,
GEO. V. MASSEY,
Solicitors for Defendant.

(Filed June 10, 1908. Henry B. Robb, clerk. By L., deputy clerk.)

17 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, complainant, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, defendant.	April sessions, 1908. No. 95. Bill in equity.

Answer of the Pennsylvania Railroad Company.

The Pennsylvania Railroad Company, the defendant in the above bill of complaint, expressly saving and reserving to itself all benefit and advantage of exception to the manifold errors, uncertainties, and insufficiencies in said bill of complaint contained for answer thereto, or to such parts thereof as it is advised it is material and necessary to answer, says:

1. This defendant admits the averments of paragraph 1 of the bill, and further states that it was incorporated by, and duly organized under an act of the State of Pennsylvania entitled "An act to incorporate the Pennsylvania Railroad Company," approved April 13, 1846. This defendant avers that it is duly possessed of and
18 may lawfully exercise all and every the corporate rights, powers, privileges, and franchises mentioned in and conferred by the said act, and by divers other acts supplementary to and amendatory thereof, subsequently from time to time enacted, and also an act entitled, "An act for the sale of the main line of public works," approved May 16, 1857, to all of which it prays leave to refer at the hearing of this cause, with the same force and effect as if the same were herein set out at length.

In addition to the powers conferred in and by the said aforementioned acts, this defendant avers that it has been, and still is, possessed of all the powers, privileges, and rights conferred by two general statutes of the said State, entitled respectively "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks and other securities, and fixing the time for holding elections for directors," approved March 31, 1868, and "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber and other material interests of this Commonwealth," approved April 15, 1869, to each of which acts it prays leave to refer at the hearing of this cause, as fully to all intents and purposes as if the same were herein set forth at length.

2. This defendant admits that it is now, and has been for many years past, engaged in operating lines of railroad in the States of Pennsylvania and New Jersey, and also a line of railroad in the State of New York, and that prior to the first day of May, 1908, it was engaged as a common carrier, within the meaning of the act to regulate commerce, in interstate transportation, and in such transportation, has, *inter alia*, for a long time past transported on and over its

lines of railroad anthracite coal from mines within the State of Pennsylvania to markets in other States, and that it is still engaged in such transportation.

3. This defendant admits that it is, as alleged in paragraph
19 3 of the bill of complaint, the owner of the entire capital stock—consisting of twenty-one thousand three hundred and sixty-eight (21,368) shares of the par value of one hundred dollars ($100), and aggregating at such par value two million one hundred and thirty-six thousand eight hundred dollars ($2,136,800)—of the Susquehanna Coal Company, a corporation of the State of Pennsylvania created and organized under a special statute of said State entitled "An act to incorporate the Pittston Railroad and Coal Company," approved April 11th, 1867, and, by virtue of said act and two additional acts, approved respectively February 24th, 1869, and June 14th, 1873, authorized to acquire, own, and operate coal lands in the county of Luzerne in said State; that this defendant, on the thirty-first day of December, 1873, acquired ten thousand (10,000) shares of the said coal company's stock—the whole whereof then issued and outstanding was fifteen thousand (15,000) shares—and, at divers times subsequently, and until and inclusive of the fifth day of January, 1886, from time to time made purchases and acquisition of the additional shares.

This defendant also admits that it is, as stated in said paragraph 3 of the bill of complaint, the owner of the whole capital stock—consisting of five hundred (500) shares of the par value of fifty dollars ($50) each, and aggregating at such par value twenty-five thousand dollars ($25,000)—of the Summit Branch Mining Company, a coal mining corporation duly constituted under the laws of the State of Pennsylvania by the purchasers at judicial sale of the corporate property and franchises of the Summit Branch Coal Company, which latter was likewise a corporation duly constituted under the laws of the State of Pennsylvania by the purchasers at judicial sale of the corporate property and franchises of the Summit Branch Railroad Company, and the said Summit Branch Railroad Company was duly constituted under and by virtue of "An act to incorporate the Summit Branch Railroad Company in Dauphin and Schuylkill counties,"
approved March 20th, 1846, and several supplements thereto
20 approved respectively February 12th, 1850, March 30th, 1853, and March 23rd, 1860, and was possessed of the corporate rights, privileges, and franchises conferred by said several acts, as well as by an act entitled "An act relating to the Summit Branch and Millersburg and Rousch Gap Railroad Companies," approved March 1st, 1866. This defendant became the owner, in 1871, of shares of the capital stock of said Summit Branch Railroad Company aggregating at their par value one million two hundred and fifty-two thousand four hundred dollars ($1,252,400), and subsequently and until and inclusive of the year 1899 from time to time made purchases of additional shares thereof. That the said last-mentioned coal company is authorized to acquire, by purchase or lease, coal

lands in the counties of Dauphin and Schuylkill in the said State of Pennsylvania, and has acquired such lands which are principally situated and operated in the said county of Dauphin.

This defendant further admits that it is, as alleged in paragraph 4 of said bill of complaint, the owner of one thousand six hundred and sixty-seven (1,667) shares, out of a total of five thousand and one (5,001) shares issued and outstanding, of the capital stock of the Mineral Railroad and Mining Company, also a corporation of the State of Pennsylvania created by and under two special statutes of said State, to wit: "An act to incorporate the Mineral Railroad and Mining Company" (public laws 1865, page 959) and "An act to authorize the Mineral Railroad and Mining Company to lease certain coal lands," approved April 1st, 1872; and that said last-mentioned company is authorized to acquire, own, and operate coal lands in the county of Northumberland in said State.

This defendant further states and avers that it became the lawful owner of the shares of each of the said three coal companies, as hereinabove stated, many years prior to the enactment of the act of Congress entitled "An act to amend an act to regulate commerce, approved February 1st, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June 29th, 1906.

21 This defendant further admits, as alleged in said paragraphs 3 and 4 of the bill of complaint, that each of the above-mentioned coal companies holds, under conveyances and leases made long prior to the said first day of May, 1908, anthracite coal lands situate in what is known as the "anthracite coal regions" of Pennsylvania, and located in the counties respectively as herein above stated, and that said companies have been, from a date long prior to the said first day of May, 1908, engaged in mining anthracite coal thereon and therefrom, such mining operations being carried on under the immediate and direct control of the executive officers of the respective companies, these, in their turn, being subject to the supervisory power and control vested in the boards of directors of the said companies by their respective charters.

The actual operations of the said coal companies, insofar as these relate to or have to do with the mining, shipping, selling, and marketing of the coal mined by the said companies, respectively, are, as this defendant is informed and believes and so avers, directed and controlled by the president and vice-president of said companies and the officers and agents subordinate to and appointed by them, and this defendant avers that, neither at the present time nor for many years past, have either the said president or vice-president of said coal companies, or any of the subordinate officers or agents appointed by them, been an officer or agent of this company, or in any wise subject to the orders or directions of this defendant.

And this defendant admits that, at the present time and for many years past, a majority of the board of directors of each of the said coal companies have been either officers or directors of this defendant.

This defendant denies that, because or by virtue of its ownership of the aforesaid shares of stock of the said several coal companies, it has become the owner of the coal lands and coal mines, title to which is in the said companies, respectively, or of the coal therein or mined therefrom, or that it has any interest in said lands, mines
22 or coal; or that, by virtue of its ownership of the shares of stocks of the said several coal companies and the voting power incident thereto in the election of the managers or directors of each of said companies, and such other officers (if any) as, under the charter of each company, are elected by the stockholders, the operations of said coal companies, or any of them. in the mining of anthracite coal, are being carried on by and under the authority of this defendant.

4. This defendant admits that from time to time since the first day of May, 1908, and at the present time anthracite coals produced from mines of the several coal companies heretofore mentioned—a portion whereof is sold before, and a portion after, the transportation thereof begins—have been transported and are still being transported at lawfully established schedule rates on and over its lines of railroad, and that a considerable portion—approximately sixty-five per centum (65%) of the coal so mined—is carried to different destinations outside the State of Pennsylvania, and that the transportation of such portion thereof by this defendant constitutes commerce between different States, and it also admits that the coal thus transported was not, and is not, necessary nor intended for the use of the defendant in the conduct of its business as a common carrier.

5. This defendant denies the correctness of the conclusions of law stated in paragraph 6 of the bill. Under advice of counsel, it denies that it results from its ownership of the shares of stock of the aforesaid coal companies, that the anthracite coals mined or produced from the mines of said coal companies have been or are being mined or produced by it or under its authority, or that it has any interest, direct or indirect, therein, within the purview, meaning, and intent of the clause of the act of Congress approved June 29, 1906, which is set out in paragraph 6 of the bill; but, on the contrary, it states and avers that it has, and can have no interest or benefit in the operation of said companies other than that of receiving such portion of
23 the clear profits of each as may be by the board of directors of each of said companies from time to time declared as dividends, and allotted to this defendant according to its ownership of the capital stock of each thereof.

6. This defendant admits that it is now engaged in the interstate transportation of anthracite coal mined by the aforesaid coal companies, and that it is its purpose to continue such transportation unless it should be required to desist from the same by the order of this honorable court, but it denies that in so doing it is acting in violation of law.

7. This defendant admits that anthracite coal is an article or commodity other than timber and the manufactured products thereof, as

averred in paragraph 8 of the bill, but it denies, under the advice of counsel, that any coal which it transports other than that which may be intended for its use in the conduct of its business as a common carrier, is either owned by it in whole or in part, or that it has any interest, direct or indirect, therein.

And this defendant, further answering, says that the mining and production of anthracite coal is confined to the State of Pennsylvania, as no deposits of this coal have as yet been found outside of the limits of that State which at the present time are being worked. That the said coal is almost the exclusive domestic fuel for large portions of the States of New York, New Jersey, Delaware, Maryland, and for many of the New England States, and that the transportation of such coal into these States has been carried on for many years past.

That in the year 1907 more than sixty-eight million gross tons of anthracite coal were mined in the State of Pennsylvania, and that approximately forty-five million tons were transported to and consumed at points outside of the State of Pennsylvania. That anthracite coal has thus become a very considerable increment in interstate commerce exceedingly important, and highly essential to the public welfare; and that any interference with or interruption of the movement of such coal to points of consumption outside
24 the State would be a serious inconvenience and detriment to a large portion of the inhabitants of the States to which anthracite coal is now transported.

That a very large proportion of the anthracite coals produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined markets over the railroads of this defendant, and that many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic and transportation uses, both without and within the State of Pennsylvania.

9. This defendant, while insisting that the interstate transportation of coal by it, which has been mined or produced by the aforesaid coal companies, is not prohibited by the act of Congress approved June 29, 1906, further states and shows to the court that the clause of said act which it is averred it has violated because of the interstate transportation of such coal, is violative of and repugnant to the Constitution of the United States in the following particulars:

(*a*) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the several companies hereinbefore mentioned; but, on the contrary, undertakes to absolutely *prohibit* transportation thereof, and therefore is not a "*regulation*" of interstate commerce,

but a "*prohibition*" of such commerce; and consequently is not within the scope of the commerce clause of the Constitution.

(*b*) That the effect of the said clause will constitute a taking of the defendant's property, corporate rights, and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.

25 (*c*) That said clause is "class legislation," unduly and unjustly discriminative in its results in that it expressly permits railroad companies to transport in interstate commerce timber and the manufactured products thereof, which may be manufactured or produced by any such company, or under its authority; or which it may own in whole or in part, or in which it may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "class legislation," in that it arbitrarily denies to one class of common carriers under the act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities but imposes no such restriction or prohibition on other common carriers under said act and its amendments.

(*d*) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate, as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to such carriers to constitute a denial of the equal protection of the law.

And this defendant having fully answered all material allegations in said bill of complaint contained, prays that it may be hence dismissed with its reasonable costs in this behalf most wrongfully sustained.

THE PENNSYLVANIA RAILROAD COMPANY,
By JAMES MCCREA, *President.*

Attest:
[SEAL.]

LEWIS NEILSON,
Secretary.

FRANCIS I. GOWEN,
GEO. V. MASSEY,
Solicitors for Defendant.

26 STATE OF PENNSYLVANIA,
City and County of Philadelphia, ss:

Be it remembered that on this ninth day of June, A. D. 1908, personally appeared before me, the undersigned, a notary public of the State of Pennsylvania, in the said county of Philadelphia, James McCrea, who having been by me duly sworn according to law, deposes and says that he is the president of The Pennsylvania Railroad Company, and that the facts set forth in the foregoing answer of

said company are correctly and truly stated according to the best of his knowledge, information and belief.

JAMES MCCREA.

Sworn to and subscribed before me the day and year aforesaid, as witness my hand and official seal hereto affixed.

[SEAL.] A. J. COUNTY,
Notary Public.

My commission expires January 21st, 1909.

31 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.	April session, 1908. No. 95. In equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in no wise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.
JOHN G. JOHNSON,
Atty. for Deft.
ROBERT W. DE FORREST,
Atty. for Deft.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. Equity. U. S. v. The Pennsylvania Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, clerk, L.

32 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.	April session, 1908. No. 95. In equity.

The complainant in this cause hereby joins issue with the defendant, The Pennsylvania Railroad Company, and will submit the cause, by permission of the court, on bill, answer and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. Equity. U. S. v. The Pennsylvania Railroad Company. Replication. Filed June 16, 1908. Henry B. Robb, clerk, L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. the Delaware, Lackawanna and Western Railroad Company, No. 562, of October Term, 1908.]

109 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs.
PENNSYLVANIA RAILROAD COMPANY. } April sessions, 1908. In Equity. No. 95.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penn. No. 95. U. S. vs. Pennsylvania Railroad Company. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

110 No. 95. April session, 1908. In equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case.

2. That the Circuit Court erred in refusing the injunction prayed in this case.

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States.

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "commodities
111 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "commodities clause."

5. That the Circuit Court erred in holding that the said co-called "commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States.

6. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution.

7. That the Circuit Court erred in holding that the said so-called "commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States.

8. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid.

9. That the Circuit Court erred in holding that the said so-called "commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law.

112 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. In Equity. United States of America vs. The Pennsylvania Railroad Company. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

113 No. 95. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

To the honorable, the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above-entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

114 (Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. In Equity. United States of America *vs.* The Pennsylvania Railroad Company. Petition for appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General, J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

115 No. 95. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, DEFENDANT.

Before DALLAS, C. J.

It is hereby ordered that the appeal in the above-entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 95. April session, 1908. In Equity. United States of America *vs.* The Pennsylvania Railroad Company. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

116 UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable George M. Dallas, judge of the Circuit Court of the United States, this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

BY THE COURT.

Service accepted.

JOHN G. JOHNSON,
Per J. W. BAYARD,
Attorney for Appellee.

Attest:

HENRY B. ROBB,
Clerk.

117 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America *v.* The Pennsylvania Railroad Company, No. 95, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[SEAL.] HENRY B. ROBB,
Clerk of C. C.

Indorsement on cover: File No. 21365. E. Pennsylvania, C. C. U. S. Term No. 569. The United States of America, Appellant, *vs.* The Pennsylvania Railroad Company. Filed, October 10th, 1908. File No. 21365.

○

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. 570.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED OCTOBER 10, 1908.

(21366)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

No. 570.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries	1	1
Bill of complaint	2	1
Appearance for defendant	18	6
Answer	19	7
Exhibit A. General consolidated mortgage, September 30, 1903	43	19
Stipulation as to submission on bill and answer	155	86
Replication	156	87
Opinions (omitted in printing)	157	
Gray, J. (omitted in printing)	158	
Dallas, J. (omitted in printing)	212	
Buffington, J. (omitted in printing)	217	
Decree	233	87
Assignment of errors	234	88
Petition for appeal	237	89
Order allowing appeal	239	90
Citation and service	240	90
Clerk's certificate	241	91

1 APRIL SESSION, 1908.

Charles J. Bonaparte, 97 Robert W. de Forest, John G. Johnson. — United States of America *vs.* Lehigh Valley Railroad Company.

1908, June 5. Bill of complaint filed.
1908, June 5. Subpœna issued returnable the first Monday of July.
1908, June 5. Order for the appearance of Robert W. de Forest and John G. Johnson, esquires, for defendant, filed.
1908, June 13. Answer filed.
1908, June 15. Printed copy of bill of complaint filed.
1908, June 16. Stipulation of counsel filed.
1908, June 16. Replication filed.
1908, June 16. Argued.
1908, June 17. Ordered that defendant file brief by June 25, 1908, and that complainant file reply brief by July 1, 1908.
1908, September 10. Opinion dismissing bill in equity filed.
1908, October 6. Dissenting opinion by Buffington, J., filed.
Decree dismissing bill of complaint filed.
Assignments of error filed.
Petition for appeal filed.
Order allowing appeal filed.
Citation allowed and issued.
Citation returned "service accepted" and filed.

2 No. 97. April sessions, 1908. In equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT, *vs.* LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

Bill of complaint.

(Filed June 5, 1908. Henry B. Robb, clerk. By L., deputy clerk.)

4 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant. — April sessions, 1908. No. 97. In equity.

To the Honorable, the Judges of said Court:

The United States of America, by Charles J. Bonaparte, its Attorney-General, brings this, its bill of complaint, against the Lehigh Valley Railroad Company, a railroad company hereinafter more

particularly described. And therefore your orator complains and says:

(1) That the said "Lehigh Valley Railroad Company," herein designated and called "the defendant," is a corporation created, organized and existing under the laws of the State of Pennsylvania, having its principal office in the State of Pennsylvania, at the city of Philadelphia, and has been such corporation since long before the first day of May, in the year nineteen hundred and eight.

5 (2) That the defendant is, and has been during its corporate existence, a railroad company now, and for some time past, operating, with its branches and connections, a railroad whose lines extend through parts of the States of Pennsylvania, New Jersey, New York, and other States. That it is, and has been since long before the said first day of May, in the year nineteen hundred and eight, a common carrier within the meaning of an act of the Congress of the United States, approved February 4, 1887, entitled "An act to regulate commerce," and of all acts supplementary thereto or amendatory thereof; and that, as such common carrier, it is, and has been through all the period aforesaid, engaged in interstate transportation, particularly in the transportation, in interstate commerce, of the article or commodity known as "anthracite coal" from the mines and the mining lands in the State of Pennsylvania to the markets of other States.

(3) That the defendant is, and has been continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of the entire capital stock of the Lehigh Valley Coal Company and of Coxe Brothers & Co., Incorporated, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year

6 nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the counties of Carbon, Lehigh, Luzerne, and Wyoming, in the said State of Pennsylvania; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and a majority of the directors of each of said coal companies being officers or directors of the defendant, as they have been for a long time past. That by virtue of the ownership of the entire capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant owns said coal lands and coal mines, and the anthracite coal therein or thereupon and mined, and being mined, therefrom, and has an interest therein; and that, by virtue of the management of said coal companies by certain of the officers of the defendant, as hereinbefore stated, the operations of said coal com-

panies in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(4) That, apart from the coal lands, coal mines, and coal hereinbefore mentioned and described, the defendant is, and has been
7 continuously since long before the said first day of May, in the year nineteen hundred and eight, the owner of a large majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company and of the Locust Mountain Coal and Iron Company, corporations of the said State of Pennsylvania, and that it thus controls, and has been controlling, the election of the directors or managers of said coal companies. That said coal companies hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming; but said coal lands and coal mines are, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, now being operated, in the mining of anthracite coal, by and under the direct management of the respective presidents and directors of said coal companies, the president of each of said coal companies being, as he has been for a long time past, the president of the defendant, and all of the directors of each of said coal companies being officers, directors, or servants of the defendant, as they have been for a long time past. That, by virtue of the ownership of a majority of the capital stock of said coal companies by the defendant, as hereinbefore stated, the defendant practically owns said coal lands and coal mines,
8 and the anthracite coal therein or thereupon and mined, and being mined therefrom, and is, also, owner thereof in part, and, likewise, has an interest therein; and that, by virtue of the management of said coal companies by certain officers, directors, and servants of the defendant, as hereinbefore stated, the operations of said coal companies, in the mining of anthracite coal, have been, and are now being, carried on by and under the authority of the defendant.

(5) That, moreover, the defendant is, at the present time, and has been for a period since long before the said first day of May, in the year nineteen hundred and eight, the owner of some part of the capital stock of the Highland Coal Company, of the Packer Coal Company, and of the Temple Iron Company, corporations of the said State of Pennsylvania, which hold, by conveyances and leases made long before the said first day of May, in the year nineteen hundred and eight, anthracite coal lands and coal mines situated and being in the said counties of Carbon, Lehigh, Luzerne, and Wyoming, which said coal lands and coal mines are being operated, as they have been continuously since long before the said first day of May, in the year nineteen hundred and eight, in the mining of anthracite coal, by and under the direct management of their respective boards of directors, the defendant being represented on each and every of

said boards of directors by one or more persons who is, or are,
9 in every such case, an officer or director, or officers or directors, of the defendant, as they have been, respectively, for a long time past. That, by virtue of such stock ownership in each and every of said last-mentioned coal companies, the defendant owns in part, and has an interest in, said last-mentioned coal lands and coal mines of the three said last-mentioned coal companies and the anthracite coal therein or thereupon and mined, and being mined, therefrom; and that, by virtue of the management of said last-mentioned coal companies by directors one or more of whom is, or are, in each case, an officer, or officers, of the defendant, as hereinbefore stated, the operations of said last-mentioned coal companies, in the mining of anthracite coal, are being carried on, as they have been in the past, by and under the authority of the defendant, as well as by and under the authority of other persons or corporations.

(6) That from time to time since the first day of May, in the year nineteen hundred and eight, and at the present time, of the anthracite coal so mined and being mined, as aforesaid, there has been, and there is being, loaded at, or near, the mines and lands from which said coal has been, and is being, mined as aforesaid, and within the counties aforesaid, upon the cars of the defendant, for transportation in interstate commerce, a large quantity, the number of tons whereof being to your orator unknown; that such large quantity of coal, when
10 so loaded as aforesaid, has been, and is being, carried and transportated in the cars aforesaid, over and upon the said railroad, and its branches and connections, of the defendant, and through and over territory of the said State of Pennsylvania within the jurisdiction of this court, and from the said State of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of the said State of Pennsylvania to and into the States of New York, New Jersey, and other States for sale and delivery at the markets of the said States of New Jersey, New York, and other States; and that such large quantity of anthracite coal, so transported as aforesaid, was not, and is not, necessary and intended for the use of the defendant in the conduct of its business as a common carrier.

(7) That, the defendant being the owner, and part owner, of the anthracite coal mined, and being mined, and transported, and being transported, as aforesaid, and such coal having been, and being, mined by the defendant, and under its authority, as aforesaid, and the defendant having an interest in said coal as aforesaid, the transportaton of said coal as aforesaid was, has been, and is, unlawful, being a failure to comply with, and a violation of, the fifth paragraph of the first section of said "act to regulate commerce" as said section was amended by an act of the Congress of the United States, approved June 29, 1906, which prescribes:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any
11 State, Territory, or the District of Columbia, to any other

State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

(8) That not only is said anthracite coal now being mined by and under the authority of the defendant and loaded on the cars of the defendant for transportation in interstate commerce, as hereinbefore set forth, but it will be so mined and loaded in the future; and that it is the purpose of the defendant to continue the same unlawful transportation of said coal, so to be mined and loaded upon the cars of the defendant as aforesaid, as has been hereinbefore described, in violation of the law hereinbefore quoted.

(9) And so your orator says that the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the defendant to continue to so unlawfully transport as aforesaid, in violation of the law hereinbefore quoted, is, and will be, "an article or commodity, other than timber and the manufactured products
12 thereof, manufactured, mined, or produced by it, or under its authority," and, also, such "article or commodity" owned by it "in whole or in part," and is, likewise, "an article or commodity, other than timber and the manufactured products thereof," in which it has, and will have, an "interest direct or indirect;" and is not "an article or commodity" "necessary and intended," or which will be necessary and intended, "for its use in the conduct of its business as a common carrier."

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity; that the said defendant, "Lehigh Valley Railroad Company," may make full answer under oath to all the allegations herein; and that an injunction be granted to enjoin and prohibit the said "Lehigh Valley Railroad Company" from further transporting, in interstate commerce, the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted; and that your orator may have such further or other relief in the premises as the nature and circumstances of the case may require.

May it please your honors to grant to your orators a writ of subpœna, to be directed to the said "Lehigh Valley Railroad Company," thereby commanding it, at a certain time therein to be limited, personally to appear before this honorable court and then and there full,
true, direct and perfect answer make to all and singular the
13 premises, and to perform and abide by such order, direction and decree as may be made against it in the premises, and as shall seem meet and agreeable to equity.

And your orator will ever pray.

CHARLES J. BONAPARTE,
Attorney-General.

18 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA
vs. April session, 1908. No. 97.
LEHIGH VALLEY R. R. COMPANY.

Enter our appearance for defendant in the above case. June 5th, 1908.

ROBERT W. DE FOREST,
JOHN G. JOHNSON,
Per F. MARKO RIVINUS,
Attorneys for Defendant.

To CLERK OF SAID COURT.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. U. S. of America v. Lehigh Valley R. R. Company. Order for appearance. Filed Jun' 5, 1908. Henry B. Robb, clerk. By L., deputy clerk. Robert W. de Forrest, John G. Johnson, attorneys for defendant.

19 97. April sessions. 1908.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *versus* LEHIGH VALLEY RAILROAD COMPANY, defendant. | April sessions, 1908. In equity.

Answer of Lehigh Valley Railroad Company.

J. F. SCHAPERKOTTER,
Solicitor for Defendant,
143 Liberty street, New York City, N. Y.

FRANK H. PLATT,
Of Counsel.

(Filed June 13, 1908. Henry B. Robb, clerk. By L., deputy clerk.)

21 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *versus* LEHIGH VALLEY RAILROAD COMPANY, defendant. | April sessions, 1908. No. 97. In equity.

The defendant, Lehigh Valley Railroad Company, for answer to the bill of complaint of the United States of America, complainant

herein, or to so much thereof as this defendant is advised it is material or necessary for it to answer, respectfully shows:

1. This defendant admits that it is a railroad corporation organized and existing under certain laws of the Commonwealth of Pennsylvania, hereinafter specified, having its principal office at the city of Philadelphia in said Commonwealth, and that it now is, and since long before May 1, 1908, has been, a common carrier by railroad of passengers and property, and engaged in interstate commerce,
22 including the transportation in interstate commerce of anthracite coal from the mines and mining lands in the State of Pennsylvania to the markets of other States.

2. Said defendant was incorporated by the name of Delaware, Lehigh, Schuylkill & Susquehanna Railroad Company on September 20, 1847, under a statute of the Commonwealth of Pennsylvania enacted April 21, 1846 (P. L. 422), entitled "An act to authorize the governor to incorporate the Delaware, Lehigh, Schuylkill and Susquehanna Railroad Company," and by a supplement to the statute aforesaid enacted January 7, 1853 (P. L. 1), the name of this defendant was changed to "Lehigh Valley Railroad Company."

3. Said statute of April 21, 1846, authorized this defendant to construct and maintain a railroad in the Commonwealth of Pennsylvania by certain routes and locations therein specified, and conferred upon the defendant certain powers, privileges, and franchises therein enumerated and expressed. The routes and location of said railroad and the corporate powers, privileges, and franchises of the defendant were thereafter extended and amended by statutes of the Commonwealth of Pennsylvania, supplementary to said act of incorporation, enacted respectively March 20, 1849 (P. L. 203); April 18, 1855 (P. L. 253); March 8, 1856 (P. L. 96); April 16, 1857 (P. L. 209); April 3, 1866 (P. L. 419); and April 2, 1872 (P. L. 739); and this defendant now possesses all the powers, privileges, and franchises conferred by said statutes.

4. On July 8, 1864, under the laws of the Commonwealth of Pennsylvania, in such case made and provided, the Beaver Meadow Railroad and Coal Company was duly consolidated with and merged into this defendant and this defendant thereupon acquired all the property, rights and franchises of said Beaver Meadow Railroad and Coal Company, including the right to mine, transport, and vend coal referred to in the next succeeding paragraph hereof.

23 5. The Beaver Meadow Railroad and Coal Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under and pursuant to the statute of said Commonwealth enacted April 7, 1830 (P. L. 392), entitled "An act to incorporate the Beaver Meadow Railroad and Coal Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad and the carrying on of the business of mining, transporting, and vending coal. The routes and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter amended and extended by statutes of said

Commonwealth, supplementary to said act of incorporation, enacted respectively April 4, 1831 (P. L. 494); January 29, 1833 (P. L. 18); April 15, 1835 (P. L. 336); December 22, 1836 (P. L. [1837] 5); February 18, 1848 (P. L. 62); March 20, 1849 (P. L. 185); March 15, 1853 (P. L. 186); and April 15, 1857 (P. L. 189).

6. On August 5, 1864, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Penn Haven and White Haven Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

7. The Penn Haven and White Haven Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under a statute of said Commonwealth enacted May 4, 1857 (P. L. [1859] 786), entitled "An act to incorporate the Penn Haven and White Haven Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad; and the routes and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter extended and amended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted respectively on April 11, 1859 (P. L. 474); April 2, 1860 (P. L. 751); and February 16, 1863 (P. L. 47).

24 8. On June 20, 1866, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Lehigh and Mahanoy Railroad Company was duly consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation.

9. The Lehigh and Mahanoy Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, organized on November 11, 1862, under a statute of said Commonwealth enacted April 8, 1861 (P. L. 259); and upon the organization of said corporation the franchises of the Quakake Railroad Company were transferred and conveyed to it. Said Quakake Railroad Company was a corporation of the Commonwealth of Pennsylvania, organized under a statute of said Commonwealth enacted April 25, 1857 (P. L. 324), entitled "An act to incorporate the Quakake Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad; and the routes and location of said railroad were thereafter extended and amended by a statute of said Commonwealth supplementary to said act of incorporation, enacted March 22, 1859 (P. L. 200).

10. On May 25th, 1868, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Hazleton Railroad Company was consolidated with and merged into this defendant, and this defendant acquired all the property, rights, and franchises of said corporation, including the right to mine, transport, and vend coal referred to in the next succeeding paragraph hereof.

11. The Hazleton Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, originally incorporated under the name of the Hazleton Coal Company, under a statute of said Commonwealth enacted March 18, 1836 (P. L. 129), entitled "An act to incorporate the Hazleton Coal Company," with certain powers, privileges, and franchises therein specified for the purposes of the mining of coal and the transacting of the usual business of companies engaged in the mining, transporting to market, and selling of coal and other products of coal mines, and constructing a railroad from any point on its lands near the headwaters of Cranberry and Hazel creeks to intersect the Beaver Meadow Railroad. The routes and location of the said railroad and the powers, privileges, and franchises of said corporation were thereafter amended and extended by statutes of said Commonwealth, supplementary to said act of incorporation, enacted respectively March 8, 1839 (P. L. 49); April 5, 1849 (P. L. 403); March 18, 1851 (P. L. 190); January 12, 1856 (P. L. 2); March 19, 1863 (P. L. 170); March 9, 1865 (P. L. 299); and March 29, 1867 (P. L. 626). Pursuant to a statute of said Commonwealth enacted March 9, 1865 (P. L. 299), the name of said corporation was duly changed to the "Hazleton Railroad Company."

12. On June 16, 1868, under the authority of the statutes of the Commonwealth of Pennsylvania, in such case made and provided, the Lehigh Luzerne Railroad Company was duly consolidated with and merged into this defendant and this defendant acquired all the property, rights, and franchises of said corporation.

13. The Lehigh Luzerne Railroad Company aforesaid was a corporation of the Commonwealth of Pennsylvania, duly organized under the name of Jeddo and Carbon County Railroad Company under a statute of said Commonwealth enacted March 23, 1854 (P. L. [1856] 605), entitled "An act to incorporate the Jeddo and Carbon County Railroad Company," with certain powers, privileges, and franchises therein specified for the purpose of constructing a railroad, and the route and location of said railroad and the powers, privileges, and franchises of said corporation were thereafter extended and amended by statutes of the Commonwealth of Pennsylvania, supplementary to said act of incorporation, enacted respectively March 16, 1855 (P. L. 545); February 12, 1856 (P. L. 41); and April 8, 1857 (P. L. 184); and by and pursuant to said supplementary statutes the name of said corporation was changed to "Lehigh Luzerne Railroad Company."

14. Under and pursuant to the statutory authority hereinbefore set forth, various lines of railway were constructed by defendant and its constituent companies aforesaid, and this defendant now owns absolutely and operates, and for many years has held in absolute ownership and operated, lines of railway in the Commonwealth of Pennsylvania, either constructed by itself or acquired from its constituent companies by virtue of the consolidations and mergers hereinbefore specified, to wit, from Phillipsburg, New Jersey, up the valleys of the Lehigh and Susquehanna to Wilkes-Barre, Pennsylvania, with

various branches and divisions traversing the counties of Northampton, Lehigh, Carbon, Luzerne, Schuylkill, Columbia, and Northumberland of said Commonwealth.

15. This defendant has also at various times acquired ownership of the entire capital stock of certain other railroad corporations which are now and long have been operated by the defendant as a part of its railroad system, to wit: (1) Lehigh Valley Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, and owning a line of railway from Phillipsburg, New Jersey, to Jersey City, New Jersey, with various branches therefrom; (2) Pennsylvania & New York Canal & Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Wilkes-Barre, Pennsylvania, up the valley of the Susquehanna to the boundary line between the State of New York and the Commonwealth of Pennsylvania, with various branches therefrom;

27 (3) Lehigh Valley Railway Company, a corporation organized and existing under the laws of the State of New York, and owning a line of railway connecting with the line of the Pennsylvania & New York Canal & Railroad Company as aforesaid at the boundary line between the State of New York and the Commonwealth of Pennsylvania and running thence to Buffalo, New York, with branches and divisions traversing all the territory of the central portion of the State of New York; (4) Montrose Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Tunkhannock, Pennsylvania, to Montrose, Pennsylvania; (5) Schuylkill & Lehigh Valley Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning a line of railway from Lizard Creek Junction, Pennsylvania, to Blackwood, Pennsylvania; (6) Delaware, Susquehanna & Schuylkill Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning lines of railway from Drifton to Sheppton and from Oneida to Derringer, Pennsylvania; (7) Easton & Northern Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and owning lines of railway from Easton to Belfast, Pennsylvania, and Bushkill Station to Thirteenth Street Junction, Easton, Pennsylvania; (8) Loyalsock Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania and owning lines of railway from Port Bowkley to Bernice, Pennsylvania, and branches.

16. This defendant also leases and operates the lines of railway of (1) the State Line & Sullivan Railroad Company, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, and owning lines of railway from Monroeton, Pennsylvania, to Bernice, Pennsylvania; and (2) the Lehigh and New York Railroad Company, a corporation organized and existing under the laws of the State of New York, and owning

28

...es of railway from the Pennsylvania State line, at or near Sayre, Pennsylvania, to North Fair Haven, New York.

17. The railway lines constituting the defendant's railway system as aforesaid aggregate 1,390.75 miles in length, and constitute and are operated as continuous transportation routes between the States of New Jersey, Pennsylvania, and New York. Said lines of this defendant intersect and connect with lines of various other railroad companies and with steamship lines on the Great Lakes and other waterways, and in conjunction with such connecting carriers this defendant transports commodities consigned from and destined to points in many other States and Territories of the United States.

18. By a statute of the Commonwealth of Pennsylvania duly enacted on March 31, 1868 (P. L. 50), entitled "An act to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities," etc., it was provided that it should be lawful for any and all companies incorporated or organized under the laws of said Commonwealth, including those authorized thereby to transport merchandise or other property, to invest their surplus or other funds or earnings in any good stocks or securities, and to sell and transfer the same and to reinvest the proceeds of such sales in securities or stocks of like kind.

19. By a statute of the Commonwealth of Pennsylvania, duly enacted on the 15th day of April, 1869 (P. L. 31), entitled "An act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," it was provided that it should be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of said Commonwealth by the purchase of their capital stock and bonds, or either of them, or by guarantee of or agreement to purchase the principal and interest or either of such bonds.

29 20. This defendant admits that it is now and has been for many years past the owner of shares of the capital stock of the coal companies named in the bill of complaint, and alleges in regard thereto as follows: This defendant now owns the entire capital stock of the Lehigh Valley Coal Company. Said Lehigh Valley Coal Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, formed by the consolidation and merger of the Luzerne Coal & Iron Company and the Green Land Company, and acquired and now owns all the rights, privileges, and franchises of said Luzerne Coal & Iron Company and said Green Land Company. In or prior to 1872 this defendant had acquired the entire capital stock of said Luzerne Coal & Iron Company and of said Green Land Company, and owned the same at the time of said consolidation, and in said consolidation exchanged such holdings for the stock of the Lehigh Valley Coal Company. Thereafter the Mineral Spring Coal Company and the Delano Land Company were consolidated and merged into the Lehigh Valley Coal Company, and the said Lehigh Valley Coal Company acquired all the rights, privileges,

and franchises of said companies. The Green Land Company aforesaid was duly organized and existed as a corporation under and pursuant to a statute of the Commonwealth of Pennsylvania, enacted on the 29th day of May, 1871 (P. L. [1872] 1351), entitled "An act to incorporate the Green Land Company," and a supplement thereto enacted on April 2, 1872 (P. L. 737). The Luzerne Coal & Iron Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania enacted on April 11, 1868 (P. L. 828), entitled "An act to incorporate the Luzerne Coal and Iron Company." The Delano Land Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted on the 15th day of March,
30 1872 (P. L. 388), entitled "An act to incorporate the Delano Land Company," etc. The Mineral Spring Coal Company aforesaid was duly organized and existed as a corporation under a statute of the Commonwealth of Pennsylvania, enacted April 3, 1866 (P. L. [1867] 1400), entitled "An act to incorporate the Mineral Spring Coal Company." This defendant now owns and since the year 1872 has owned the majority and control of the capital stock of the New York & Middle Coal Field Railroad & Coal Company. Said New York & Middle Coal Field Railroad & Coal Company is a corporation originally organized and existing under the laws of the Commonwealth of Pennsylvania, under the name of The Coal Run Improvement Company, under and pursuant to a statute of said Commonwealth enacted on March 11, 1851 (P. L. 143), entitled "An act to incorporate The Coal Run Improvement Company," and supplements to said statute enacted respectively March 2, 1853 (P. L. 136); May 2, 1855 (P. L. 399); April 8, 1864 (P. L. 300); April 17, 1866 (P. L. 1000); February 15, 1872 (P. L. 111); March 7, 1872 (P. L. 250), and reincorporated and since existing under and pursuant to the laws of the Commonwealth. This defendant owns the entire capital stock of Coxe Brothers & Company, Incorporated. Said Coxe Brothers & Company, Incorporated, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. This defendant owns a minority interest in the capital stock of the Highland Coal Company. Said Highland Coal Company is a corporation organized and existing under a statute of the Commonwealth of Pennsylvania enacted on the 18th day of July, 1863. This defendant now owns and since the year 1869 has owned a majority and control of the capital stock of the Locust Mountain Coal & Iron Company. Said Locust Mountain Coal & Iron Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, originally organized under a stat-
31 ute of said Commonwealth enacted April 5, 1842 (P. L. 240), entitled "An act authorizing Jacob Sorrick and Michael Hetrick, trustees of the Lutheran Congregation of Clover Creek, Huntingdon County, to sell and convey certain real estate and for other purposes," and supplements to said statute enacted respectively March 31, 1853 (P. L. 265); May 3, 1864 (P. L. 710); and April 13, 1868

. L. 906). This defendant owns a minority interest in the capital tock of the Packer Coal Company. Said Packer Coal Company is a orporation organized and existing under the laws of the Commonwealth of Pennsylvania. This defendant owns a minority interest in the capital stock of the Temple Iron Company. Said Temple Iron Company is a corporation of the Commonwealth of Pennsylvania, organized in 1873, under a statute of said Commonwealth enacted March 21, 1873 (P. L. 28), and acts supplementary thereto and amendatory thereof.

21. The shares of the capital stock of the aforesaid Lehigh Valley Coal Company, New York & Middle Coal Field Railroad & Coal Company, Coxe Brothers, Incorporated, Highland Coal Company, Locust Mountain Coal & Iron Company, Packer Coal Company and Temple Iron Company, now owned by this defendant, were acquired and are owned and held by it under the authority therefor conferred by the various statutes of the Commonwealth of Pennsylvania hereinbefore mentioned.

22. The aforesaid Lehigh Valley Coal Company, New York & Middle Coal Field Railroad & Coal Company, Coxe Brothers & Company, Incorporated, Highland Coal Company, Locust Mountain Coal & Iron Company, Packer Coal Company and Temple Iron Company, under the authority of their respective charters and the provisions of the several statutes under which they respectively exist, are empowered to mine, ship, and sell coal, and defendant admits that said companies, pursuant to the powers so conferred upon them,
32 have acquired by purchase, lease, or otherwise, coal lands, and coal mines and interests therein in the Commonwealth of Pennsylvania, and that said companies or their lessees are engaged in the mining, production, and sale of anthracite coal within the Commonwealth of Pennsylvania, and shipping such coal by the lines of this defendant from various points within the Commonwealth of Pennsylvania to market in other States for sale therein.

23. This defendant admits that as the owner of the entire capital stock of said Lehigh Valley Coal Company and of said Coxe Brothers & Company, Incorporated, and as the owner of a majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company, and of the Locust Mountain Coal & Iron Company, it controls and has been controlling the election of the directors or managers of said coal companies, that the coal lands and coal mines of said companies have been continuously since long before the 1st day of May, in the year 1908, and now are operated in the mining of anthracite coal by and under the direct management of the respective presidents and directors of said coal companies, that the person who has been and is the president of each of said coal companies is and for a long time past has been the president of the defendant; that the same persons who are and have been a majority of the directors of each of said coal companies are and for a long time past have been officers or directors of this defendant; that the coal lands and coal mines of the said Highland Coal Company, Packer Coal Company,

and Temple Iron Company have been continuously since long before the 1st day of May, in the year 1908, and now are operated in the mining of anthracite coal under the direct management of their respective boards of directors, and that this defendant is and for a long time past has been represented upon the board of directors of said Highland Coal Company, Packer Coal Company and Temple
33 Iron Company by one or more persons who are also officers or directors of this defendant; and defendant further admits that at the present time and continuously since the 1st day of May, in the year 1908, some of the anthracite coal mined by the aforesaid coal companies or by their lessees has been and is being loaded at or near the mines and lands from which said coal is produced, upon the cars of this defendant, for transportation in interstate commerce, and that a large quantity of such coal has been and is being carried and transported in the cars of this defendant over and upon the railroad of this defendant and its branches, connections, and lines operated as a part of its railway system, through and over the territory of the Commonwealth of Pennsylvania, by continuous carriage, in interstate commerce, across the boundary line of said Commonwealth to and into the States of New York, New Jersey, and other States for sale and delivery at the markets thereof, and that a large quantity of such anthracite coal so transported as aforesaid was not and is not necessary and intended for the use of this defendant in the conduct of its business as a common carrier; and defendant further admits that it is the purpose of this defendant to continue the transportation of said coal as aforesaid.

24. This defendant denies that its ownership in whole or in part of the capital stock of the various coal companies as hereinbefore set forth constitutes the defendant the owner of the coal lands and coal mines and the anthracite coal therein or thereupon and mined or being mined therefrom, or constitutes any interest of this defendant, direct or indirect therein, within the meaning of the 5th paragraph of section 1 of "An act to regulate commerce," approved February 4, 1887, as amended by the act of Congress approved June 29, 1906; and this defendant further denies that the participation of certain persons who are also officers and directors of this defendant in the management of the said coal companies as aforesaid constitutes the operations of
34 said coal companies in the mining and delivering of anthracite coal a mining or production of such anthracite coal by this defendant or under its authority within the meaning of the act of Congress aforesaid.

25. The capital stock of the Lehigh Valley Coal Company and of the New York & Middle Coal Field Railroad & Coal Company owned by this defendant as aforesaid was transferred and assigned to and is now held by the Girard Trust Company as trustee under the general consolidated mortgage executed by this defendant, dated September 30, 1903, for the purposes and upon the terms expressed in said mortgage, a copy of which is hereto annexed marked "Exhibit A," and made a part of this answer. Bonds to the amount of $23,539,000 have

en issued by this defendant under said mortgage and are now outstanding in the hands of the public.

26. The capital stock of Coxe Brothers & Company, Incorporated, owned by this defendant as aforesaid, was transferred and assigned to and is now held by the Girard Trust Company as trustee under the collateral trust agreement executed by this defendant, dated November 1, 1905, for the purposes and upon the terms expressed in said agreement, a copy of which is hereto annexed marked "Exhibit B," and made a part of this answer. Bonds to the amount of $18,000,000 have been issued by this defendant under said agreement and are now outstanding in the hands of the public.

27. The anthracite coal fields of Pennsylvania contain the only large, extensively mined, and commercially valuable deposits of anthracite coal known in the world and are divided geographically into three regions, commonly known respectively as the Wyoming, Lehigh, and Schuylkill regions, all located in the eastern portion of the said Commonwealth. The anthracite coal produced from these coal fields is a commodity of use and necessity as fuel for domestic, manufacturing, and other purposes, the annual consumption of anthracite coal from the said Pennsylvania coal fields being estimated at 12,589,722 tons in the Commonwealth of Pennsylvania and 52,183,601 tons in other States.

28. The gross earnings of this defendant during its last fiscal year were $36,068,431, of which $15,110,899, or nearly 42% of such gross earnings, was derived from the freight rates for the transportation of coal, and $14,996,672 was derived from the freight rates for the transportation of other commodities. During the said period, the coal transported by this defendant represented over 51% of the entire tonnage of freight transported by this defendant. During the said period, the net earnings of this defendant, after the payment of operating expenses, were $13,954,178, and its net income after deducting the expenditures for interest on funded debt and other obligations, rentals, taxes, and improvements was $6,024,953. Of the aforesaid amount of gross earnings derived from the transportation of coal, the greater part thereof was received by this defendant for the transportation of coal for the various coal companies whose stock is in whole or in part owned by defendant as aforesaid. This company transports annually in interstate commerce upwards of 7,600,000 tons of anthracite coal shipped by the said coal companies, whose stock is owned by this defendant in whole or in part, and transports annually for said coal companies wholly within the State of Pennsylvania upwards of 1,500,000 tons. In addition to the portion of the defendant's earnings directly derived from the transportation of coal for said coal companies, a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and coll'eries of said coal companies. If this defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its busi-

ness could not be continued except at a net loss of many millions of dollars per annum.

36 29. The railroad lines of this defendant intersect the Wyoming coal region, reach all parts of the Lehigh coal region and extend into the eastern portion of the Schuylkill coal region, and the mines and collieries of the aforesaid coal companies whose stock is owned by this defendant in whole or in part are all located in the portions of said coal fields tributary to the lines of railroad of this defendant. Many of the mines and collieries of the said coal companies are so situated that no means of transporting their product to market exists or can practically be made available, except the railroad lines of this defendant, and many other mines and collieries of said coal companies are so situated that the natural, direct, and more economical route, although not the exclusive route, for the transportation of their product to market, is over the lines of the defendant. The value of the stocks of said companies is dependent upon the right and ability to transport the coal owned or produced by them to the markets in other States, and such stocks would be rendered of little or no value if this defendant should be prohibited from transporting the product of said coal companies in interstate commerce.

30. Throughout the corporate existence of this defendant the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. The railroad lines of this defendant have been from time to time extended, the control of other railroads acquired and its facilities and equipment increased at enormous expense in reliance upon the rights and franchises conferred by the statutes of Pennsylvania as aforesaid, and upon the prospective earnings from the transportation of anthracite coal, and to meet the increasing demands of the markets of the United States for said commodity. The prosperity and existence of this defendant have at all times been dependent upon the transportation of anthracite coal, and its prosperity has increased with the expansion and growth of the anthracite coal trade.

37 31. This defendant has expended large sums of money in extending its lines and constructing branches and sidings to the collieries of said coal companies whose stock is owned by it in whole or in part, and in providing other facilities in order to receive and transport the product of said collieries.

32. The defendant and other railroad corporations whose railroad lines are operated as a part of defendant's railroad system, as aforesaid, respectively own branch lines of railroad of great value, connecting with the main lines of said system and extending from the main lines to collieries owned by the Lehigh Valley Coal Company or others of said coal companies whose capital stock is owned in whole or in part by the defendant. Such branch lines were built only to reach said collieries and to provide the means of transporting the products of said collieries respectively, and are and at all times have been used exclusively for that purpose. They have no other traffic, except such coal traffic and the carriage of supplies to such collieries and small

traffic incidental thereto. Substantially the entire amount of the anthracite coal so transported over said branch lines of railway is destined to markets in States other than the Commonwealth of Pennsylvania, and no accessible and available market within the Commonwealth of Pennsylvania exists therefor. The value of such branch lines of railway depends wholly upon their use in transporting the anthracite coal from the collieries tributary thereto, and there is no value to such branch lines except for that purpose. Defendant specifies the following branch lines as to which the foregoing allegations are true:

(1) The Blackwood Branch of the Schuylkill & Lehigh Valley Railroad Company, from Blackwood Junction, Pennsylvania, to the Blackwood colliery of the Lehigh Valley Coal Company, said branch line being 5.2 miles in length and having a reproduction value of at least $100,000.

(2) Sheppton Branch of the Delaware, Susquehanna &
38 Schuylkill Railroad Company, from Oneida Junction to Sheppton, Pennsylvania, on which are located the Harwood and Oneida collieries controlled by Coxe Brothers & Company, Incorporated, said branch line being 9.7 miles in length and having a reproduction value of at least $125,000.

(3) Derringer Branch of the Delaware, Susquehanna & Schuylkill Railroad Company, from Oneida Junction to Derringer, Pennsylvania, on which is located the Derringer colliery of Coxe Brothers & Company, Incorporated, said branch line being 13.4 miles in length and having a reproduction value of at least $400,000.

(4) Primrose Branch of this defendant to the Primrose colliery of the Lehigh Valley Coal Company, said branch line being 3 miles in length and having a reproduction value of at least $90,000.

(5) There are many other branch lines of great value as to which the foregoing allegations of this paragraph are true.

33. The capital stock of this defendant issued and outstanding amounts to $40,441,100, consisting of 808,822 shares of the par value of $50 each, and said shares are distributed among and held by 5,370 stockholders, of whom 2,732 own less than 25 shares each.

34. The transportation of anthracite coal over the lines of this defendant in interstate commerce, which is charged in the bill of complaint to be unlawful, amounts to a daily average of at least 1,200 cars.

35. This defendant is informed and believes and therefore alleges that there are railroad corporations other than this defendant which transport from one State or Territory to another State or Territory timber and the manufactured products thereof produced or manufactured by such railroad corporations, or under their authority, or which such railroad corporations own or are interested in,
39 other than timber and the manufactured products thereof which are necessary and intended for the use of such railroad corporations in the conduct of their business as common carriers.

36. This defendant further states and avers that its only relation to the said anthracite coal produced from the mines of said coal companies whose stock is owned by defendant in wholesale part and transported by this defendant (apart from its obligation and duty as a railroad common carrier in the transportation thereof) is incidental to and arises from its ownership to the extent herein before stated of shares of the capital stock of said coal companies, and this defendant is advised by counsel and verily believes and so avers that its ownership of shares of the capital stock of said coal companies, which it had lawfully acquired and owned for a long period prior to the enactment of the said act of Congress approved June 29, 1906, and the participation of some persons who are also its officers in the management of said coal companies, do not constitute this defendant a miner or producer of the anthracite coal produced from the mines of said coal companies, or as authorizing such production; or invest this defendant with any ownership of or any interest, direct or indirect, in said coal within the purview, meaning, and intent of the fifth paragraph of section 1 of "An act to regulate commerce," approved Feb. 4, 1887, as amended by the act of Congress approved June 29, 1906.

37. Defendant avers that if the ownership of the stocks of the coal companies aforesaid could rightfully be held to create ownership of, or interest in, the anthracite coal transported by defendant for such corporations, within the meaning of the act of Congress aforesaid, said statute would have the effect of destroying and rendering wholly valueless property lawfully acquired and owned by this defendant, and would amount to a taking of its property without due process of law and without compensation and to an arbitrary deprivation of the liberty of the defendant, in contravention of the fifth amendment to the Constitution of the United States.

38. Defendant further avers that the said act of Congress is in effect a prohibiton of interstate commerce in a useful and necessary commodity and not a regulation of commerce, and that its enactment was not within the scope and power of Congress under the third clause of section 8, Article I, of the Constitution of the United States, and that such prohibition is not an appropriate means or a means consistent with the letter and spirit of the Constitution for the accomplishment of any purpose within the scope of said third clause of section 8, Article I, of the Constitution.

39. Defendant further avers that said act of Congress, if construed as prohibiting the transportation of authracite coal owned by the Lehigh Valley Coal Company, the New York & Middle Coal Field Railroad & Coal Company, and Coxe Brothers & Company, Incorporated, would have the direct and necessary operation and effect of impairing the obligations of the contracts between this defendant and its bondholders expressed in its general consolidated mortgage and collateral trust agreement hereto annexed, in contravention of the Constitution of the United States.

40. Defendant further avers that the act of Congress aforesaid is in contravention of the provisions of the eighth amendment to the Constitution of the United States, in that it operates to impose and inflict excessive fines and cruel and unusual punishment within the meaning of said constitutional amendment.

Wherefore, this defendant, having fully answered, confessed, traversed, and avoided all the matters in said bill of complaint material to be answered, according to its best knowledge and belief, humbly prays this honorable court to enter its decree that this defendant be hence dismissed, and for such further and other relief in the
41 premises as to this honorable court may seem meet and in accordance with equity.

J. F. SCHAPERKOTTER,
General Solicitor for Lehigh Valley Railroad Company,
143 Liberty street, New York City, N. Y.

FRANK H. PLATT,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK, ss:

Eben B. Thomas, being duly sworn, deposes and says that he is the president of the Lehigh Valley Railroad Company, the defendant herein; that he has read the foregoing answer of said defendant and that the same is true to the best of his knowledge, information, and belief.

E. B. THOMAS.

Sworn to before me this 11th day of June, 1908.

F. T. HARBACH,
Notary Public, New York Co.

43 EXHIBIT A.

General consolidated mortgage.

This indenture, made the thirtieth day of September, in the year one thousand nine hundred and three, between

Lehigh Valley Railroad Company, a corporation created by and existing under the laws of the State of Pennsylvania (hereinafter called the "Railroad Company"), party of the first part, and Girard Trust Company, a corporation created by and existing under the laws of the State of Pennsylvania (hereinafter called the "Trustee"), party of the second part.

Whereas, at a meeting of the board of directors of the railroad company, duly called and held at its office in the city of Philadelphia on the thirtieth day of September, in the year nineteen hundred and three, the draft of a mortgage or deed of trust in the form of this indenture was submitted and read, and resolutions in the following words were duly and unanimously adopted, viz:

Resolved, That the president or vice-president and the secretary of the company be, and they are hereby, authorized and directed, in its

behalf and under its corporate seal, and in form substantially that now submitted to this board, to execute and deliver a mortgage or deed of trust upon the property and franchises of the corporation, to be known as the "General Consolidated Mortgage," to Girard Trust Company, as trustee, to secure an issue of bonds for an aggregate principal sum not exceeding $150,000,000, the principal of such bonds to be payable in gold coin of the United States of the
44 present standards of weight and of fineness, on the first day of May, in the year 2003, at the office or agency of the railroad company in the city of Philadelphia or in the city of New York, as shall be determined by the board of directors from time to time as such bonds shall be issued, with interest thereon at such rate per annum, not exceeding five per cent, as shall from time to time be determined by the board of directors when such issues of such bonds shall be made; interest to be payable semiannually at said office or agency, in like gold coin, on the first days of May and November in each year, such bonds to be issued and disposed of on the conditions, for the purposes, and in the manner set forth in said form of mortgage.

And whereas the bonds to be secured by this indenture are to be executed in the name and on behalf of the said company and under its corporate seal by its president, or any vice-president, and its secretary or assistant secretary, as and when called for by resolution of the board of directors of the railroad company, under the terms of this indenture, and are to be for such denomination or par value, at such rate of interest, and in such form consistent with the terms of this indenture as at the time of issue said board shall prescribe, the $20,000,000 of said bonds which, as hereinafter provided, may be forthwith issued, to be coupon bonds of the denomination of $1,000, numbered consecutively from 1 upwards, and registered bonds of the denominations of $1,000, $5,000, and $10,000, numbered consecutively from A 1 upwards for $1,000 bonds, B 1 upwards for $5,000 bonds, and C 1 upwards for $10,000 bonds, and to be substantially in the following tenor, unless at the time of issue the board of directors shall prescribe some other denomination and form consistent with the terms of this indenture.

45 (Form of coupon bond.)

No. . $1,000.

United States of America, State of Pennsylvania.

Lehigh Valley Railroad Company. General consolidated mortgage gold bond. Total issue, $150,000,000.

Coupon bond.

Know all men by these presents, that Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter called the "Railroad company," for value received, promises to pay to the bearer or, if registered, to the registered holder, of this bond, one

usand dollars, gold coin of the United States of America, on the first day of May, in the year 2003, at the office or agency of the railroad company, in the city of Philadelphia, and to pay interest thereon, from November 1st, 1903, at the rate of per cent per annum, payable semiannually, in like gold coin, at said office or agency, on the first days of May and November in each year, but only upon presentation and surrender of the annexed coupons as they severally mature, such United States gold coin in every case to be of the standard of weight and fineness as it existed July 1st, 1903.

Both the principal and interest of this bond are payable without deduction for any tax or taxes of the United States, or of any State, county, or municipality thereof, which the railroad company may be required to pay, or to retain therefrom, under any present or future law.

This bond is one of a series of coupon and registered bonds of the railroad company known as "General consolidated mortgage gold bonds," duly authorized and approved by the board of directors of the railroad company, and issued and to be issued, to an amount not exceeding in the aggregate $150,000,000 at any one time outstanding; all of which bonds are issued under, and in pursuance of, and are equally secured by, a mortgage or deed of trust dated September 30th, 1903, executed by the railroad company to Girard Trust Com-
46 pany, a corporation of the State of Pennsylvania, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises mortgaged and the nature and extent of the security, and the rights of the holders of said bonds, under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond may be registered as to principal in the owner's name on the books of the railroad company at the office or agency of the railroad company in the city of Philadelphia, such registry being noted on the bond by the railroad company's transfer agent, after which no transfer shall be valid unless made on the railroad company's books by the registered owner in person or by attorney duly authorized and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which transferability by delivery shall be restored; but it may again, from time to time, be registered or transferred to bearer as before; such registration, however, shall not affect the negotiability of the coupons by delivery merely. This bond is also exchangeable for registered bonds without coupons, as provided in said mortgage or deed of trust, on payment, if the railroad company shall so require, of the charge therein provided for.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage or deed of trust.

In witness whereof, Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president,

and its corporate seal to be hereunto affixed and attested by its secretary or its assistant secretary, and coupons for said interest, with the engraved signature of its treasurer, to be attested hereunto this thirtieth day of September, 1903.

LEHIGH VALLEY RAILROAD COMPANY,
By , *Vice-President.*

Attest:

, *Secretary.*

47 (Form of registered bond.)

No. A . $———.

United States of America. State of Pennsylvania.

Lehigh Valley Railroad Company. General consolidated mortgage gold bond. Total issue, $150,000,000.

Registered bond.

Know all men by these presents, that Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania, hereinafter called the "Railroad company," for value received, promises to pay or assigns, thousand dollars, gold coin of the United States of America, on the first day of May, in the year 2003, at the office or agency of the railroad company in the city of Philadelphia, and to pay interest thereon from the first day of May or November, as the case may be, next preceding the date of issue hereof, at the rate of per cent per annum, payable semiannually, in like gold coin, at said office or agency, on the first days of May and November in each year, such United States gold coin in every case to be of the standard of weight and fineness as it existed July 1st, 1903.

Both the principal and interest of this bond are payable without deduction for any tax or taxes of the United States or of any State, county, or municipality thereof, which the railroad company may be required to pay, or to retain therefrom, under any present or future law.

This bond is one of a series of coupon and registered bonds of the railroad company, known as "General consolidated mortgage gold bonds," duly authorized and approved by the board of directors of the railroad company, and issued and to be issued, to an amount not exceeding in the aggregate $150,000,000 at any one time outstanding; all of which bonds are issued under and in pursuance of, and are equally secured by, a mortgage or deed of trust, dated Sep-
48 tember 30th, 1903, executed by the railroad company to Girard Trust Company, a corporation of the State of Pennsylvania, as trustee, of all the property and franchises of the railroad company mentioned in said mortgage or deed of trust, to which reference is hereby made for a description of the property and franchises mort-

thereby charged, and the nature and extent of the security, and the rights of the holders of said bonds, under the same, and the terms and conditions upon which said bonds are issued and secured.

This bond is transferable by the registered holder hereof, in person or by attorney duly authorized, on the books of the railroad company at the office or agency of the railroad company in the city of Philadelphia upon surrender and cancellation of this bond, and a new registered bond will be issued to the transferee in exchange therefor, as provided in said mortgage or deed of trust, and on payment, if the railroad company shall so require, of the charge therein provided for.

This bond shall not become obligatory for any purpose until it shall have been authenticated by the certificate, hereon endorsed, of the trustee under said mortgage or deed of trust.

In witness whereof, Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary or its assistant secretary this day of .

LEHIGH VALLEY RAILROAD COMPANY,

By , *Vice-President.*

Attest:

, *Secretary.*

And whereas, there are to be annexed to the said coupon bonds, at the time of the issue thereof, coupons representing the semiannual interest installments which may become due thereon to and including the first day of May, 2003, each of which coupons is to be substantially of the following tenor:

49 (Form of interest coupon.)

No. . $.

On the first day of Lehigh Valley Railroad Company will pay to bearer at its office or agency in the city of Philadelphia, dollars gold coin, without deduction for taxes, being six months' interest then due on its general consolidated mortgage gold bond No. .

Treasurer.

And whereas the coupons to be attached to said coupon bonds are to be authenticated by the engraved signature of the present treasurer or of any future treasurer of the company, it being intended that the company may adopt and use for that purpose the engraved signature of any person who shall have been its treasurer, at or subsequent to the date of these presents, notwithstanding the fact that he may have ceased to be such treasurer at the time when such bonds shall be actually certified and delivered;

And whereas there is to be endorsed on each of such bonds a certificate of the trustee that it is one of the general consolidated mortgage gold bonds herein described, and no bond will be valid or oblig-

atory for any purpose until such certificate shall have been execute... by the trustee, such certificate to be substantially of the following tenor, viz:

(Form of trustee's certificate.)

This bond is one of the series of general consolidated mortgage gold bonds referred to in the within-mentioned mortgage executed by Lehigh Valley Railroad Company to the undersigned.

GIRARD TRUST COMPANY, *Trustee.*
By , *Vice-President.*

50 Now, therefore, this indenture witnesseth: That in order to secure the payment of the principal and interest of all such bonds at any time issued and outstanding under this indenture, according to their tenor and effect, and the performance of all the covenants and conditions herein contained, and to declare the terms and conditions upon which such bonds are issued and received, and in consideration of the premises and of the purchase and acceptance of such bonds by the holders thereof, and of the sum of one dollar to the railroad company duly paid by the trustee at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged:

Lehigh Valley Railroad Company, party of the first part, has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred, and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer, and set over unto the trustee, party of the second part, its successors and assigns forever:

All and singular the following estates, railroads, lands, properties, rights, privileges, and franchises, and shares of capital stock, viz:

First. The main line of railroad of said Lehigh Valley Railroad Company, extending from Phillipsburg, in the State of New Jersey, on the eastern bank of the river Delaware, opposite the city of Easton, in the county of Northampton, in the State of Pennsylvania, to Wilkesbarre, in the county of Luzerne, in the said State of Pennsylvania; also the following branches, all in the said State of Pennsylvania; the Barber's Quarry Branch, West End Branch, and Jordan Loop, at Allentown, Lehigh County; the Egypt Branch, at Coplay, Lehigh County; the Slatedale Branch, extending from Slatington, Lehigh County, to Seagersville Quarry, Lehigh County; the
51 Welshtown Creek Branch, at Slatington, Lehigh County; the Mahoning Creek Branch, at Lehighton, Carbon County; the Silk Mill Banch, at Mauch Chunk, Carbon County; the Beaver Meadow Branch extending from Penn Haven Junction on said main line, in the county of Carbon to Audenried, in said county of Carbon; the Lehigh and Mahanoy Branch, extending from Black Creek Junction, on the said Beaver Meadow Branch, in said county of Carbon, to Mount Carmel, in the county of Northumberland; the Ashland Branch, extending from Kohinoor Junction to Ashland in the county

the Schuylkill; the Hazleses which the Pennsylvania Railroad Com-
Junction on the said Beaving date the tenth day of May, A. D. 1872,
bon, through Hazleton, to for the recording of deeds, in and for the
Delano and Hazleton Braphia, in Deed F. T. W., No. 10, page 49,
on the said Hazleton Branch unto the Lehigh Valley Railroad Com-
Junction, in the county of Sch-
extending from Hazleton Branch a privileges mentioned and expressed
Luzerne, to Harleigh Junction, on the sa five parts, which shall, or of
Milnesville, in the county of Luzerne; the Hig iors of the said premises.
ing from Pink Ash Junction, on the Lehigh Luzer with the buildings
county of Luzerne, to Sandy Run Junction in the same ward of the
Bear Creek Branch, extending from Bear Creek Junction made by
county of Luzerne, to Beaupland in the same county; the Mount the
Cut Off, from Fairview, in the county of Luzerne, to Avoca, in the
same county; said railroads, with their branches, turnouts, and sidings, amounting in the aggregate to 798.75* miles of single-track railroad; together with all other branches of the said railroads, and each of them, now belonging to, or which may hereafter be constructed by or belong to the said party of the first part, in the said State of Pennsylvania;

52 Including any and all roadbed, superstructure, rights of way, rails, tracks, side tracks, bridges, viaducts, buildings, depots, stations, warehouses, car houses, engine houses, freight houses, coaling stations, machine shops, and other shops, turntables, water stations, fences, docks, structures, erections, and fixtures, and all other things of whatever kind in any wise or now or hereafter belonging or appertaining to any line of railway, or to any branch or extension, at any time subject to the lien of this indenture, or provided for use thereon, or in connection therewith; and any and all lands now or hereafter designed for depots, warehouses, or other structures at any terminus, or on and along such lines of railway, or upon or along any such branch or extension; and any and all locomotives, engines, cars, and other rolling stock equipment, machinery, instruments, tools, implements, materials, and furniture now owned or hereafter acquired by the railroad company, and other chattels, wheresoever situated, now or hereafter held, acquired, or provided for use upon such lines of railway or branches or extensions, or upon any other line or branch or extension, or upon any operated line; and any and all leases, under which it now operates or may hereafter operate any railroads, and any and all other property, real or personal, of every kind and description, now or hereafter acquired for use upon, or in connection with, or for the purpose of, any lines of railway, branches, or extensions now or hereafter subject to the lien hereof; and any and all corporate or other rights, privileges, and franchises which the railroad company now has, or hereafter shall acquire, possess, or exercise for, or appertaining to, the construction, maintenance, use, or opera-

*The additional mileage of the lines of railroad whose capital stocks are pledged hereunder under Subdivisions I and II of section third of the granting clauses hereof is 761.46 miles.

atory for any purpose until such certificate r extensions, or any part by the trustee, such certificate to be subs s, profits, tolls, and other tenor, viz: ıches or extensions, or any

(Form of trustee's cer privileges, franchises, prop- l things which the railroad

This bond is one of the series of possess, or become entitled to gold bonds referred to in the in connection with, the operation by Lehigh Valley Railroad y such branch or extension.

ng and referred to above, are:

nd New York Canal and Railroad Company to y Railroad Company, dated Dec. 1, 1888.

50 Lehigh Valley Rail Way Company to Lehigh Valley Railroad pany, dated April 14, 1891.

Lehigh and New York Railroad Company to Lehigh Valley Railroad Company, dated Aug. 24, 1895.

Second. All and singular the following estates, lands, wharves, and properties:

1. All that certain lot or piece of ground with the building thereon erected, situate on the west side of Third street (enlarged by a strip of ground ten feet in width thrown out for public use to widen the footway) and on the south side of Willing's alley, as at present laid out and opened, eighteen feet in width between Walnut and Spruce streets, in the city of Philadelphia, State of Pennsylvania, containing in front or breadth on Third street forty-two feet three inches, and extending of that width westward one hundred and seventy-eight feet six inches on the north line thereof, and one hundred and seventy-eight feet ten and one-fourth inches on the south line thereof, to the easternmost line of a private passageway or court.

Together with the free use, right, and privilege of the said passageway and water course.

(Being the same premises which the Pennsylvania Railroad Company, et al., by deed bearing date the tenth day of May, A. D. 1872, and recorded in the office for recording of deeds in and for the city and county of Philadelphia, in Deed Book F. T. W. No. 10, page 44, etc., granted and conveyed unto the Lehigh Valley Railroad Company, its successors and assigns.)

54 2. All that certain lot or piece of ground with the building thereon erected, situate on the west side of Third street (enlarged by a strip of ground ten feet in width thrown out for public use to widen the footway by Thomas Willing, Benjamin Chew, and others, by indenture of five parts, dated the twentieth day of December, A. D. 1809), between Spruce street and Willing's alley in the city of Philadelphia. Beginning at a point on the west side of Third street, enlarged, as aforesaid, at the distance of forty-two feet three inches southward from the south side of Willing's alley aforesaid, containing in breadth, north and south, twenty feet six and a half inches, and in length or depth east and west one hundred and fifty-one feet ten and three-fourths inches on the north line, and one hundred and fifty-two feet on the south line thereof.

(Being the same premises which the Pennsylvania Railroad Company, et al., by deed bearing date the tenth day of May, A. D. 1872, and recorded in the office for the recording of deeds, in and for the city and county of Philadelphia, in Deed F. T. W., No. 10, page 49, etc., granted and conveyed unto the Lehigh Valley Railroad Company, its successors and assigns.)

Together with all the rights and privileges mentioned and expressed in the above-mentioned indenture of five parts, which shall, or of right, ought to attach to the owners and occupiers of the said premises.

3. All those two certain lots or pieces of ground with the buildings and improvements thereon erected, situate in the sixth ward of the city of Philadelphia, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the eighth day of September, A. D. 1890, as follows, to wit:

One thereof, beginning at a point on the west side of Delaware avenue at a distance of two hundred and six and fifty-six one hundredths feet northward from the north side of Arch street; thence extending northward along the west side of said Delaware avenue sixty-four feet to a point on the south side of a certain ten-feet wide alley; thence extending westward along the south side of said alley one hundred and thirty-seven and ninety-two one-hundredths feet to a point on the east side of Water street; thence extending
55 southward along said side of Water street fifty-three and eighty-five one-hundredths feet to a point; thence extending eastward ninety-one and fifty-eight one hundredths feet to a point; thence extending southward twelve and fifty-four one-hundredths feet to a point; thence extending eastward forty-six and forty-two one-hundredths feet to the first-mentioned point and place of beginning.

And the other thereof, beginning at a point on the east side of said Delaware avenue at a distance of one hundred and seventy-six and forty-eight one-hundredths feet northward from the north side of Arch street; thence extending northward along the said side of Delaware avenue ninety-three and twenty-seven one-hundredths feet to a point in the south line of a certain ten-feet wide alley; thence extending eastward along the south side of said alley two hundred and seventy-five and fifteen one-hundredths feet to the port warden's line in the river Delaware; thence extending southward along the said port warden's line eighty-nine and four hundred and twenty-six one-thousandths feet; thence extending westward two hundred and seventy-six and eighty-four one-hundredths feet to the first mentioned point and place of beginning.

Excepting therefrom the following described tract:

Beginning at a point on the east side of Delaware avenue at its intersection with the southerly line of lands of the Lehigh Valley Railroad Company; thence westward along the southerly line of lands of the Lehigh Valley Railroad Company 118 feet 5/8 inches more or less to a point in the former easterly side of Delaware avenue distant 176.48 feet northward measured along said former easterly

line of Delaware avenue from the northerly line of Arch street; thence northward along the former easterly line of Delaware avenue 93.2 feet; thence eastward 118 feet more or less to the eastward side of Delaware avenue; thence southward along said easterly side of Delaware avenue 92 feet more or less to the place of beginning. Being a part of the tract of land which was dedicated by the Lehigh Valley Railroad Company to the city of Philadelphia, December 22, 1897, for the widening of Delaware avenue.

4. All that certain lot or piece of ground, with the buildings, wharves, and improvements thereon erected, situate in the
56 sixth ward of the said city of Philadelphia, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the eighth day of September, A. D. 1890, as follows, to wit:

Beginning at a point on the east side of Delaware avenue at the distance of one hundred and fifty-one and ninety-four one-hundredths feet southward from the south side of Race street; thence extending southward along the said side of Delaware avenue one-hundred and eighty-two and twenty-nine one-hundredths feet to a point on the north side of a certain ten feet wide alley; thence extending eastward along the north side of said alley two hundred and seventy-five and five one-hundredths feet to the port warden's line in the river Delaware; thence extending northward along the said port warden's line one hundred and eighty-three and fifty-six one-hundredths feet; thence extending westward two hundred and seventy-four and sixty-one one-hundredths feet to the first mentioned point and place of beginning.

Excepting therefrom the following described tract: Beginning at a point in the east side of Delaware avenue at its intersection with the northerly line of lands of the Lehigh Valley Railroad Company; thence westward along the northerly line of lands of the Lehigh Valley Railroad Company 117 feet 5/8 inches more or less to a point in the former east side of Delaware avenue distant 151.94 feet southward measured along the said former easterly side of Delaware avenue from the southerly side of Race street; thence southward along said former easterly line of Delaware avenue 182.29 feet; thence eastward 117 feet more or less to the easterly side of Delaware avenue; thence northward along the said easterly side of Delaware avenue 181 feet more or less to the place of beginning. Being a part of the tract of land which was dedicated by the Lehigh Valley Railroad Company to the city of Philadelphia, December 22, 1897, for the widening of Delaware avenue.

Under and subject to a certain mortgage debt of one hundred and fifty thousand dollars ($150,000), secured upon the premises by indenture of mortgage given and executed by Charles Hartshorne to Alexander Kerr, dated October 9th 1890, and recorded at Philadelphia, in Mortgage Book G. G. P. No. 636, page 326, &c., together with the interest due and to become due thereon.

Also, all the right, title and interest of the said Lehigh Valley Railroad Company in and to said ten feet wide alley above mentioned and extending from the easterly side of Delaware avenue to the port warden's line in the Delaware River, which said alley was, by ordinance of the select and common councils of the city of Philadelphia, approved the twenty-first day of September, A. D. 1896, stricken from the city plan.

5. All that certain lot or piece of ground, with the buildings and improvements thereon erected, situate in the sixth ward of the city of Philadelphia, in the State aforesaid, described according to a survey thereof made by W. C. Cranmer, surveyor and regulator of the third district, on the twelfth day of March, A. D. 1892, as follows, viz:

Beginning at a point on the west side of Delaware avenue at the distance of one hundred and sixty-two feet eight and three-quarter inches northward from the north side of Arch street (which said point is also in the middle of a certain alley eight feet eight inches front on the said Delaware avenue, which extends westward increasing in width to the east side of Water street on which it contains nine feet four inches); thence extending westward along the centre line of said alley one hundred and thirty-eight feet two and five-eighths inches to a point on the east side of Water street at a distance of one hundred and sixty-three feet five and three-quarter inches northward from the north side of Arch street aforesaid, thence northward along the east side of said Water street fifty-five feet nine and three-quarter inches to a point, thence eastward ninety-one feet seven inches to a point, thence southward twelve feet six and one-half inches to a point; thence further eastward forty-six feet five inches to a point on the west side of said Delaware avenue, thence southward along the said side of Delaware avenue forty-three feet ten inches to the first-mentioned point and place of beginning.

Together with the free and common use, right, liberty, and privilege of the said alley as and for a passageway and water course at all times hereafter forever in common with the owners, tenants, and occupiers of the other lots of ground bounding thereon.

Under and subject to a certain mortgage debt of twenty
58 thousand dollars ($20,000) secured upon the premises by indenture of mortgage given and executed by Charles Hartshorne to the Pennsylvania Company for Insurances on Lives and Granting Annuities, trustee, dated April 4th, 1892, and recorded at Philadelphia, in mortgage book T. G. No. 147, page 349, etc., together with the interest due and to become due thereon.

(Being the same premises [as to above tracts 3, 4, and 5] which Charles Hartshorne, by deed dated the thirtieth day of April, A. D. 1897, and recorded in the office for recording of deeds in and for the city and county of Philadelphia in deed book W. M. G. No. 194, page 83, etc., granted and conveyed [subject as aforesaid] unto the Lehigh Valley Railroad Company, its successors and assigns.)

6. The rights, interests, equities, claims, and demands as particularly set forth in certain declarations of trusts made, executed, and delivered to the trustee herein for the benefit of the holders of the bonds secured hereby, to wit:

(a) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated the 14th day of July, A. D. 1903, as to certain real estate in Jersey City, N. Y., containing 8 1/3 acres, more or less, known as the Kellogg lots, conveyed to the United Real Estate Company by Charles Hartshorne by deed dated April 23, 1898, and recorded in book 699 of Deeds, page 405, &c., in the office of the register of deeds of Hudson County, N. J.

(b) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated the 14th day of July, A. D. 1903, as to certain real estate in Jersey City, containing 4.7 acres, more or less, known as the Edge lots, conveyed to the United Real Estate Company by two deeds, one from Charles L. Carrick, special master in chancery, and the other from Benjamin Edge, each dated June 5, 1900, and recorded in Book 753 of Deeds, page 299, &c., and page 288, &c., respectively, in the office of the register of deeds of Hudson County, N. J.

59 (c) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to certain real estate in the city of Bayonne, N. J., containing 127.63 acres, known as the Constable Hook property; conveyed to the United Real Estate Company by Elisha P. Wilbur and wife by deed dated April 28, 1898, and recorded in Book 699 of Deeds, page 408, &c., in the office of the register of deeds of Hudson County, N. J.

(d) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to certain real estate in the city of Newark, containing 199 acres more or less, known as the Newark Meadow property; conveyed to the United Real Estate Company by sundry deeds, containing full description of same, as follows:

(1) L. D. H. Gilmour et ux to the United Real Estate Company, dated October 12, 1899, and recorded in the office of the register of Essex County, N. J., in Book T 32 of Deeds, page 550–552.

(2) Clarence T. Platt et ux to the United Real Estate Company, dated October 14, 1899, and recorded in aforesaid office in Book Q 32, page 589–590.

(3) Clarence T. Platt et ux to the United Real Estate Company, dated June 2, 1899, and recorded in said office in Book T 32, page 552–554.

(4) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 27, 1899, and recorded in said office in Book T 32, page 532–535.

(5) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book T 32, page 547–550.

(6) L. D. H. Gilmour et ux to the United Real Estate Company, dated July 30, 1900, and recorded in said office in Book O 33, page 385–386.

60 (7) L. D. H. Gilmour et ux to the United Real Estate Company, dated November 14, 1899, and recorded in said office in Book U 32, page 187–188.

(8) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 29, 1899, and recorded in said office in Book Q 32, page 593–594.

(9) L. D. H. Gilmour et ux to the United Real Estate Company, dated June 9, 1899, and recorded in said office in Book T 32, page 545–547.

(10) John B. Stetson et ux to the United Real Estate Company, dated May 6, 1899, and recorded in said office in Book Q 32, page 592–593.

in Book T 32, page 540–542.

(12) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 27, 1899, and recorded in said office in Book Q 32, page 595–596.

(13) William W. Winner to the United Real Estate Company, dated May 4, 1899, and recorded in said office in Book Q 32, page 590–591.

(14) L. D. H. Gilmour et ux to the United Real Estate Company, dated August 2, 1899, and recorded in said office in Book Q 32, page 596–597.

in Book T 32, page 543–545.

(16) L. D. H. Gilmour et ux to the United Real Estate Company, dated October 12, 1899, and recorded in said office in Book U 32, page 1–2.

(15) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 4, 1899, and recorded in said office

(17) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 21, 1899, and recorded in said office

Company, dated July 28, 1899, and recorded in said office

(11) L. D. H. Gilmour et ux to the United Real Estate

in Book T 32, page 537–540.

61 Company, dated June 1, 1899, and recorded in said office in Book Q 32, page 598–599.

(19) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 11, 1899, and recorded in said office in Book Q 32, page 599–600.

(20) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book T 32, page 535–537.

(21) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 21, 1899, and recorded in said office in Book U 32, page 2–3.

(22) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 29, 1899, and recorded in said office in Book U 32, page 4–5.

(23) L. D. H. Gilmour et ux to the United Real Estate Company, dated October 20, 1899, and recorded in said office in Book U 32, page 5–6.

(24) Ada McGregor Clark and husband to the United Real Estate Company, dated May 26, 1900, and recorded in said office in Book M 33, page 87–90.

(25) William P. Coe et ux to the United Real Estate Company, dated April 12, 1900, and recorded in said office in Book F 33, page 320–322.

(26) M. A. Pierson et als., executors, to the United Real Estate Company, dated April 12, 1900, and recorded in said office in Book F 33, page 318–320.

(27) H. F. Osborne et als., to the United Real Estate Company, dated April 12, 1900, and recorded in said office in Book F 33, page 315–317.

(28) L. D. H. Gilmour et ux to the United Real Estate Company, dated August 9, 1900, and recorded in said office in Book O 33, page 455–456.

(29) L. D. H. Gilmour et ux to the United Real Estate Company, dated February 21, 1900, and recorded in said office in Book F 33, page 7–9.

62 (30) L. D. H. Gilmour et ux to the United Real Estate Company, dated February 21, 1900, and recorded in said office in Book D 33, page 278–279.

(31) L. D. H. Gilmour et ux to the United Real Estate Company, dated February 21, 1900, and recorded in said office in Book F 33, page 9–11.

(32) L. D. H. Gilmour et ux to the United Real Estate Company, dated May 21, 1900, and recorded in said office in Book F 33, page 560–562.

(33) M. P. Guerin et al., executors, to the United Real Estate Company, dated February 20, 1900, and recorded in said office in Book G 33, page 79–81.

(34) E. R. McGregor and husband to the United Real Estate Company, dated February 27, 1900, and recorded in said office in Book G 33, page 77–79.

(35) George W. Weidenmayer et ux to the United Real Estate Company, dated November 3, 1899, and recorded in said office in Book V 32, page 495–497. Excepting therefrom all that portion of the tract conveyed which lies south of the southerly side of Murray street, being land included within the right of way lines of the Lehigh Valley Terminal Railway and also land which was conveyed by the

(35) ...ted Real Estate Company to the New York Bay Railroad Company, by deed dated May 23d, 1900.

(36) Robert H. Sayre et ux to the United Real Estate Company, dated November 30, 1897, and recorded in the said office in Book F 31, page 164–170.

(e) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to other real estate in the city of Newark, known as the Alpine Street Terminal; conveyed to the United Real Estate Company by sundry deeds containing full descriptions of same, as follows:

(1) David G. Baird et ux to the United Real Estate Com-
63 pany, dated November 30, 1897, recorded in office of register of Essex County, New Jersey, in Deed Book D 31, page 339.

(2) John C. Groel et ux to the United Real Estate Company, dated March 31, 1902, recorded in office of register of Essex County, New Jersey, in Book D 35 of Deeds, page 382.

(3) Margaret W. Fort to United Real Estate Company, dated December 6, 1901, recorded in office of register of Essex County, New Jersey, in Book W 34, page 251.

(4) L. D. H. Gilmour et ux to the United Real Estate Company, dated April 21, 1902, recorded in office of register of Essex County, New Jersey, in Book K 35, page 51.

(4) Willard S. Muchmore to United Real Estate Company, dated April 21, 1902, recorded in office of register of Essex County, New Jersey, in Book K 35, page 50.

(5) Albert Lewis Lumber Company to United Real Estate Company, dated July 7, 1902, recorded in office of register of Essex County, New Jersey, in Book L 35, page 544.

(6) John S. Howkins et ux to United Real Estate Company, dated Nov. 8, 1902, recorded in office of register of Essex County, New Jersey, in Book D 36, page 14.

(f) Declaration of trust, United Real Estate Company to the Girard Trust Company, of Philadelphia, and the Lehigh Valley Railroad Company, dated 14th day of July, A. D. 1903, as to other real estate in the city of Newark, known as the Newark Coal Pockets; conveyed to the United Real Estate Company by David G. Baird et ux, by deed dated November 30th, 1897, and recorded in the office of the said register of deeds of Essex County in Deed Book D 31, page 349.

Third. Shares of capital st... of the following named companies, in the amounts (at par) stat... belonging to the railroad company:

64 I.

The Lehigh Valley Rail Way Company [6]	$7,720,000
Lehigh & New York Railroad Company (preferred)	2,148,500
Pennsylvania & New York Canal & Railroad Company	1,051,200
Schuylkill & Lehigh Valley Railroad Company	1,998,950

[6] Formed by merger August 3, 1903, of the following corporations: The Lehigh Valley Rail Way Company, The Depew & Tonowanda Railroad Company, Rochester Southern Railroad Company, Middlesex Valley Railroad Company, The Seneca County Railway, and The Waverly and State Line Railway Company.

Easton & Northern Railroad Company	$300,
Lehigh Valley Railroad Company of New Jersey[a]	16, 454,
National Docks Railway Company	3, 854,
Lehigh Valley Transportation Company	750, 000
The Lehigh Valley Coal Company	1, 000, 000
Hazleton Coal Company	500, 000

II.

The Elmira, Cortland & Northern Railroad Company	2, 000, 000
The Canal Railroad Company	60, 000
The Canastota Northern Railroad Company	200, 000
Loyalsock Railroad Company	300, 000
The Wilkes-Barre & Harvey's Lake Railroad Company	150, 000
Coal Ridge Improvement & Coal Company	1, 335, 450
Coal Ridge Improvement & Coal Company (preferred)	122, 350
Mineral Spring Coal Company	300, 000
New York & Middle Coal Field Railroad & Coal Company	1, 061, 150
Westwood Coal Company	165, 000
National Storage Company	2, 400, 000

65 The said stocks comprise the entire capital stocks of the companies above named with the exception of the following three minority interests outstanding in the hands of the public, viz, $1,654,842 of the stock of the Lehigh and New York Railroad Company; $42,200 of the stock of the Coal Ridge Improvement and Coal Company, and $438,850 of the stock of the New York and Middle Coal Field Railroad and Coal Company.

Fourth. All right, title, and interest of the Lehigh Valley Railroad Company, that may be hereafter acquired, in or to any and all other shares of stock of any of the companies above enumerated in subdivision third.

Fifth. All property of every name and nature hereafter acquired by the railroad company which, by any of the provisions of this indenture, it is required to convey, mortgage, pledge, assign, or transfer to the trustee.

Sixth. All property of every name and nature, from time to time hereafter, by delivery or by writing of any kind, for the purposes hereof, pledged, assigned, or transferred by the railroad company or by any one in its behalf to the trustee, which is hereby authorized to receive any property, at any and all times, as and for additional security, and also, when and as hereinafter provided, as substituted security, for the payment of bonds issued or to be issued hereunder, and to hold and apply any and all such property subject to the terms hereof.

Seventh. All estates, lands, properties, rights, privileges, and franchises, real, personal, or mixed, hereafter acquired by the railroad company, as appurtenant or incidental to, or in replacement of, or in exchange or substitution for any of the mortgaged premises above described.

---

[a] Formed by merger July 29, 1903, of the following corporations: Easton and Amboy Railroad Company, Lehigh Valley Terminal Railway Company, Greenville and Hudson Railway Company, Middlesex Railway Company, Perth Amboy and Raritan Railway Company, and Pittstown Branch Railway Company.

Uni

To have and to hold, the premises, properties, real or personal, rights, franchises, estates, appurtenances, and stocks hereby granted, conveyed, and assigned, or mentioned or intended to be granted, conveyed, or assigned by the railroad company, with the appurtenances, unto the trustee, its successor or successors and assigns forever, but upon the trusts hereinafter declared:

Subject, as to certain portions of the property hereby mortgaged, conveyed, and pledged, to the mortgages of the railroad company recited in sec. 5 of article two hereof, so far as such mortgages respectively cover such property.

But as to all property hereby or hereunder conveyed or pledged, in trust nevertheless, for the equal and proportionate benefit and security of all present and future holders of the bonds and interest obligations issued and to be issued under and secured by this indenture, and for the enforcement of the payment of said bonds and interest obligations, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture; without preference, priority, or distinction as to lien or otherwise of any one bond over any other bond by reason of priority in the issue or date or negotiation thereof, so that each and every bond, issued and to be issued as aforesaid, shall have the same right, lien, and privilege under and by this indenture, and so that the principal and interest of every such bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been made, dated, executed, delivered, and negotiated simultaneously with the execution and delivery of this indenture; it being intended that the lien and security of this indenture shall take effect from the day of the date hereof without regard to the date of actual issue, sale, or disposition of said bonds as though upon such day all of said bonds were actually issued, sold, and delivered to, and in the hands of, innocent holders for value.

67 The conditions, uses, and trusts upon which the said premises and property are to be held by the trustee shall be as follows, to wit:

ARTICLE ONE.

SECTION 1. All bonds to be secured hereby shall, from time to time, be executed and delivered by the railroad company to the trustee for certification, and thereupon the trustee shall certify and deliver the same as provided in this article, and not otherwise. The aggregate amount of bonds issued and outstanding under this indenture at any one time shall never exceed the principal sum of $150,000,000.

Only such bonds as shall bear thereon endorsed the trustee's certificate by it duly executed shall be secured by this indenture, and every such certificate of the trustee upon any bond executed in the behalf of the railroad company shall be conclusive evidence that the bond so certified is one of the series of general consolidated mortgage gold bonds executed by the railroad company under this mortgage.

Before certifying or delivering any coupon bond hereby secured, the trustee shall cut off and cancel all coupons thereof then matured;

and the trustee shall not certify or deliver any registered bond bearing interest from any date six months or more prior to such certification or delivery.

Prior to any issue or issues of bonds intended to be secured hereby and until such issues, after being duly authorized, can be engraved and printed from engraved plates, the railroad company may execute and deliver printed bonds, registered, or negotiable by delivery, and substantially of the tenor of the bonds proposed to be issued hereunder, except that no coupons shall be attached to any of said bonds, and the same may be for the payment of one thousand dollars
68 or any multiple thereof, as the railroad company may determine. All such printed bonds shall have stamped or printed upon their face, "Temporary bond, exchangeable for engraved coupon or registered bonds," and shall, after execution, be duly certified by the trustee of this mortgage in the same manner as the bonds hereinbefore described, and such certificate shall be conclusive evidence that each of such bonds bearing such certificate is one of the temporary bonds executed by the railroad company hereunder. Such printed bonds, duly issued and certified hereunder, shall be exchangeable for engraved bonds, to be issued hereunder, and upon any such exchange such printed bonds shall forthwith be cancelled by the trustee. Until so exchanged, such printed bonds shall in all respects be entitled to the lien and security of these presents as bonds issued and certified hereunder, and interest, when and as payable, shall be paid thereon.

SEC. 2. Of the bonds authorized to be issued under and secured by this indenture:

(a) Immediately upon the execution and delivery hereof, or as and when requested thereafter by the railroad company, bonds to the amount of ten million dollars ($10,000,000), shall be certified by the trustee and delivered to the railroad company.

(b) Bonds to the amount of ten million dollars ($10,000,000) additional shall, as and when requested by the railroad company, be certified by the trustee and delivered to the railroad company on account of capital advances heretofore made by it in the payment of the annual installments due on the following securities of the rail-
69 road company, and to provide funds for further payments thereon, or on similar securities hereafter issued:

	Total issue.	
Car Trust Series A, due Feb. 1, 1906	$1,000,000	
Car Trust Series B, due Aug. 1, 1906	500,000	
Car Trust Series C, due June 1, 1909	2,000,000	
Car Trust Series D, due Mar. 1, 1910	3,000,000	
Car Trust Series E, due Feb. 1, 1909	656,000	
Car Trust Series F, due May 1, 1909	560,000	
Car Trust Series G, due Aug. 1, 1910	800,000	
		$8,516,000
Connell stock purchase bonds, due Mar. 1, 1906	600,000	
Seneca stock purchase bonds, due June 1, 1907	665,000	
Righter stock purchase bonds, due Apr. 1, 1908	270,000	
		1,535,000
		10,051,000

(c) Ninety-six million dollars ($96,000,000) of said bonds shall be reserved to be used and applied for the redemption, purchase, exchange, acquisition, or payment at or before maturity, of the following existing and outstanding obligations, constituting liens on property of the railroad company, and on property of corporations named in I and II of subdivision third of the granting clauses hereof. Such reserved bonds shall be called for by resolution of the board of directors of the railroad company when and as required for the purposes aforesaid, and in the amounts required and stated in such resolution, and the trustees shall on the receipt of a copy of such resolution, certified by the secretary or assistant secretary of the railroad company, certify and deliver to the railroad company so many of said reserved bonds as shall, at par, equal the amount required for the redemption, purchase, exchange, acquisition or payment by the railroad company of said obligations, if the price at which said obligations shall be redeemed, purchased, exchanged, acquired or paid, shall in the discretion of the trustee, be approved by it, but if such price shall be higher than the trustee shall approve, then the trustee shall, on the railroad company furnishing the additional funds required, certify and deliver to the railroad company so many only of said reserved bonds as shall equal in amount at par the price which the trustee shall, in its discretion, approve paying for the bonds so redeemed, purchased, exchanged, acquired, or paid. Said reserved bonds shall be used and applied only for the purposes aforesaid until all of said obligations shall have been redeemed, purchased, exchanged, acquired, or paid, after which, if any of said reserved bonds shall remain, they may be issued, used, and applied for such purposes as the board of directors of the railroad company shall decide, and shall, either at one time, or from time to time, be certified by the trustee and delivered to the railroad company on receipt of a copy, duly certified by the secretary or assistant secretary, of a resolution of said board calling for such issue and delivery. If any of said obligations shall be paid or acquired with funds provided by the railroad company from sources other than said reserved bonds, the trustee shall, as in the foregoing case, if duly requested as aforesaid by resolution of the board of directors of the railroad company, certify and deliver to the railroad company so many of said reserved bonds as shall at par equal the amount paid by the railroad company for said obligations, if the price paid shall be approved by the trustee, but if the price shall be higher than the trustee shall approve, then the trustee shall certify and deliver to the railroad company so many only of said reserved bonds as shall equal in amount at par the price which the trustee shall in its discretion approve paying for the bonds so redeemed, purchased, exchanged, acquired, or paid. Upon the payment or acquisition, either at their maturity or from time to time prior thereto, of the whole or any part of the several issues of said obligations, by means of said reserved bonds or any part thereof, or by funds advanced by the railroad company and subsequently reimbursed to the

railroad company by delivery of said reserved bonds, such obligations shall be delivered to the trustee and cancelled; it being the intent that this mortgage securing the bonds issued hereunder shall ultimately become the first lien on the property of the railroad company, and that the liens, stated in the following table, on the properties of the companies whose stocks are pledged hereunder, shall be provided for by the bonds issued hereunder:

	Date.	Date of maturity.	Rate of interest.	Bonds outstanding at date of this indenture.
Lehigh Valley R. R. Co.:				
First mortgage	May 15, 1868	June 1, 1948, as extended.	4%	$5,000,000
Second mortgage	June 29, 1870	Sept. 1, 1910	7%	6,000,000
Con. mortgage	Nov. 13, 1873	Dec. 1, 1923	6%	5,638,000
Con. mortgage	Nov. 13, 1873	Dec. 1, 1923	4½%	4,762,000
" " (ann. bonds)	" " "	Perpetual.	6%	10,962,000
" " (ann. bonds)	" " "	Perpetual.	4½%	2,538,000
Collateral trust mtge	May 1, 1897	May 1, 1997	5%	9,568,000
National storage trust certificates	Dec. 8, 1899	Dec. 8, 1904–9	4%	5,000,000
Lehigh Valley Railway Company:				
First mortgage	June 23, 1890	July 1, 1940	4½%	15,000,000
Lehigh Valley Terminal Railway Company:				
First mortgage	Oct. 1, 1891	Oct. 1, 1941	5%	10,000,000
Easton & Amboy R. R. Company:				
First mortgage	Apr. 13, 1880	May 1, 1920	5%	6,000,000
Penn. & New York Canal & Railroad Co.:				
First mortgage	June 1, 1866	June 1, 1906	7%	1,500,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	5%	4,000,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	4½%	1,500,000
Con. mortgage	Nov. 13, 1888	Apr. 1, 1939	4%	3,000,000
Elmira, Cortland & Northern Railroad Co.:				
First mtge. (pref. bonds)	Apr. 1, 1884	Apr. 1, 1914	6%	750,000
First mtge	Apr. 1, 1884	Apr. 1, 1914	5%	1,250,000
Canastota Northern R. R. Co.:				
First mortgage	July 1, 1886	July 1, 1906	6%	300,000
Middlesex Valley R. R. Company:				
First mortgage	Aug. 26, 1892	Nov. 1, 1942	5%	211,000
Easton & Northern R. R. Company:				
First mortgage	Oct. 7, 1895	Nov. 1, 1935	4½%	51,000
Lehigh Valley Coal Company:				
Five ten-year coal pledge bonds	Nov. 21, 1902	Dec. 1, 1907–12	5%	2,000,000
				94,130,000

72 SEC. 3. The remainder of the authorized issue hereunder, amounting to $34,000,000 of said bonds, shall be reserved, to be executed, and to be certified by the trustee, not immediately, but only when and as called for by resolution of the board of directors of the railroad company as next hereinafter provided, for the following purposes, or some one or more of them, viz.:

(a) For the construction or acquisition, on and after January 1st, 1905, of railway lines, extensions, terminal properties or rolling stock; or for the construction or acquisition on and after that date of other property real or personal; or for the constructon of betterments, improvements or enlargements, on and after that date; all such construction, betterments, improvements or enlargements or property acquired, to be upon, along, or appurtenant to the properties of the railroad company at the time subject to the lien of this indenture, or to be useful to the business of the railroad company, or upon, along or appurtenant to properties of, or useful to the business of, some one or more of the companies mentioned in Subdivision Third of the

granting clauses hereof whose stock is at the time pledged hereunder, or of some other company of whose capital stock no part is now pledged hereunder, but of whose capital stock more than one-half, at the time of such use, shall be pledged hereunder, it being intended that such lines, extensions, terminal properties, betterments, improvements, and enlargements or other property may be constructed or acquired by and in the name of the railroad company or by or in the name of or for account of any such other company; or for the acquisition on and after January 1st, 1905, of shares, bonds, or other obligations of any company owning any line, extension, terminal property, lands, coal estates, rolling stock, floating equipment, or other property the acquisition of which would, in the judgment of
73 the board of directors of the railroad company, render the holding of such stock, bonds, or obligations useful or advantageous to the railroad company.

(b) For the acquisition of bonds of the Lehigh Valley Coal Company that may be issued under the provisions of sec. 12 of article two hereof; provided that, in every case of any such acquisition, the aggregate par value of such bonds so acquired shall be at least equal to the aggregate par value of the bonds hereby secured, used for such acquisition.

(c) To reimburse the railroad company for outlays or advances by it made for, or to promote, any construction or acquisition made pursuant to (a) or (b) hereof on or subsequent to January 1st, 1905, or made theretofore since January 1st, 1900, and not previously reimbursed to the railroad company by the issuance to it of bonds under its collateral trust mortgage, dated May 1st, 1897.

The bonds reserved under this section shall by the trustee be certified and delivered to the railroad company, or upon its order, as follows, and not otherwise, viz.:

(1) Such bonds shall be certified and delivered by the trustee from time to time only as and when it shall receive a copy of the resolution of the board of directors of the railroad company, certified by its secretary or assistant secretary, calling for the certification and delivery of such bonds, and stating that such bonds or their proceeds will be used only for purposes authorized by this session.

(2) On January 1st, 1906, or on any day thereafter (prior to December 31st, 1906), bonds to such amount as shall be called for in such resolution, shall be so certified and delivered, but not exceeding in the aggregate $2,000,000, par value, unless a larger issue shall be especially authorized as provided in (5) of this section.

74 (3) In each calendar year after December 31st, 1906, there shall be so certified and delivered such additional amount of such bonds, not exceeding $2,000,000 par value in any calendar year except to supply deficiencies and unless a larger issue shall be especially authorized, as provided in (5) of this section, as from time to time shall be called for in similar resolutions, but in every instance before certifying and delivering any of the bonds reserved under this section (except the $2,000,000 deliverable in the year 1906), the

trustee shall require the railroad company to furnish, in addition to such resolutions of its board of directors, the verified certificate or certificates of some person or persons, stating as of his or their own knowledge:

(a) That the bonds last certified and delivered under this section or the proceeds of all such bonds, have been used for such purposes, or for some one or more of them, or to reimburse the railroad company as above provided, specifically indicating every such acquisition or construction of any railroad, structure, betterment, rolling stock, or other property, and every such acquisition of bonds of the Lehigh Valley Coal Company and every such acquisition of stock, bonds, or other obligations of any other company owning any railroad or other property, and also stating in detail the amount of bonds, or proceeds of bonds, used or expended for each and every such purpose, and whether such acquisition was by or in the name of the railroad company, or by or for account of any other company as herein authorized; and also that no acquisition, construction, or expenditure stated in such certificate was stated in any previous certificate;

(b) That the price paid in such bonds, or their proceeds, for any such construction, or acquisition (other than for bonds of the Lehigh Valley Coal Company, as aforesaid), was not in excess of the fair value of the work done or property acquired.

75 (4) Every such verified certificate, unless signed (1) by the president or by a vice-president and (2) by the comptroller or auditor or treasurer of the railroad company, shall be accompanied by a written statement of one of the officers first above designated and one of the officers secondly above designated of the railroad company that they believe such certificate to be true, and that such bonds have not been used and the expenditures therein certified have not been made for ordinary maintenance of the property owned, leased, or in any way controlled by the railroad company, or for replacements or other purposes ordinarily treated by similar companies or companies owning similar properties, as a part of their operating expenses. Together with such statements and verified certificates, there shall be delivered to the trustee all bonds and certificates for all shares of stock so acquired and such further instruments and conveyances as may be necessary to vest in the trustee all new property so acquired, so far as the same shall have been acquired by or for the railroad company, and so far as practicable any and all other liens, charges, or indebtedness taken up or acquired with the said bonds or their proceeds, and also the written opinion of counsel of the railroad company to the effect that such instruments and conveyances are sufficient for that purpose, or that no instrument or conveyance is necessary. The certificates for all shares of stock so acquired shall be duly transferred into the name of the trustee and shall be classified under either I or II of subdivision third of the granting clauses hereof, as shall, with the approval of the trustee, be designated by the railroad company. Such resolutions, statements, instruments, and conveyances, verified certificates, and opinion (together with the

pledge with the trustee of all bonds and certificates for all shares of stock so acquired) shall be deemed and taken as plenary authority to the said trustee for its certification of such bonds under the foregoing provisions of this article.

76 (5) Except to supply deficiencies as next hereinafter provided, there shall not be issued or certified under this section in any one calendar year any of said $34,000,000 bonds in excess of an aggregate amount of $2,000,000; provided, however, that if a larger amount than $2,000,000 should, in the opinion of the board of directors of the railroad company, be required in any year or years for some of the purposes for which the said $2,000,000 in bonds may annually be issued as above provided, then and in that case if the stockholders of the railroad company shall at any annual meeting or at any special meeting called for the purpose approve by a vote of a majority in interest of the stock represented in person or by proxy at such meeting the issue of additional bonds under this section, then any amounts so approved by the stockholders in excess of $2,000,000 may be issued in such year or years, and on demand of the railroad company shall be certified and delivered by the trustee to the railroad company or upon its order.

If in any calendar year after January 1, 1906, the trustee shall not have certified and delivered to the railroad company or upon its order two million dollars ($2,000,000) of bonds authorized by (2) and (3) of this section to be certified and delivered for such calendar year, or any additional amount or amounts approved as aforesaid by the stockholders, the right of the railroad company to require certification and delivery of any such residue of such $2,000,000 bonds and of any additional amount or amounts so approved which may not have been actually certified and delivered in such calendar year shall not lapse nor be extinguished, but such residue of such bonds not so certified and delivered in any calendar year shall be certified and delivered by the trustee to the railroad company or upon its order from time to time in any subsequent year or years upon the resolution of the board of directors of the railroad company,

77 as hereinbefore provided, accompanied by the statements, verified certificates and opinion hereinbefore prescribed, notwithstanding the fact that under the provisions of this section and to the extent herein authorized there shall thereby be certified and delivered by the trustee in such year or years more than $2,000,000 bonds.

(6) The $150,000,000 of bonds to be issued hereunder may be issued in such denominations, at such rate of interest not exceeding five per cent per annum, and in such form, consistent with the terms of this indenture, as the board of directors of the railroad company shall prescribe at the time or times of such issue; and any bonds which may have been part or all of said entire $150,000,000 of bonds issued under this mortgage may at any time be extended at a less rate of interest than that named therein, or the interest on any bond hereby secured

may at any time and from time to time be reduced with the consent of the then holder of such particular bond.

SEC. 4. Whenever any coupon bond or bonds issued hereunder, together with all unmatured coupons thereto belonging, shall be surrendered for exchange for a registered bond, or for registered bonds as the case may be, the railroad company shall issue, and the trustee shall certify and deliver, in exchange for such coupon bond, a registered bond without coupons; or if there be more than one coupon bond so surrendered, then a like amount of registered bonds without coupons, of the same or of other denominations, as herein authorized. Such registered bond or bonds shall bear interest at the same rate as the surrendered coupon bond or bonds, and from the date of the last matured coupon thereof. In every case of such exchange the trustee forthwith shall cancel the surrendered bond or bonds and coupons, and shall deliver the same to the railroad company.

Whenever any registered bond or bonds issued hereunder shall be surrendered for transfer, the railroad company shall issue and the trustee shall certify and deliver, upon surrender and cancella-
78 tion of the bond or bonds transferred, a like amount of new registered bonds of the same or of other denominations as herein authorized; but no registered bond may be converted into a coupon bond.

The board of directors of the railroad company may at the time of issue (or of any reissue as hereinafter provided) of any bonds hereunder, order that such bonds shall, the election of the holder, be convertible at any half-yearly interest period into common stock of the railroad company at par; provided, that notice in writing of such election on the part of such holder, specifying the numbers of the bonds to be converted, shall have been given to the railroad company at its office or agency in the city of Philadelphia, or in the city of New York, at least thirty days prior to the half-yearly interest day on which such conversion is desired (which shall be the half-yearly interest day next ensuing the giving of such notice). Upon surrender of any such bond or bonds to the railroad company at any interest period, after notice as aforesaid, interest thereon shall cease, and the railroad company shall deliver such bond or bonds, duly cancelled, to the trustee, and shall issue to the holder in exchange therefor so many shares of the capital stock of the railroad company at the par value thereof, as shall equal the par value of the bond or bonds so surrendered. Any bonds surrendered as aforesaid for conversion into stock may be reissued, but only for the purpose stated in (a), (b), and (c) of sec. 3 of this article, and such reissue may be made as often as such conversion of bonds into stock shall have been made and in such amounts as said board of directors shall from time to time order; and the bonds so reissued shall be of such denomination, at such rate of interest, and in such form as said board shall at the time of reissue order; provided, that the total amount of bonds issued or reissued and outstanding under this mortgage containing the said provisions

for conversion into capital stock shall not at any time exceed
79 $25,000,000. Such bonds shall on demand made by the railroad company on the trustee, be certified and delivered to the railroad company by the trustee from time to time, in such amounts as the railroad company shall demand, but only on receipt by the trustee from the railroad company of a copy of a resolution of the board of directors of the railroad company, certified by its secretary, or assistant secretary, calling for the certification and delivery of such bonds, and stating that such bonds, or their proceeds, will be used only for the purposes stated in (a), (b), or (c) of sec. 3 of this article, with also (except in respect to the first lot of such bonds so reissued) verified certificates showing the uses to which the previous reissue of bonds, or their proceeds, have been applied, with also any necessary instruments and conveyances and opinion of counsel, such certificates, resolutions, statements, instruments, conveyances, and opinions to be similar to those provided for in (a) and (b) of (3) and in (4) of sec. 3 of this article. In case of reissue, the trustee shall certify any new bonds issued in place of any bonds of other form or denominations so surrendered. Provided, always that the total outstanding bonds under this mortgage shall in no case and at no time exceed $150,000,000.

For any exchange of coupon bonds for registered bonds, or of bonds for stock, and for any transfer of registered bonds without coupons, the railroad company, at its option, may make a charge not exceeding fifty cents for each new registered bond issued in exchange for any surrendered bond or bonds; but no charge shall be made for registration of the principal of coupon bonds.

In case any coupon bond issued hereunder, with the coupons thereto appertaining, or any registered bond without coupons, shall become mutilated or be destroyed, the railroad company, in its discretion, may issue, and the trustee thereupon may certify and deliver, a new bond of like tenor and date bearing the same serial number, in exchange and substitution for and upon cancellation of the
80 mutilated coupon bond and its coupons or of the registered bond, or in lieu of and substitution for the coupon bond and its coupons or the registered bond so destroyed, upon receipt by the railroad company of satisfactory evidence of the destruction of such coupon bond and its coupons, or of such registered bond, and upon receipt also of satisfactory indemnity.

SEC. 5. Nothing in this article, or in any other article of this indenture expressed or implied, is intended, or shall be construed, to confer upon any person or corporation, other than the parties hereto and the holders of bonds secured by this indenture, any legal or equitable right, remedy, or claim under or in respect of this indenture, or any covenant, condition, or stipulation thereof; all its covenants, conditions and stipulations being intended to be, and being for the sole and exclusive benefit of the parties hereto and of the holders of bonds hereby secured.

ARTICLE TWO.

The railroad company covenants as follows:

SEC. 1. It will well, duly, and punctually pay, or cause to be paid to every holder of any bond issued and secured hereunder, the principal and interest accruing thereon, at the dates and place and in the manner mentioned in such bonds, and in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States, or any State, county, or municipality therein, which the railroad company may be required to pay, or to retain therefrom, under or by reason of any present or future law. When and as paid, all coupons shall forthwith be canceled.

SEC. 2. All lines of railway and all property of every kind,
81 and all interest therein, when and as and to the extent hereafter acquired by the railroad company as above provided, out of bonds, or the proceeds of bonds, issued pursuant to the provisions of (a) or (b) of sec. 2, or of sec. 3, or of sec. 4, of article one hereof, immediately upon, and subject to the terms and conditions of such acquisition, and without any further conveyance or assignment, shall become and be subject to the lien of this indenture as fully and completely as though now owned by the railroad company, and expressly and specifically conveyed by, and embraced in, the several granting clauses of this indenture; but at any and all times the railroad company will execute and deliver any and all such further assurances or conveyances thereof as the trustee may reasonably direct or require, for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

Immediately upon payment of the bonds of the railroad company secured by its collateral trust mortgage dated May 1st, 1897, and upon the transfer and delivery to the railroad company by the trustee under said collateral trust mortgage of such stocks pledged under said mortgage, as are also pledged hereunder, such stocks shall be transferred and delivered to and held by the trustee under this indenture; and similarly, immediately upon the payment of the certificates issued by the Central Trust Company of New York under agreement dated December 8th, 1899, between said trust company and the railroad company and upon the transfer and delivery to the railroad company by the said Central Trust Company, trustee, of the stocks pledged under said agreement which stocks are also pledged hereunder, said stocks shall be transferred and delivered to and held by the trustee under this indenture.

SEC. 3. Whenever demanded by the trustee, the railroad company will grant, convey, confirm, assign, transfer, and set over unto the trustee, all real and personal estate, corporate rights and franchises
which, in any way or manner it shall acquire (out of such
82 bonds, or the proceeds of bonds, issued, as aforesaid, pursuant to the provisions of (a) or (b) of sec. 2, or of sec. 3, or of sec. 4, of article one hereof), as incidental or appurtenant to, or for

use upon, any property mortgaged hereunder, and will also do, execute, acknowledge, and deliver, and cause to be done, executed, acknowledged, and delivered, all and every such further acts, deeds, conveyances, and transfers, and assurances in the law, for better assuring, conveying, and confirming unto the trustee all and singular the hereditaments and premises, estates, and property hereby conveyed, or intended so to be, or which it has herein covenanted and agreed hereafter to convey to the trustee, as the trustee shall reasonably require for better accomplishing the provisions and purposes of this indenture, and for securing payment of the principal and interest of the bonds intended to be hereby secured.

But nothing expressed or implied in this indenture is intended, or shall be construed, to limit the right or power of the railroad company, hereby expressly reserved, by the use of its credit or in any manner, except by the use of bonds issued hereunder, or funds received pursuant to any provision hereof, to construct or to acquire property of any kind, or interest therein, free from the lien hereof.

SEC. 4. The railroad company will, at an office or agency to be maintained by it in the city of Philadelphia, keep a sufficient register or registers of bonds issued hereunder, which registers at all reasonable times shall be open to the inspection of the trustee; and, upon presentation for such purpose, it will, under such reasonable regulations as it may prescribe, register therein any coupon bonds and any bonds without coupons issued under the provisions hereof.

Upon presentation of any such registered coupon bond by the holder thereof in person, or upon its presentation with an instrument in writing authorizing the transfer of the same, executed by the registered holder, such bond shall be transferred upon such
83 register, and thereafter the transferee or transferees of such bond upon such register shall be held to be the owner or owners thereof, and from time to time such transfers may be made as shall be so directed by the registered holder of any such bond for the time being. The registered holder of any such registered coupon bond shall have the right also to cause the same to be registered as payable to bearer, in which case transferability by delivery shall be restored, and thereafter the principal thereof shall be payable to any person presenting the same.

Any holder of a coupon bond registered to bearer may cause such bond to be registered in the name of such holder with the same effect as a first registration thereof; and successive registrations and transfers to bearer as aforesaid may be made from time to time as desired; and such registration shall by the bond registrar be noted on the bond.

Any registered bond without coupons may be transferred by the registered holder in person, or by instrument in writing executed by the registered holder, upon surrender of the bond, in which case a like amount of new registered bonds will be issued to the transferee as provided in sec. 4 of article one hereof, on payment of the charge provided for in said section.

As to all bonds so registered, the persons in whose name the same shall be registered shall for all purposes of this indenture be deemed and regarded as the owner hereof, and thereafter payment of or on account of the principal of such bond, if it be a coupon bond, and of the principal and interest, if it be a registered bond without coupons, shall be made only to such registered holder or upon his order; but such registration may be changed as hereinbefore provided. All such payments so made shall be valid and effectual to satisfy and discharge the liability upon such bond to the extent of the sum or sums so paid.

No registration of any coupon bond shall restrain the negotiability of any coupon thereto belonging, but every such coupon shall continue to pass by delivery merely.

84 SEC. 5. Until such bonds shall be paid and discharged, the railroad company will duly, punctually and regularly pay or cause to be paid as from time to time the same shall accrue the interest on its following bonds outstanding at the date of this indenture:

First mortgage 4% bonds due 1948	$5,000,000
Second mortgage 7% bonds due 1910	6,000,000
Consolidated mortgage 6% bonds due 1923	5,638,000
Consolidated mortgage 6% annuity bonds	10,062,000
Consolidated mortgage 4½% bonds due 1923	4,762,000
Consolidated mortgage 4½% annuity bonds	2,538,000
Collateral trust mortgage 5% bonds, due 1997	9,568,000
Equipment trust bonds	5,547,000
Connell stock purchase 4% bonds	300,000
Seneca stock purchase 4% bonds	400,000
Righter stock purchase 4% bonds	225,000
National storage 4% certificates	5,000,000
	$55,040,000

and in the meantime it will observe, or will cause to be observed, all the covenants, terms and conditions undertaken by, or imposed upon said railroad company, in or by any such bonds or the several respective mortgages securing the same, and in all cases it will duly and punctually pay the principal of such bonds at the several dates of the maturity thereof as now fixed or as from time to time hereafter extended as in this section permitted. But nothing in this article or in any other article of this indenture is intended, or shall be construed, to require the railroad company, not then being otherwise in default hereunder, to pay the principal of any such outstanding bond during any period for which the same shall have been extended or renewed as next hereinafter permitted; the right being hereby expressly reserved by the railroad company in the discretion of its board of directors, from time to time, with the consent of the holders

85 thereof, to extend the time for the payment of the principal of any said outstanding bonds for any period not exceeding two years, if at the date of maturity thereof it shall not in the opinion of the board be advisable to arrange for the refunding or payment thereof through and by the bonds reserved hereunder for the purpose, reserving in case of such extension the right on sixty days notice published once a week in one newspaper published in the city of Philadelphia and in one newspaper published in the city of New York, to

call in and pay off the same at any interest period through and by means of the bonds so reserved hereunder: Provided that the aggregate principal sum or the rate of interest of such outstanding bonds shall not be increased, though the principal and interest of all such extended bonds may be made expressly payable in gold coin of the United States of the standards of weight and of fineness at the time of the extension thereof.

SEC. 6. The railroad company will not (except as above provided) voluntarily create or suffer to be created any new lien or charge upon the mortgaged premises of the railroad company, or any part thereof, or upon the income thereof, having priority to the lien of this indenture; and will not after the execution of this mortgage issue any bonds theretofore unissued under any of its mortgages prior to this indenture; provided, however, that bonds reserved under the terms of said prior mortgages for the purpose of providing for prior liens may be issued unless due provision can be made, as set forth in (c) of sec. 2, of article one hereof for the redemption, purchase, exchange, acquisition, or payment by bonds issued hereunder, of such prior liens; and provided, that the $1,668,000 of bonds under its collateral trust mortgage which have been issued to the railroad company and are now in its treasury (and are included in the $9,568,000 stated in sec. 5 of this article), and represent disbursements
86 heretofore made on the property of the company, may be issued from its treasury and sold or disposed of by it. And the railroad company will not at any time sanction or permit the issue, by any company whose stock at the time shall be pledged hereunder, of any bonds reserved under mortgages of said companies respectively for the purpose of providing for the payment of prior liens if due provision can be made, as set forth in (c) of sec. 2 of article one hereof, for such prior liens; and will immediately, on the payment of its outstanding $5,000,000 of National Storage Company trust certificates, secured by agreement dated December 8, 1899, and on the release and delivery to it of the $2,000,000 of its collateral trust mortgage bonds pledged under said agreement, cause the said pledged bonds to be cancelled. And, within six months after the same shall accrue, the railroad company will from time to time pay all lawful claims and demands of mechanics, laborers, and others, which, if unpaid, might by law be given priority to this indenture as a lien or charge upon the mortgaged premises or any part thereof, or the income thereof; and if any company, of whose capital stock the greater part now is or hereafter shall be pledged hereunder, shall create or suffer to be created any lien or charge upon its property or income, or shall create or suffer to be created any indebtedness, other than (1) mortgage indebtedness as hereinafter permitted, (2) indebtedness of the coal company as hereinafter permitted, (3) indebtedness to the railroad company, or (4) indebtedness for the current operating expenses of such company during a period not exceeding six months; then it, the railroad company, will pay and discharge the same, or

will acquire the same and transfer the same to the trustee for the benefit of this mortgage.

SEC. 7. The railroad company from time to time will pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon the premises hereby mortgaged, or upon any
87 part thereof, or upon the income and profits thereof, the lien of which would be prior to the lien hereof, so that the priority of this indenture shall be fully preserved in respect of such properties; and if any company of whose capital stock the greater part now is, or hereafter shall be, pledged hereunder, shall, at any time during the continuance of any such pledge, fail to pay all such taxes, assessments, and charges lawfully imposed upon the property of such company or upon the income and profits thereof, then it, the railroad company, will itself pay and discharge the same; provided that the covenants of this section shall not require the railroad company to pay any tax, assessment, or charge, so long as the validity thereof is in good faith contested.

SEC. 8. The railroad company from time to time and at all times during the continuance of this indenture, and until the payment of all bonds issued hereunder, will maintain the mortgaged premises and each and every part thereof, and will replace the same and all parts thereof lost, destroyed, or used up so far as the same may be needed. The mining and selling of coal by any coal company the stock of which is owned or controlled by the railroad company, without replacement, reservation of royalty, or provision for sinking fund, shall not be construed as a violation of this covenant.

SEC. 9. The railroad company will exercise the voting power on all stocks pledged hereunder in such manner that it shall retain in itself the rights and powers of the holder of the greater part of the capital stock of such company; and as such holder of stock of any company above mentioned in I and II of subdivision third of the granting clauses hereof, or of stock of any other company whose stock the greater part shall at such time be pledged hereunder, the railroad company will not, by affirmative vote, or by abstaining from voting, sanction or permit any increase of the capital stock of
88 any such company or the creation of any so-called "floating" indebtedness of any such company (except current operating accounts for a period not at any date exceeding six months prior thereto), or (except in respect of the Lehigh Valley Coal Company as hereinafter permitted) the issue or guaranty of any bonds by any such company, or the creation of any mortgage or other lien upon the railroad or property of any such company (except bonds or mortgages or other liens in extension or replacement of those now existing), unless effective provision be made that all such additional stock (or such part of such additional stock as shall be proportionate to the part of such entire capital stock previously pledged hereunder), and (except as hereinafter provided in respect of the Lehigh Valley Coal Company) that any such indebtedness and the evidences thereof, and any such bonds issued or guaranteed, and any such mortgage or

other lien, immediately upon the issue of such stock, or creation of such indebtedness, shall be delivered to and peldged with the trustee, by it to be held subject to all the trusts of this indenture, with the same effect as if such stock, indebtedness, bonds, mortgage or other lien, had been delivered and pledged to it hereunder at the time of the making hereof; and all such additional stock shall be fully paid and nonassessable. But nothing in this article or in any other article of this indenture is intended, or shall be construed, to require the railroad company to so deliver and pledge any bonds or obligations of such companies heretofore issued. And the right is hereby expressly reserved by the railroad company, in the discretion of its board of directors, from time to time, to take all necessary steps to procure the extension, for a period not exceeding two years, of the time for the payment of the principal of such of the existing bonds of such companies, for the payment of which provision has been made by (c) of sec. 2 of article one hereof, if at the date of maturity thereof it shall not be advisable in the opinion of the said board to
89 arrange for the redemption, purchase, exchange, acquisition or payment thereof through and by the bonds reserved hereunder for the purpose, reserving in case of such extension the right on sixty days' notice, published once a week in one newspaper published in the city of Philadelphia, and in one newspaper published in the city of New York, to call in and pay off the same at any interest period through and by means of the bonds reserved hereunder, but in such extension the aggregate principal sum or the rate of interest now charged on such property by such existing liens shall not be increased though the principal and interest of all such extended bonds may be made expressly payable in gold coin of the United States of the standards of weight and of fineness at the time of such extension.

SEC. 10. The railroad company will not by affirmative vote, or by abstaining from voting, permit any railroad company, of whose capital stock the greater part shall at the time be pledged hereunder under I of subdivision third of the granting clauses hereof, to sell or dispose of its railroad, except to some company of whose capital stock there shall then be held or received by the railroad company and pledged or assigned to the trustee hereunder, an amount not proportionately less than the amount then held hereunder of the capital stock of the company whose railroad shall be so sold. Provided that any parts of such railroad not required for the proper exercise of the public franchises of such company may be sold or disposed of with the approval of the trustee. The railroad company may, however, permit any railroad company of whose capital stock the greater part shall at the time be pledged hereunder under II of subdivision third of the granting clauses hereof, to sell or dispose of its railroad or any part thereof to any company or other party, or to exchange its railroad or any part thereof for property of such other company or party if in the opinion of the trustee such sale shall not be prejudicial to the security of the bonds issued and secured hereunder.

90 In case of any sale as aforesaid the proceeds of such sale shall be applied as provided by any mortgage then existing on such property, and if not so subject, then so far as may be practicable, as provided under sec. 2 of article six hereof in respect to other property sold or disposed of.

SEC. 11. The railroad company will not issue, negotiate, sell, or dispose of any bonds hereby secured, in any manner other than in accordance with the provisions of this indenture, and the agreements in that behalf herein contained; and in issuing, selling, negotiating, or otherwise disposing of such bonds, from time to time, it will well and truly apply, or cause to be applied, the same, or the proceeds thereof, to and for purposes herein prescribed, and to and for no other or different purpose.

SEC. 12. It is expressly understood, anything in this indenture to the contrary notwithstanding, that the Lehigh Valley Coal Company, may, from time to time, borrow money and may secure the repayment thereof, by a pledge or hypothecation of coal when actually mined, or the representatives or proceeds of coal when actually mined, it being further understood, however, that the amount of money so borrowed shall never exceed the fair market value of coal so actually mined and the coal accounts, bills receivable, notes, and other representatives and proceeds of such coal, then held by the coal company; and may execute and issue bonds, to be secured by mortgage upon its property, to provide for the improvement of its property, and for the acquisition of new coal properties, all such mortgages to contain proper sinking fund provisions, by which the payment of such bonds shall be provided for out of and from the coal to be mined from the property of said company.

SEC. 13. The trustee from time to time upon written request of the railroad company signed by the president or any vice-president
91 and under its corporate seal duly attested by the secretary or assistant secretary shall give to the railroad company or its nominees suitable proxies to give full effect to the provisions of this article.

ARTICLE THREE.

SEC. 1. Unless (a) the railroad company shall be in default in the payment of interest on any bond secured by this indenture, or unless default shall be made in the payment of interest on any bond mentioned in sec. 5 of article two hereof, and such default shall have continued for a period of six months; or unless (b) the railroad company shall be in default in the due and punctual payment of the principal of any bond secured hereby, or of any bond mentioned in sec. 5 of article two hereof, or unless (c) the railroad company shall be in default in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or the income and profits thereof, and such default shall have continued for a period of six

months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds secured hereby; or unless (d) the railroad company shall be in default in the due performance and observance of any covenant or condition of this indenture and such default shall have continued beyond the period of grace, if any, herein provided for in respect of such default, and the trustee shall have entered or shall have elected to enter into possession under the power of entry hereinafter conferred; or unless (e) the railroad company shall have voluntarily surrendered to the trustee possession of the mortgaged premises as hereinafter authorized, the trustee (unless with the assent of the railroad company) shall not collect or be entitled to collect the interest of any bonds or the principal or interest of other claims or indebtedness hereafter pledged with or assigned to the trustee under this indenture; and (1) the rail-
92 road company shall be entitled to receive all interest due and dividends declared in respect of any bonds or stocks transferred to or pledged with the trustee pursuant to any of the provisions of this indenture; and from time to time (subject to the covenants in respect hereof in this section contained), upon the request of the railroad company, the trustee shall deliver to it the coupons for such interest, in order that the railroad company may receive payment thereof for its own use, and shall deliver to the railroad company suitable orders in favor of the railroad company or its nominee for the payment of such dividends and for the payment of such interest on registered bonds; and the railroad company may collect such interest and dividends, but not by any proceeding which the trustee shall deem and declare to be prejudicial to the trusts hereunder; and the trustee shall at once pay over to the railroad company any such interest and dividends which may be collected or received by it; and (2) the railroad company shall be entitled for its own use to demand, receive, and collect, release, and discharge, the principal or interest of any such claim against, or indebtedness (other than bonds) of, any other company assigned to or pledged with the trustee hereunder, and upon request of the railroad company the trustee shall execute any reassignments or releases which may be required for that purpose.

If any such coupon, or if any evidence of any such claim or indebtedness, delivered to the railroad company as aforesaid, shall not as aforesaid forthwith be paid and cancelled, the railroad company shall return the same to the trustee, and in case of the payment of any such coupon, claim, or indebtedness, shall upon demand of the trustee furnish satisfactory evidence of the cancellation and extinguishment thereof.

Provided, however, and it is hereby declared and agreed that, except as herein otherwise expressly provided (1) the railroad company shall not be entitled to receive, and the trustee shall not pay over to it, any principal of any bond pledged or assigned to the trustee
93 hereunder; (2) the railroad company shall not be entitled to receive, and the trustee shall not pay over, any interest on any such bond or any principal or interest of any such other claim or in-

debtedness which shall have been collected or paid out of the proceeds of any sale of any property covered by a mortgage securing such bonds, or out of the proceeds of the sale of any other property of the company liable upon such bonds, claims, or indebtedness, it being the intention that the railroad company shall be entitled to receive only payments made out of the rents, revenues, income, or proceeds of operation of such properties; (3) the railroad company shall not sell, assign, or transfer any such coupon or right to dividend, delivered or assigned to it, or any other such claim or indebtedness, except subject to this indenture; (4) the railroad company shall not collect any such coupons or other claims or indebtedness by legal proceedings or by enforcement of any security therefor, except with the assent of the trustee, nor in any manner which the trustee shall deem prejudicial to the trust hereunder; and (5) until actually paid or discharged every such coupon or right to dividends and other claims and indebtedness shall in all respects remain subject to the lien of this indenture.

SEC. 2. In case any sum shall be paid to the trustee on account of the principal of any bond hereafter pledged with the trustee hereunder, or in case, upon the dissolution or liquidation of any company, or out of any sale of the property of any company, any sum shall be paid to the trustee upon any shares of stock of such company held by the trustee hereunder, or upon any claims against or indebtedness of such company, as mentioned in sec. 1 of this article, then in every such case (unless applied as in section 5 of this article provided) such sum shall be received by the trustee and shall be held, used, and applied in the same manner as the proceeds of similar property released under article 6 hereof.

94 SEC. 3. Unless (1) the railroad company shall be in default, and such default being one mentioned under (a), (b), or (c) of sec. 1 of this article, shall have continued as therein provided, or being one mentioned under (d) in said section, the trustee shall have entered, or shall have elected to enter, into possession, or unless (2) the railroad company shall have voluntarily surrendered possession of the mortgaged premises as hereinafter authorized, the railroad company shall have the right to vote upon all shares of stock pledged hereunder, for all purposes not inconsistent with the provisions or purposes of this indenture, and with the same force and effect as though such pledge had not been made. The trustee from time to time, upon written request of the railroad company, signed by the president or any vice-president and under its corporate seal duly attested by the secretary or assistant secretary, shall give to the railroad company or its nominees suitable proxies for such purposes; it being expressly understood that, notwithstanding any other provision of this indenture, and in addition to all other purposes not inconsistent with the provisions or purposes of this indenture, such proxies may and shall, if desired by the railroad company, be given to enable it or its nominees to vote, and that accordingly it or they may vote upon all shares of stock of any company pledged hereunder (1) to enable such company to change, alter or renew, or terminate any existing lease of

railway or other property leased to or by it, or (2) to make a new lease of all or any part of the railway or other property covered by any such existing lease, or to lease additional lines of railway or other property, unless, in the opinion of the trustee, such a change, alteration, renewal, or termination, or such new lease or such lease of additional lines is likely to be prejudicial to this trust; (3) to authorize the merger or consolidation of any two or more of the companies whose capital stock is or shall be pledged hereunder with each
95 other, or the merger or consolidation of any one or more of said companies with some company or companies whose stock shall not prior to such merger be pledged hereunder, or the merger or consolidation of any one or more of such companies into or with the railroad company or into or with the railroad company and other companies; provided, always, that stock issued to the railroad company of any consolidated company formed by the merger or consolidation of any companies the capital stock of one or more of which is or shall be pledged hereunder, with each other, or with any company or companies whose stock shall not prior to such merger be pledged hereunder, shall be transferred to and deposited with the trustee hereunder, in lieu of the stock of the respective companies so merged or consolidated. In the case of a merger or consolidation into or with the Lehigh Valley Railroad Company, provision shall be made, if it shall be practicable so to do, for the lien of this mortgage to attach to the property or properties of the company or companies so merged or consolidated into or with the Lehigh Valley Railroad Company prior to any of the mortgages of the Lehigh Valley Railroad Company mentioned in section 5 of article 2 hereof. And it is further expressly understood that notwithstanding any other covenant or provision of this indenture, and for the full accomplishment of the purposes of any vote or power given as in this section permitted, the railroad company and any such other company severally and respectively, from time to time, may take any and all action authorized by any such vote or power.

SEC. 4. The trustee is authorized to cause to be registered in its name as trustee any and all coupon bonds having provision for registration which may be hereafter pledged at any time with it hereunder, or to cause the same to be exchanged, if practicable, for registered bonds of any denomination without coupons, or if the
96 railroad company shall, in writing, consent thereto to cause the same to be stamped "Not negotiable. Held by Girard Trust Company as trustee, under the mortgage of Lehigh Valley Railroad Company, dated September 30th, 1903." The trustee shall cause to be transferred into its name as trustee hereunder all registered bonds and all shares of stock which at any time may be delivered and assigned to it as security hereunder.

The trustee may do whatever it may deem necessary for the purpose of maintaining or preserving the corporate existence of any and all companies any of whose shares shall at any time be pledged hereunder, and for such purposes it may from time to time assign

and transfer so many shares of the stocks of the several companies as may be necessary to qualify persons to act as directors of or in any other official relation to said companies, and in all cases the trustee may make such arrangements as it shall deem necessary for the protection of the trusts hereunder.

SEC. 5. If any default shall be made in the payment of the principal or interest of any mortgage bonds at any time hereafter pledged hereunder, or of other bonds secured by the same mortgage as secures such bonds held by the trustee, then, in any such case, the trustee, upon the written request of the railroad company and upon being provided with the necessary funds or provided with satisfactory security for costs and expenses, shall cause proper proceedings to be instituted and prosecuted in some court of competent jurisdiction to foreclose the mortgage or mortgages by which such bonds are secured.

In case the railroad company shall be in default in the payment of the principal or interest of any of the bonds hereby secured, and such default shall have continued for a period of six months, or in case a receiver of the premises mortgaged hereby shall have been appointed, or in case the trustee shall have entered or shall have
97 elected to enter into possession of any such mortgaged premises under the power hereinafter conferred or by the voluntary action of the railroad company, then the trustee, in its discretion, may institute such proceedings of its own motion without such written request.

In case, at any time, any company of whose capital stock the greater part shall be held by the trustee hereunder shall be dissolved or liquidated, or in case all or any of the property of any such company shall be sold upon the insolvency of such company, at any judicial or other sale, or in case any property covered by a mortgage securing any bonds held by the trustee hereunder shall be sold to satisfy such mortgage, then (1), in any such case, if the property of such company or the property sold can be acquired by crediting on the bonds, claims, indebtedness or stock held by the trustee hereunder the amount accruing thereon out of the proceeds of such property, the trustee may, in its discretion and (2) in any case, if by the railroad company requested in writing, and by it provided with the necessary funds therefor, the trustee shall purchase or cause to be purchased such property, either in the name and on behalf of the railroad company or in its own name or by purchasing trustees, and shall use such bonds, claims, indebtedness, and stock to make payment for such property; and in case of any such purchase, the trustee shall take such proceedings as it may deem best to cause such property to be vested either in the railroad company, subject to the lien of this indenture, or in some other corporation organized, or to be organized, for that purpose, of whose bonded debt and capital stock all, excepting the amount thereof required to qualify directors, shall be received and held by the trustee, and shall be vested in the railroad company, subject to the lien of this indenture.

The railroad company covenants that, on demand of the trustee, it will forthwith pay or satisfactorily provide for all expendi-
98 tures incurred by the trustee under any of the provisions of this section, including all sums required to obtain and perfect the ownership and title to any properties which the trustee shall purchase or cause to be purchased pursuant to the provisions of this section; and, in case the railroad company shall fail so to do, then, without impairment of or prejudice to any of its rights hereunder by reason of the default of the railroad company, the trustee, in its discretion, may advance all such expenses and other moneys required, or may procure such advances to be made by others, and for such advances, made by the trustee, or by others at its request, with interest thereon, the trustee shall have a lien on the property hereby mortgaged and pledged, which lien shall be prior to the lien of the bonds hereby secured, but in no event shall the principal of such lien exceed, in the aggregate, at any one time, a sum equal to five per cent of the principal of the total amount of bonds issued hereunder and then outstanding.

In case the trustee shall not purchase or cause to be purchased the property sold at any such sale, and shall not join in a plan of reorganization as aforesaid in respect of such bonds or stock, the trustee shall receive any portion of the proceeds of the sale accruing on the securities by it held hereunder, and shall apply the same in the manner provided in article six hereof in respect of moneys arising from the sale of similar property released from the lien hereof as therein provided.

SEC. 6. Anything herein contained to the contrary notwithstanding the trustee may also in any of the cases herein stated or in any other case not specifically provided for in this instrument take such steps or assent to such action, in respect to any of the premises or property, real or personal, now or hereafter mortgaged or pledged hereunder as in the opinion of the railroad company expressed by resolution of the board of directors and in the discretion of the trustee shall be for the benefit of such premises and property or any part thereof, and for such purpose the trustee may join in any plan of reor-
99 ganization, or other action, or in any agreement approved by it, in respect of any such premises and property, and may accept any new securities representing any such premises and property issued under any such plan.

SEC. 7. The trustee, at any time in its discretion, may, and, if requested in writing by the railroad company, shall, consent to the extension of any bonds which hereafter shall be pledged with or assigned to the trustee hereunder, and of the mortgages securing the same, to the extent provided in sec. 9 of article two hereof; provided that such extended bonds shall be secured by a lien and charge upon the same property equal or superior to that of the bonds extended. The trustee may receive the certificate of counsel of the railroad company as conclusive evidence that such extended bonds are so secured.

ARTICLE FOUR.

SEC. 1. Neither any coupon belonging to any bond hereby secured, nor any claim for interest on any registered bond, which in any way, on or after the maturity thereof, shall have been transferred or pledged, separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled, in case of a default hereunder, to any benefit of, or from, this indenture, except after the prior payment in full of the principal of all bonds issued hereunder, and of all coupons and interest obligations not so transferred or pledged.

SEC. 2. In case (1) default shall be made in the payment of any interest on any bond at any time issued under and secured by this indenture, or on any bond mentioned in section 5 of article two hereof, and any such default shall continue for a period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond secured hereby or of any bond mentioned
100 in section 5 of article two hereof; or in case (3) default shall be made by the railroad company in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged, or upon the income and profits thereof, and such default shall continue for a period of six months after written notice thereof from the trustee or from holders of five per cent in amount of the bonds hereby secured and then outstanding; or in case (4) the railroad company shall make default in the due observance and performance of any other covenant or condition herein contained, and any such default shall continue for a period of six months after written notice thereof to the railroad company from the trustee or from the holders of five per cent in amount of the bonds hereby secured and then outstanding; then, and in each and every such case of default (provided, however, in respect of any of the three cases so indicated, that such default shall have continued for six months as aforesaid), the trustee personally, or by its agent or agents, attorney or attorneys, may enter into and upon all or any part of the railroads, property, and premises, lands, rights, interests, and franchises hereby conveyed, or intended so to be, and each and every part thereof, and may exclude the railroad company, its agents and servants, wholly therefrom, and having and holding the same, may use, operate, manage, and control said premises, and conduct the business thereof, either personally or by its superintendents, managers, receivers, agents, and servants, or attorneys, to the best advantage of the holders of the bonds hereby secured in accordance with law and with any statute relating to said premises or any part thereof, or to the operation thereof; and, upon every such entry, the trustee, at the expense of the trust estate, from time to time, by purchase, repairs, or construction, may maintain and restore, and insure or keep insured, the railroads, property, buildings and structures erected or provided for use in connection with
101 said premises, and whereof it shall become possessed, as afore-

said, in the same manner and to the same extent as is usual, and likewise, from time to time, at the expense of the trust estate, may make all necessary or proper repairs, renewals, and replacements and useful alterations, additions, betterments, and improvements thereto and thereon; and the trustee in such case shall have the right to manage the mortgaged premises as aforesaid, and to carry on the business and exercise all rights and powers of the railroad company, either in the name of the railroad company, or otherwise, as the trustee shall deem best; and it shall be entitled to collect and receive all incomes, rents, issues, and profits of the same and every part thereof, and also the income from stocks and bonds pledged hereunder, and after deducting the expenses of operating said premises, and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, insurance, and prior or other proper charges upon the said premises and property, or any part thereof, including any interest paid on bonds prior in lien to those secured hereby, as well as just and reasonable compensation for its own services and for all agents, clerks, servants, and other employees by it properly engaged and employed, it shall apply the moneys arising as aforesaid as follows:

In case the principal of the bonds hereby secured shall not have become due, to the payment of the interest remaining in default, in the order of the maturity of the installments of such interest, with interest thereon at the rate of five per cent per annum; such payments to be made ratably to the persons or parties entitled thereto, without discrimination or preference.

In case the principal of the bonds hereby secured shall have
102 become due by declaration or otherwise, first, to the payment of the accrued interest, with interest thereon at the rate of five per cent per annum, in the order of the maturity of the installments thereof, and, next, to the payment of the principal of all bonds hereby secured; in every instance such payments to be made ratably to the person or persons entitled to such payment without any discrimination or preference.

All the foregoing provisions are, however, subject to the provisions postponing the rights of holders of detached coupons and assignments of interest, not accompanied by the bond to which they relate.

In case, and during such continuance, of any such default in either of the first three cases specified in this section, either with or without entry by the trustee, and also in the fourth case, if the trustee shall have entered or shall have elected to enter as aforesaid, the trustee shall have, exercise, and enjoy the right to vote on all shares of stock pledged or agreed to be pledged hereunder, and, for the benefit of the holders of bonds hereby secured, the right to receive and collect all interest moneys and dividends maturing or payable upon all pledged bonds and stocks, and to apply as hereinbefore provided the net moneys received, and as holder of such shares of stock and of such

bonds that may be hereafter pledged under this indenture, to perform any and all acts, and to make or execute any and all requests, requisitions, or other instruments in the premises. In the event that a receiver of the hereby mortgaged premises shall have been appointed and shall be in possession thereof, the trustee, from time to time, in its discretion, may turn over any part or all of the interest moneys and dividends so collected by it, to such receiver, and may cooperate with such receiver in managing and operating the entire properties mortgaged or pledged hereunder in such manner as the trustee shall deem for the best interests of the holders of the bonds hereby secured.

103 SEC. 3. In case default shall be made by the railroad company in the payment of any interest on any bond hereby secured, and such default shall continue for a period of six months, then and in every case of such continuing default, upon the written request of the holders of a majority in amount of the bonds hereby secured then outstanding, the trustee, by notice in writing delivered to the railroad company, shall declare the principal of all bonds hereby secured then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this indenture or in said bonds contained to the contrary thereof in anywise notwithstanding. This provision is, however, subject to the condition, that if at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon all such bonds, with interest at the rate of five per cent per annum on overdue instalments of interest, shall either be paid by the railroad company or be collected out of the mortgaged premises before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the railroad company and to the trustee, may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon.

In case the trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of such waiver, or for any other lawful reason, or shall have been determined adversely to the trustee, then and in every such case, the railroad company shall be restored to its former position and rights hereunder in respect of the mortgaged premises and the shares of stock and bonds, and other property, herein pledged or agreed to be pledged; and, upon its written request, the trustee shall do, make, exe-

104 cute, acknowledge and deliver such acts, deeds, instruments, and assurances in the law as may be required to effectuate such purpose; but, nevertheless, all rights, remedies, and powers of the trustee shall survive and continue as though no such proceedings had been taken.

SEC. 4. In case (1) default shall be made by the railroad company in the payment of any interest on any bond at any time issued under and secured by this indenture, or on any bond mentioned in section 5 of article two hereof, and any such default shall continue for a period of six months; or in case (2) default shall be made by the railroad company in the due and punctual payment of the principal of any bond secured hereby, or of any bond mentioned in section 5 of article two hereof; or in case (3) default shall be made by the railroad company in the payment of any tax, assessment, or other governmental charge lawfully imposed or levied upon any part of the property and premises hereby mortgaged or upon the income and profits thereof, and such default shall continue for a period of six months after written notice thereof to the railroad company from the trustee or from holders of five per cent in amount of the bonds hereby secured and then outstanding; or in case (4) the railroad company shall make default in the due observance and performance of any other covenant or condition herein contained, and any such default shall continue for a period of six months after written notice thereof to the railroad company from the trustee or from the holders of five per cent in amount of the bonds hereby secured and then outstanding; then, and in each and every such case of default (provided, however, in respect of any of the three cases so indicated, that such default shall have continued for six months as aforesaid), the trustee, with or without entry, personally or by attorney, in its discretion (a) may sell to the highest and best bidder, all and singular the mortgaged and pledged property and premises, bonds and stocks, rights, fran-
105 chises and interests, lands and appurtenances, and other real and personal property of every kind, and all right, title and interest, claim and demand therein, and right of redemption thereof, in one lot, as an entirety, provided, however, in respect of such lot that if a sale thereof in parcels shall be required under the provisions of section 6 of this article, sale may be made in parcels as in said section provided; which sale shall be made at public auction at such place in the city of Philadelphia, in the State of Pennsylvania, or at such other place, and at such time and upon such terms, as the trustee may fix and briefly specify in the notice of sale to be given as herein provided; or (b) immediately upon the expiration of the six months in any of the three cases so indicated, and immediately upon default in payment of principal in the other case, may proceed to protect and enforce the right of bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this indenture, or for the enforcement of any other appropiate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and to enforce any of its rights or duties hereunder.

Upon the written request of the holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding, in case

of any such default (continued in any of said three cases for six months as aforesaid), it shall be the duty of the trustee, upon being indemnified as hereinafter provided, to take all needful steps for the protection and enforcement of its rights and the rights of the bondholders secured hereby, and to exercise the powers of entry or sale herein conferred, or both, or to take appropriate judicial proceedings by action, suit or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most expedient in the interest of the holders of the bonds hereby secured.

106 SEC. 5. Anything in this indenture contained to the contrary notwithstanding, the holders of seventy-five per cent in amount of the bonds hereby secured and then outstanding, in case of any subsisting default, from time to time, shall have the right to direct and control the method and place of conducting any and all proceedings for any sale of the property and premises hereby conveyed and pledged, or agreed or intended so to be, or for the foreclosure of this indenture, or for the appointment of a receiver, or for the purpose of taking any other proceedings hereunder.

SEC. 6. In the event of any sale, whether made under the power of sale hereby granted and conferred, or under or by virtue of judicial proceedings, or of some judgment or decree of foreclosure and sale, the whole of the property hereby mortgaged and pledged shall be sold as provided in section 4 of this article in one lot, as an entirety, including all the rights, title, estates, lands, rights to lands, railroads, equipment, franchises, leases, leasehold interests, contracts, stocks, bonds, and other real and personal property of every name and nature, unless the holders of a majority in amount of the bonds hereby secured then outstanding shall in writing request the trustee to cause the same to be sold in parcels, in which case the sale thereof shall be made in such parcels as may be specified in such request or petition, or unless such sale as an entirety is impracticable by reason of some statute or other cause; and this provision shall bind the parties hereto and each and every of the holders of the bonds and coupons hereby secured or intended so to be.

SEC. 7. Notice of any such sale pursuant to any provision of this indenture shall state the time and place when and where the same is to be made, and shall contain a brief general description of the property to be sold, and shall be sufficiently given if published once in each week for four successive weeks prior to such sale in a newspaper published in the city of New York, and in a newspaper published in the city of Philadelphia.

107 SEC. 8. Upon the completion of any sale or sales under this indenture the trustee shall make, execute, and deliver to the accepted purchaser or purchasers a good and sufficient deed or good and sufficient deeds of conveyance of the property and franchises sold. And the trustee and its successors are hereby appointed the true and lawful attorney or attorneys, irrevocable, of the railroad company in its name and stead to make all necessary deeds and conveyances of property and all necessary transfers of shares of stock

or bonds or other obligations thus sold, and for that purpose it and they may execute all necessary acts of assignment and transfer and may substitute one or more persons with like power, the railroad company hereby ratifying and confirming all that its said attorney or attorneys or such substitute or substitutes shall lawfully do by virtue hereof.

Any such sale or sales made under or by virtue of this indenture, whether under the power of sale hereby granted and conferred or under or by virtue of judicial proceedings, shall operate to divest all right, title, interest, claim, and demand whatsoever, either at law or in equity, of the railroad company of, in, and to the premises sold, and shall be a perpetual bar both at law and in equity against the railroad company, its successors and assigns, and against any and all persons claiming or to claim the premises sold, or any part or parcel thereof, by, from, through, or under the railroad company, its successors and assigns, or any of them.

The personal property and chattels conveyed or intended to be conveyed by or pursuant to this indenture, other than stocks, bonds, and other securities, and property pledged or to be pledged with the trustee, shall be real estate for all the purposes of this indenture, and shall be held and taken to be fixtures and appurtenances of the railroads and part thereof, and are to be used and sold therewith and not separate therefrom, except as herein otherwise provided.

108 SEC. 9. The trustee, from time to time, may adjourn any sale to be made by it under the provisions of this indenture by announcement at the time and place appointed for such sale or for such adjourned sale or sales; and without further notice or publication it may make such sale at the time and place to which the same shall be so adjourned.

SEC. 10. The receipt of the trustee shall be a sufficient discharge to the purchaser or purchasers of the property sold as aforesaid for the purchase money, and no such purchaser or purchasers, or his, their, or its representatives, vendees, grantees, or assigns, after paying such purchase money and receiving such receipt, shall be bound to see to the application of such purchase money upon or for any trust or purpose of this indenture, or in any manner whatsoever be answerable for any loss, misapplication, or nonapplication of any such purchase money or any part thereof, or be bound to inquire as to the authorization, necessity, expediency, or regularity of any such sale.

SEC. 11. In case of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, the whole of the principal sum of the bonds hereby secured, if not previously declared due, shall at once become due and payable, anything in said bonds or in this indenture to the contrary notwithstanding.

SEC. 12. The proceeds or avails of any such sale, whether under the power of sale hereby granted or pursuant to judicial proceedings, and the purchase money paid thereon, together with any sums which may be held by the trustee under any of the provisions of this

indenture, at the time of or after such sale, as part of the trust estate or the proceeds thereof, shall be applied as follows:

First. To the payment of the costs and expenses of such sale, including a reasonable compensation to the trustee, its agents, attorneys, and counsel, and of all expenses, liabilities, and advances
109 made and incurred by the trustee in managing and maintaining the property hereby conveyed or so intended to be, and of all taxes, assessments, or liens prior to the lien of these presents, except any taxes, assessments, or other superior liens to which such sales shall have been made subject.

Second. To the payment of the whole amount then owing or unpaid upon the bonds hereby secured for principal and interest, with interest at the rate of five per cent per annum on the overdue installments of interest, and in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon the said bonds, then to the payment of such principal, and interest, without preference or priority of principal over interest, or of interest over principal, or of any installment of interest over any other installment of interest, ratably, to the aggregate of such principal and the accrued and unpaid interest.

Third. To the payment of the surplus, if any, to the railroad company, or to whomsoever may be lawfully entitled to receive the same.

All the foregoing provisions are, however, subject to the provisions postponing the rights of holders of detached coupons and assignments of interest not accompanied by the bond to which they relate.

SEC. 13. The railroad company covenants that in case (1) default shall be made in the payment of any interest on any bonds at any time outstanding and secured by this indenture, or in case (2) default shall be made in the payment of the principal of any such bonds when the same shall become payable, whether at the maturity of said bonds or by declaration as authorized by this indenture, or by a sale of the mortgaged premises as hereinbefore provided, then, upon demand of the trustee, it will pay to the trustee the whole
110 amount of the interest, or of the interest and principal, due and payable on all the bonds hereby secured then outstanding, with interest at the rate of five per cent per annum upon the overdue principal and installments of interest; and in case it shall fail to pay the same, forthwith, upon such demand, the trustee in its own name and as trustee of an express trust, shall be entitled to recover judgment for the whole amount so due and unpaid.

The trustee shall be entitled to recover judgment as aforesaid, either before or after, or during the pendency of any proceedings for the enforcement of the lien of this indenture upon the mortgaged and pledged premises, and the right of the trustee to recover such judgments shall not be affected by any entry or sale hereunder, or by the exercise of any other right, power, or remedy for the enforcement of the provisions of this indenture or the foreclosure of the lien thereof; and in case of a sale of the mortgaged premises and of the application of the proceeds of sale to the payment of the mortgage

debt, the trustee, in its own name and as trustee of an express trust, shall be entitled to enforce payment of, and to receive, all amounts then remaining due and unpaid upon any and all of the bonds issued hereunder and then outstanding, for the benefit of the holders thereof, and shall be entitled to recover judgment for any portion of the mortgage debt remaining unpaid, with interest. No recovery of any such judgment by the trustee and no levy of any execution upon any such judgment upon property subject to the lien of this indenture, or upon any other property, shall in any manner, or to any extent, affect the lien of the trustee upon the mortgaged premises or any part thereof, or any rights, powers, or remedies of the trustee hereunder, or any rights, powers, or remedies of the holders of the bonds hereby secured, but such lien, rights, powers, and remedies shall continue unimpaired as before.

Any moneys collected by the trustee under this section shall
111 by it be distributed and paid over to the persons registered as holders of the registered coupon bonds and registered bonds without coupons at the time of payment, and to the persons presenting the coupon bonds and coupons for such payment, without any preference or priority of any kind and ratably according to the amounts which shall have become due upon such bonds and coupons respectively.

SEC. 14. The railroad company will not, at any time insist upon or plead, or in any manner whatever claim, or take the benefit or advantage of, any stay or extension law now or at any time hereafter in force in any locality where the mortgaged premises or pledged property, or any part of either, may or shall be situate, nor will it claim, take, or insist on any benefit or advantage from any law now or hereafter in force, providing for the valuation, or appraisement, of the mortgaged premises, or pledged property, or any part thereof, prior to any sale or sales thereof to be made pursuant to any provision herein contained, or prior to the decree of any court of competent jurisdiction; nor after any such sale or sales will it claim or exercise any right under any statute enacted by the Congress of the United States, or by the legislature of any State, to redeem the property so sold or any part thereof; and it hereby expressly waives all benefit and advantage of any such law or laws; and it covenants that it will not hinder, delay, or impede the execution of any power herein granted and delegated to the trustee, but that it will suffer and permit the execution of every such power, as though no such law or laws had been made or enacted.

SEC. 15. Upon filing a bill in equity or upon commencement of any other judicial proceedings to enforce any right of the trustee or of the bondholders under this indenture, the trustee shall be entitled to exercise the right of entry herein conferred, and also any and all other rights and powers herein and hereby conferred and pro-
112 vided to be exercised by the trustee upon the occurrence and continuance of default as hereinbefore provided; and, in any

case of any default entitling the trustee to enter as provided in section 2 of this article, the trustee, as matter of right, shall be entitled to the appointment of a receiver of the premises hereby mortgaged, and of the earnings, income, revenue, rents, issues, or profits thereof, with such powers as the court making such appointment shall confer; but, notwithstanding the appointment of any receiver, the trustee shall be entitled, as pledgee, to continue to retain possession and control of the stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 16. The railroad company at any time hereafter, before full payment of the bonds secured hereby, and whenever deemed expedient for the better security of such bonds, although there be then no default entitling the trustee to enter into possession, may, with the consent of the trustee, surrender and deliver to the trustee full possession of the whole or any part of the property, premises, and interests by it hereby conveyed, or intended so to be, for any period, fixed or indefinite. Upon such surrender and delivery to the trustee, with its consent, the trustee shall enter into and upon the premises so surrendered and delivered, and shall take and receive possession thereof, for such period, fixed or indefinite, as aforesaid, without prejudice, however, to its right at any time subsequently, when entitled thereto by any provision hereof, to insist upon and to maintain such possession though beyond the expiration of any such prescribed period. Upon any such voluntary surrender and delivery of said property and premises, or any part thereof, the trustee, from the time of its entry shall work, maintain, use, manage, control, and employ the same in accordance with the provisions of this indenture, and shall receive and apply the income and revenue thereof as provided in section 2 of this article. Upon application of the trustee, and
113 with consent of the railroad company if there be then no subsisting default hereunder, and without such consent if there shall then be a subsisting default entitling the trustee to enter as provided in section 2 of this article hereof, a receiver may be appointed to take possession of, and to operate, maintain, and manage the whole or any part of said property wheresoever the same may be situated, with all the rights, powers, and duties by this section conferred upon the trustee, and the railroad company shall transfer and deliver to such receiver all such property in its possession wheresoever the same may be situated; provided, however, that notwithstanding the appointment of any such receiver, the trustee, as pledgee, shall be entitled to retain possession and control of the stocks, bonds, cash, and other property pledged or to be pledged with the trustee hereunder.

SEC. 17. No holder of any bond or coupon hereby secured shall have any right to institute any suit, action, or proceeding in equity or at law for the foreclosure of this indenture or for the execution of any trust hereof, or for the appointment of a receiver, or for any other remedy hereunder, unless such holder shall previously have given to the trustee written notice of default and of the continuance thereof as

hereinbefore provided, nor unless, also, the holders of twenty-five per cent in amount of the bonds hereby secured and then outstanding shall have made written request of the trustee, and shall have afforded to it reasonable opportunity, either itself to proceed to exercise the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name, nor unless, also, they shall have offered to the trustee adequate security and indemnity against the cost, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared in every such case, at the option of the trustee, to be conditions precedent to the
114 execution of the powers and trusts of this indenture and to any action, or cause of action, for foreclosure or for the appointment of a receiver, or for any other remedy hereunder; it being understood and intended that no one or more holders of bonds and coupons shall have any right in any manner whatever to affect, disturb, or prejudice the lien of this indenture by his or their action, or to enforce any right hereunder, except in the manner herein provided, and that all proceedings at law or in equity shall be instituted, had, and maintained in the manner herein provided and for the equal benefit of all holders of such outstanding bonds and coupons.

SEC. 18. Except as herein expressly provided to the contrary, no remedy herein conferred upon or reserved to the trustee, or upon or to the holders of bonds hereby secured, is intended to be exclusive of any other remedy, but each and every such remedy shall be cumulative, and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute.

SEC. 19. In case of any sale hereunder any and all purchasers in making settlement or payment shall be entitled to turn in any bonds and any matured and unpaid interest obligations hereby secured, estimating the value of such bonds and coupons for that purpose at the sum payable out of the net proceeds of such sale to the holder or holders of such bonds and coupons as his or their ratable share of such net proceeds, after allowing for the proportion of the total payment required to be made in cash for the costs and expenses of the sale or otherwise; and if such share of net proceeds shall be less than the amount then due upon such bonds and coupons, such purchaser or purchasers may make such settlement by receipting on the bonds the amount to be credited thereupon; and at any such sale any bondholders may bid for and purchase such property, and, upon compliance with the terms of sale, may hold, retain, and dispose of such property without further accountability therefor.

115 SEC. 20. No delay or omission of the trustee, or of any holder of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid shall impair any such right or power, or shall be construed to be a waiver of any such default, or an acquiescence therein.

SEC. 21. If, in order to preserve the franchises of the railroad company, and to avoid a sale hereunder, any plan of reorganization shall be proposed with provisions for the modification of this mortgage, so

far as to authorize and require the creation of new liens upon the mortgaged premises prior and superior to the lien hereof, then and in every such case registered holders of four-fifths in amount of all outstanding bonds hereby secured, may, in writing, direct the trustees, in behalf of all the holders of all bonds then or thereafter issued hereunder, to acquiesce in the provisions of such plan; which plan also may determine and provide for the interests of other creditors and lienors and of the shareholders of the railroad company. This special power, however, is granted to the registered holders of four-fifths in amount of the bonds upon the express condition that no bond hereby secured and then outstanding shall be changed as to amount or date of payment of principal or rate or dates of payment of interest. Thereupon, but not otherwise, the trustee shall by writing acquiesce in such provisions of such plan and such acquiescence by the trustee shall constitute the irrevocable assent of all holders of bonds and coupons hereby secured to any such accepted modifications, as set forth in such plan and necessary to give effect to such provisions thereof. All such modifications so affecting this indenture and the bonds and coupons hereby secured shall be reduced to a written agreement between the railroad company and the trustee, and such agreement shall be recorded in Philadelphia County, Pennsylvania; and thenceforth shall be deemed to be part of this indenture, and thereafter the lien of this indenture and of the bonds hereby secured, shall be
116 deemed to be and shall be subordinate to such new and prior liens created pursuant to such plan, but only to the extent specified in such written agreement.

Registration of bonds for any purpose of this section shall be sufficient if then or theretofore made and then continuing in any manner permitted by section 4 of article two of this indenture.

Article five.

Sec. 1. Any request or other instrument required by this indenture to be signed and executed by bondholders may be in any number of concurrent instruments of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request or other instrument, or of a writing appointing any such agent, and of the holding by any person of coupon bonds transferable by delivery, shall be sufficient for any purpose of this indenture, if made in the following manner:

The fact and date of the execution by any person of any such request, or other instrument of writing, may be proved by the certificate of any notary public, or other officer authorized to take acknowledgments of deeds to be recorded in Pennsylvania, that the person signing such request or other instrument acknowledged to him the execution thereof, or by an affidavit of a witness of such execution.

The amount of coupon bonds transferable by delivery, held by any person executing any such request or other instrument as the holder of bonds, and the issue numbers of the bonds held by such person, and

the date of his holding the same, may be proved by a certificate executed by any trust company, bank, bankers, or other depositary (wherever situated), whose certificate may be deemed by the trustee to be satisfactory, showing that such person had on deposit with such depositary the bonds described in such certificate at the
117 date therein mentioned. The ownership of registered coupon bonds or of registered bonds without coupons shall be proved by the registers of such bonds as provided in section 4 of article two hereof.

Such proof shall be conclusive in favor of the trustee with regard to any action taken by it under such request or other instrument.

ARTICLE SIX.

SEC. 1. Upon the written request of the railroad company, approved by resolution of its board of directors or executive committee, from time to time, while the railroad company, not being in any default hereunder, is in possession of the mortgaged premises, but subject to the conditions and limitations in this section prescribed, and not otherwise, the trustee, by proper instruments of writing, shall release from the lien and operation of this indenture any part of the premises and property, real or personal, now or hereafter mortgaged or pledged hereunder, except any of the shares of stock mentioned in I of subdivision third of the granting clauses hereof, and except also any shares of stock that may hereafter be pledged hereunder, and at the time of pledge classified, with the approval of the trustee under said I, but no release of stocks pledged hereunder shall be made except upon the redemption thereof as hereinafter provided.

No release hereunder of real estate shall be made unless the railroad company shall have sold, or shall have contracted to sell or to exchange for other property, the property so to be released.

The railroad company shall have the right at any time and from time to time to redeem from the lien hereof any or all of the shares of stock mentioned in II of subdivision third of the granting clauses hereof or hereafter pledged hereunder, and at the time of pledge classified with the approval of the trustee, under said II, and any or all bonds hereafter pledged hereunder, at prices which, in its discretion, the trustee shall approve; provided, that in the case
118 of the alienation of the said shares of stock, the railroad company and the trustee, in the discretion of the trustee, shall be of the opinion that the alienation of such stocks on the terms proposed will not be detrimental to the security of the bonds issued hereunder and secured hereby; and such redemption may be made either in money or in bonds hereby secured at the par value thereof, with five per cent premium added thereto, and for the purpose of any such redemption the railroad company may use any of the bonds hereby secured when duly issued or re-issued hereunder and held or acquired by it from time to time. All of said bonds hereby secured so applied

in redemption of securities shall thereupon be cancelled by the trustee, and, when cancelled, shall be surrendered to the railroad company.

The railroad company shall have the right at any time to exchange for other stocks the stocks named in II of subdivision third of the granting clauses hereof or hereafter pledged hereunder and at the time of pledge classified with the approval of the trustee under said II, provided such exchange shall be approved by the trustee, and the stock received by way of exchange shall be deposited and pledged with the trustee of this mortgage and classified under II.

The trustee shall deliver to the railroad company, with all rights unimpaired, any stock or bonds so redeemed from the lien hereof by the railroad company, and shall execute and deliver all proper instruments of transfer and assignment in respect thereof.

SEC. 2. The proceeds of any and all such sales of property, or of stocks or bonds pledged hereunder, and also all moneys received as compensation for any such property subject to this indenture taken by exercise of the power of eminent domain, may be disposed of as required by any mortgage thereon or pledge thereof prior hereto, and the trustee may acquiesce in such disposition. So far as
119 such proceeds and moneys shall not be disposed of pursuant to any such requirement, they shall be set apart and, at the option of the railroad company, shall be applied, either (1) to the purchase of bonds hereby secured in such manner and at such prices as the railroad company and the trustee shall deem expedient (including bonds held or acquired by the railroad company, from time to time), all of which bonds so applied in disposition of proceeds of sale as aforesaid shall thereupon be cancelled by the trustee, and when cancelled shall be surrendered to the railroad company, and to the extent that bonds hereby secured can not be bought on terms deemed expedient by the railroad company and the trustee, then to the purchase of securities in which at such time savings banks shall be authorized under the laws of Pennsylvania to invest their funds, such securities to be held by the trustee as a part of the trust estate hereunder, and the interest thereon or income therefrom, to be paid to the railroad company; or (2), to the improvement of, or additions to, any part of the mortgaged premises of the railroad company, or of the premises of any company, the entire capital stock (or in the opinion of the trustee substantially the entire capital stock) of which shall, at the time, be pledged hereunder, or to the purchase of other property, real or personal, by the railroad company, or by any such other company, or to the purchase by the railroad company of stocks or bonds of other companies, which shall be assigned in trust by the railroad company to the trustee, subject to all the trusts hereby declared, and shall be classified under I or II of subdivision third of the granting clauses hereof as the trustee shall approve. And if such proceeds and money shall have been applied, under (1) hereof, to the purchase of securities in which at such time savings banks shall be authorized under the laws of Pennsylvania to invest their funds, the trustee shall at

120 any time or times on the request of the railroad company, sell such securities at prices satisfactory to the trustee, and apply the proceeds as above provided under (2) of this section. Any new property acquired by the railroad company to take the place of any property released hereunder, shall ipso facto become and be subject to the lien of this indenture, as fully as if hereby specifically mortgaged, but, if requested by the trustee, the railroad company will convey or assign the same to the trustee by appropriate instruments upon the trusts and for the purposes of this indenture.

SEC. 3. The railroad company, from time to time, while in possession of the mortgaged premises as provided in article nine hereof, and not being in default hereunder, shall have full power, in its discretion, to dispose of any portion of the machinery, equipments and implements, at any time held or acquired, which may have become unfit for use, or unnecessary, replacing the same so far as may be necessary by new machinery, equipments or implements, which immediately, upon such acquisition, shall become subject to the lien and operation of this indenture, and the railroad company may, notwithstanding anything herein contained, consent to such disposition by any of the companies whose stocks are at the time pledged hereunder, of like property of such companies.

In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article of this indenture be required to see to the application of the purchase money.

In case any portion of the mortgaged or pledged premises shall be in the possession of a receiver lawfully appointed, the powers in and by this article conferred upon the railroad company may be exercised by such receiver with the approval of the trustee; and if the trustee shall be in possession of the mortgaged or pledged premises under any provision of this indenture, then all the powers by this article conferred upon the railroad company may be exercised by the trustee in its discretion.

121 SEC. 4. In case at any time it shall become necessary, or in the judgment of the trustee shall be for the interest of the bondholders hereby secured, or for the benefit of the mortgaged property, that the railroad company shall terminate or renew or shall make changes or alterations in or a substitution of any of the leases embraced in the granting clauses of this mortgage, the railroad company with the written consent of the trustee may make any such terminations, renewals, changes, alterations or substitutions, and may make or cause to be made, executed and delivered all such instruments in writing as may be proper and necessary to carry out and perfect any and all terminations, renewals, changes, alterations or substitutions authorized in this section. At the same time provision shall be made by instruments in writing satisfactory to the trustee so that any renewed, changed, altered, or substituted leases shall forthwith become bound by and be subject to the terms of this indenture in the same manner as the original lease.

ARTICLE SEVEN.

SEC. 1. The trustee shall not be answerable for the default or misconduct of any agent or attorney appointed by it in pursuance hereof, if such agent or attorney shall have been selected with reasonable care; or for anything whatever, in connection with this trust, except its own wilful misconduct or gross negligence. The trustee shall not be personally liable for any debts contracted by it or for damages to persons or property carried or injured, or for salaries or nonfulfilment of contracts, during any period wherein the trustee shall manage the trust property or premises upon entry or voluntary surrender as aforesaid. The trustee shall not be under any obligation to take any action towards the execution or enforcement of the trust hereby created, which, in its opinion, shall be likely to involve it in expense or liability, unless and as often as required by the trustee, the trustee shall be furnished with reasonable indemnity against
122 such expense or liability; nor shall the trustee be required to take notice of any default hereunder unless notified in writing of such default by the holders of at least five per cent in amount of the bonds hereby secured then outstanding, or to take any action in respect of any default unless requested in writing to take such action by the holders of not less than twenty-five per cent in amount of the bonds hereby secured then outstanding, and tendered reasonable indemnity as aforesaid, anything herein contained to the contrary notwithstanding; but neither any such notice or request, nor this provision therefor, shall restrict any discretion herein given to the trustee to determine whether or not it shall take action in respect of such default, or to take action without such request. The trustee shall not be responsible for the recording of this indenture.

The trustee shall be entitled to reasonable compensation for all services rendered by it in the execution of the trusts hereby created.

SEC. 2. The trustee, or any trustee hereafter appointed, may resign and be discharged of the trusts created by this indenture by giving notice thereof to the railroad company and to the bondholders through publication at least twice a week for four successive weeks, in one newspaper at that time published in the city of New York, and in one newspaper published in the city of Philadelphia, and by due execution of the conveyances hereinafter required.

The trustee may be removed at any time by an instrument or concurrent instrument in writing delivered to it signed by the holders of three-quarters in amount of the bonds secured hereby and then outstanding, or by their attorneys in fact duly authorized.

SEC. 3. In case at any time the said trustee, or any trustee hereafter appointed, shall resign or be removed or otherwise become incapable of acting, a successor, or successors, may be appointed by the holders of a majority in amount of the bonds hereby secured and then outstanding, by an instrument or concurrent instruments in
123 writing signed by such bondholders or their attorneys in fact duly authorized; provided, nevertheless, and it is hereby agreed

and declared that, in case at any time there shall be a vacancy in the office of trustee hereunder, the railroad company, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. The railroad company shall thereupon publish notice of such appointment once a week for six successive weeks in a newspaper published in the city of New York, and in a newspaper published in the city of Philadelphia, and any new trustee so appointed by the railroad company shall immediately and without further act be superseded by a trustee appointed in the manner above provided by the bondholders prior to the expiration of ninety days after such publication of notice. In case no such appointment shall be made by the bondholders prior to the expiration of such ninety days, a new trustee, to supersede the trustee appointed by the railroad company, may nevertheless be appointed by any judge of the United States Circuit Court for the Third Circuit, or by any court of competent jurisdiction in the premises, upon the application of one-quarter in amount of the bondholders. Every such trustee appointed in place of Girard Trust Company, Philadelphia, or its successor in the trust, shall always be a trust company in good standing, doing business in the city of Philadelphia or in the city of New York, and having a capital and surplus aggregating at least $2,000,000, if there be such a trust company willing and able to accept the trust upon satisfactory terms.

Any new trustee appointed hereunder shall execute, acknowledge, and deliver to the trustee last in office and also to the railroad company an instrument accepting such appointment hereunder, and thereupon such new trustee shall become vested with all the estates, properties, rights, powers, and trusts of its or his predecessor
124 in the trust hereunder with like effect as if originally named as trustee herein, without any further act, deed, or conveyance; the trustee ceasing to act shall, on the written request of the new trustee, execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the trustee so resigning or removed, and shall duly assign, transfer, and deliver any and all stocks, bonds, or other property and moneys held by such trustee to the new trustee so appointed in its or his place.

Should any deed, conveyance, or instrument in writing from the railroad company be required by any new trustee for more fully and certainly vesting in and confirming to such new trustee such estates, rights, powers, and trusts, any and all such deeds, conveyances, and instruments in writing shall, on due request, be made, executed, acknowledged, and delivered by the railroad company.

Article eight.

Sec. 1. No recourse under any obligation, covenant, or agreement of this indenture, or of any bond or coupon hereby secured, shall be had against any incorporator, stockholder, officer, or director of the

railroad company or of any successor corporation, either directly or through the railroad company, by any assessment or by any legal or equitable proceeding by virtue of any statute or otherwise, it being expressly agreed and understood that this mortgage and the obligations hereby secured are solely corporate obligations and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers, or directors of the railroad company or of any successor corporation or any or either of them, under or by reason of any or either of the obligations, covenants, or agreements in this indenture, or in any of the bonds or coupons hereby secured, expressed, and contained or that may be implied therefrom, and that any and all personal liability, if any there should be, of every name and nature, either at common law or in equity, or by existing or future statutes, of every such incorporator, stockholder, officer, or director, is hereby expressly waived as a condition of and consideration for the execution and issue of this mortgage and such bonds and coupons.

ARTICLE NINE.

SEC. 1. Until some default shall have been made in the due and punctual payment of the interest or of the principal of the bonds hereby secured, or of some part of such interest or principal, or in the due and punctual performance and observance of some covenant or condition hereof obligatory upon the railroad company, and until such default shall have continued beyond the period of grace, if any, herein provided in respect thereof, or until the railroad company voluntarily shall have surrendered possession to the trustee as herein permitted, the railroad company, its successors and assigns, shall be suffered and permitted to retain actual possession of all the premises hereby mortgaged (other than the bonds, certificates of stock, cash, and other property pledged or to be pledged hereunder with the trustee), and the same and every part thereof, with the rights and franchises appertaining thereto, and the tolls, income, rents, issues, and profits thereof, to manage, operate, collect, receive, use, and enjoy in any manner not inconsistent with the provisions hereof.

SEC. 2. If at any time, under the provisions hereof, the entire amount of the bonds and coupons hereby secured shall have been acquired by the railroad company, or if when the bonds hereby secured shall have become due and payable the railroad company shall well and truly pay, or cause to be paid, the whole amount of the principal moneys and interest due upon all the bonds and coupons for interest thereon hereby secured then outstanding, or shall provide for such payment by depositing with the trustee hereunder for the payment of such bonds and coupons the entire amount due thereon for principal and interest, and shall also pay, or cause to be paid, all other sums payable hereunder by the railroad company, and shall well and truly perform all the things herein required to be performed by it according to the true intent

and meaning of this indenture, then all property, rights and interest hereby conveyed or pledged shall revert to the railroad company, and the estate, right, title and interest of the trustee shall thereupon cease, determine and become void, and the trustee in such case, on demand of the railroad company and at its cost and expense, shall assign and deliver to the railroad company all stocks, bonds and other property pledged with or held by said trustee and shall enter satisfaction of this indenture and of any conveyances made in trust to it, pursuant to this indenture, upon the records; otherwise the same shall be, continue and remain in full force and virtue.

ARTICLE TEN.

SEC. 1. All the covenants, stipulations, promises and agreements in this indenture contained, by or in behalf of the railroad company, shall bind not only it but also its successors or assigns, whether so expressed or not.

SEC. 2. Nothing contained in this indenture, or in any bond hereby secured, shall prevent the railroad company from entering into any lawful consolidation or merger with, or any lease to, any other corporation or corporations, or any conveyance and transfer (subject to the continuing lien of this indenture and to all the provisions thereof), of all the hereby mortgaged and pledged premises as an entirety to a corporation at that time existing under and by virtue of the laws of the United States or any State thereof, and lawfully entitled to acquire the property affected by this mortgage;
127 provided, however, that such consolidation, merger, lease or sale shall not impair the lien and security of this indenture, or any of the rights or powers of the trustee, or of the bondholders hereunder, and that, upon any such consolidation, merger, lease or sale, the due and punctual payment of the principal and interest of all said bonds according to their tenor, and the due and punctual performance and observance of all the covenants and conditions of this indenture, shall be assumed by any corporation formed by such consolidation or merger, or leasing or purchasing as aforesaid.

SEC. 3. In case the railroad company, pursuant to sec. 2 of this article, shall be consolidated or merged with any other corporation, or shall sell, convey and transfer, subject to this indenture, all its mortgaged and pledged premises as an entirety as aforesaid, every successor corporation formed by such consolidation or into which the railroad company shall have been merged, or which shall have purchased and received any conveyance and transfer as aforesaid, shall, upon executing and causing to be recorded an indenture with the trustee, satisfactory to the trustee, whereby such successor corporation shall assume the due and punctual payment of the principal and interest of the bonds hereby secured, and the performance of all the covenants and conditions of this indenture, succeed to, and be substituted for, the railroad company, party of the first part hereto, with the same effect as if it had been named herein as party of the

first part hereto, and every such successor corporation may thereupon cause to be signed and may issue, either in its own name or in the name of the railroad company, any or all of such bonds which shall not theretofore have been signed by the railroad company and delivered to the trustee, and, subject to all the terms, conditions and restrictions herein prescribed, the trustee shall certify and deliver any of such bonds which shall have been previously signed and delivered by the officers of the railroad company to the trustee
128 for certification, and any of such bonds which such successor corporation shall, as above provided, thereafter cause to be signed and delivered to the trustee for that purpose upon the order of such successor corporation. All bonds so issued shall in all respects have the same legal rank and security as the bonds theretofore or thereafter issued in accordance with the terms of this indenture, as though all of said bonds had been issued at the date of the execution hereof.

SEC. 4. For every purpose of this indenture, including the execution, issue and use of any and all bonds hereby secured, the term "Lehigh Valley Railroad Company" includes and means not only the corporation of that name, party of the first part hereto, but also any such successor corporation, as provided in sec. 3, now existing or hereafter formed under the laws of the United States or of any State or States thereof. Every such successor corporation shall possess and from time to time may exercise each and every right and power hereunder of Lehigh Valley Railroad Company in its name or otherwise.

SEC. 5. Any act or proceeding by any term of this indenture, or of any bond or resolution herein recited, required or provided to be done or performed by any board or officer of the railroad company, shall and may, in event of any change in its corporate existence, be done and performed with like force and effect by the like board or officer of any corporation that shall at the time be lawful sole successor of the railroad company.

SEC. 6. Nevertheless, before the exercise of the powers conferred by this article, the railroad company, by instrument in writing executed by authority of its board of directors and delivered to the trustee, may surrender any of the powers reserved to the railroad company or to such successor corporation under this article, and thereupon such power so surrendered shall terminate.

129 ARTICLE ELEVEN.

SEC. 1. The railroad company may deem and treat the registered holder of any registered bond without coupons, or of any registered coupon bond, or the bearer of any coupon bond hereby secured which shall not at the time be registered, as hereinbefore authorized, and the bearer of any coupon for interest on any such bond, whether such bond shall be registered or not, as the absolute owner of such bond

or coupon, as the case may be, for the purpose of receiving payment of the interest or principal of such bond, or the amount of such coupon, and for all other purposes, and the railroad company shall not be affected by any notice to the contrary.

ARTICLE TWELVE.

SEC. 1. Girard Trust Company, trustee, party hereto of the second part, hereby accepts the trusts in this indenture declared and provided, and agrees to perform the same upon the terms and conditions hereinbefore set forth.

The words "the trustee," or "said trustee," or any other equivalent term, as used in this indenture (except when otherwise clearly indicated), shall be held and construed to mean the trustee, or trustees, for the time being, whether original or successor, and the words "trustee," "bond," "coupon," "bondholder," and "holder" shall include the plural as well as the singular number, and the terms "majority" and "per cent" shall signify "majority in amount," or "per cent in amount," whether or not so expressed.

In order to facilitate the record of this indenture, the same may be simultaneously executed in several counterparts, each of which so executed shall be deemed to be an original; and such counterparts shall together constitute but one and the same instrument.

Lehigh Valley Railroad Company doth hereby constitute and
130 appoint D. G. Baird to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

Girard Trust Company doth hereby constitute and appoint Samuel W. Morris to be its attorney for it and in its name and as and for its corporate act and deed to acknowledge this mortgage before any person having authority by the laws of the Commonwealth of Pennsylvania to take such acknowledgment, to the intent that the same may be duly recorded.

131 In witness whereof, Lehigh Valley Railroad Company, the party thereto of the first part, has caused this indenture to be signed by its , and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and Girard Trust Company, the party of the second part, has caused this indenture to be signed by its , and its corporate seal to be hereunto affixed and the same to be attested by the signature of its secretary, the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

Attest:
D. G. BAIRD, *Secretary.*

[Seal of the Lehigh Valley Railroad Co.]

Signed, sealed, and delivered on behalf of Lehigh Valley Railroad Company in the presence of—

D. G. BAIRD,
HENRY S. DRINKER,
J. WM. ROBBINS.

GIRARD TRUST COMPANY,
By E. B. MORRIS, *President.*

Attest:
E. S. PAGE, *Secretary.*

[Seal of the Girard Trust Co.]

Signed, sealed, and delivered on behalf of Girard Trust Company in the presence of—

W. N. ELY,
W. J. DICKSON,
E. S. PAGE.

132 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I hereby certify that on this 30th day of September, in the year of our Lord one thousand nine hundred and three (1903), before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared D. G. Baird, the attorney named in the foregoing mortgage, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage to be the act of the said Lehigh Valley Railroad Company.

Witness my hand and notarial seal the day and year aforesaid.

J. WM. ROBBINS,
[Seal of J. Wm. Robbins, notary public.] *Notary Public.*

My commission expires March 4th, 1907.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I hereby certify that on this thirtieth day of September, in the year of our Lord one thousand nine hundred and three (1903), before me, the subscriber, a notary public, in and for the State and count yaforesaid, personally appeared Samuel W. Morris, the attorney named in the foregoing mortgage, and by virtue and in pursuance of the authority therein conferred upon him, acknowledged the said mortgage to be the act of the said Girard Trust Company.

Witness my hand and notarial seal the day and year aforesaid.

WILLIAM J. DICKSON,
[Seal of William J. Dickson, notary public.] *Notary Public.*

Commission expires May 12th, 1905.

I am not a stockholder, director, or clerk in the corporation for which I hereby act as notary public.

133 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the 30th day of September, in the year 1903, before me, personally came D. G. Baird, to me known, who, being by me duly sworn, did depose and say that he resided in the city of Beverly and State of New Jersey; that he is the secretary of Lehigh Valley Railroad Company, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

J. WM. ROBBINS,
Notary Public.

[Seal of J. Wm. Robbins, notary public.]
My commission expires March 4th, 1907.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On the thirtieth day of September, in the year 1903, before me, personally came E. B. Morris, to me known, who, being by me duly sworn, did depose and say that he resided in the county of Montgomery and State of Pennsylvania; that he is the president of Girard Trust Company, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

WILLIAM J. DICKSON,
Notary Public.

[Seal of William J. Dickson, notary public.]
Commission expires May 12, 1905.

134 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be it remembered, that on this thirtieth day of September, A. D. before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared David G. Baird, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Lehigh Valley Railroad Company, party to the foregoing mortgage; that he well knows the corporate seal of the said Lehigh Valley Railroad Company; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said mortgage signed and delivered by E. B. Thomas, who was, at the date and execution thereof, the president of the said company, in the presence of deponent, as the voluntary act and deed of the said company; and that deponent thereupon signed the same as subscribing and attesting witness.

G. D. BAIRD.

Subscribed and sworn to before me, the day and year last above written.

J. WM. ROBBINS,
Notary Public.

[Seal of J. Wm. Robbins, notary public.]
My commission expires March 4th, 1907.

135 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be it remembered, that on this thirtieth day of September, A. D., 1903, before me, the subscriber, a notary public in and for the State and county aforesaid, personally appeared E. S. Page, who, being by me duly sworn, does depose and make proof to my satisfaction, that he is the secretary of Girard Trust Company, party to the foregoing mortgage; that he well knows the corporate seal of the said Girard Trust Company; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto, and the said mortgage signed and delivered by E. B. Morris, who was, at the date and execution thereof, the president of the said company, in the presence of deponent, as the voluntary act and deed of the said company; and that deponent thereupon signed the same as subscribing and attesting witness.

E. S. PAGE.

Subscribed and sworn to before me the day and year last above written.

WILLIAM J. DICKSON,
Notary Public.

[Seal of William J. Dickson, notary public.]
Commission expires May 12, 1905.

137 EXHIBIT B.

Collateral trust agreement.

This agreement, made this first day of November, one thousand nine hundred and five (1905) between the Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania (hereinafter called the railroad company), of the first part, and the Girard Trust Company, also a corporation of the State of Pennsylvania (hereinafter called the trustee), of the second part:

Whereas the railroad company has purchased all the capital stock of Coxe Brothers and Company, Incorporated, amounting to fifty-eight thousand two hundred and three (58,203) shares, at the par value of two million nine hundred and ten thousand one hundred and fifty dollars ($2,910,150), and all of the capital stock of the Delaware, Susquehanna and Schuylkill Railroad Company, amounting to thirty thousand (30,000) shares, at the par value of one million five hundred thousand dollars ($1,500,000);

And whereas at a meeting of the board of directors of the railroad company, duly called and held in its office at the city of Philadelphia, on the thirteenth day of October, in the year one thousand nine hundred and five, a draft of an agreement, in the form of this agreement, was submitted and read, and a resolution in the following words was duly and unanimously adopted, viz:

"*Resolved*, That the proper officers of this company be and they are hereby authorized and directed in its behalf and under its corporate seal and in form substantially that now submitted to this board, to execute an agreement with the Girard Trust Company to secure an issue of bonds for an aggregate principal sum of nineteen million dollars ($19,000,000) each bond of the denomination of one thousand dollars ($1,000), payable in gold coin of the United States of America of the present standard of weight and fineness, as in
138 said agreement to be provided, at the office of the Lehigh Valley Railroad Company in the city of Philadelphia, Pennsylvania, on the first days of August and February, from August 1st, A. D. 1907, with interest thereon from the first day of August, A. D. 1905, at the rate of four per cent per annum, payable semi-annually on the first days of the months of February and August in each year thereafter at the said office until the respective series of bonds shall become due and payable as in said agreement provided; principal and interest of said bonds payable without deduction from either principal or interest of any tax or taxes of the United States or of any State or municipality thereof which the Lehigh Valley Railroad Company may be required to pay or retain therefrom under any present or future law."

And whereas the bonds to be secured by this agreement are to be coupon bonds of the denomination of one thousand dollars ($1,000.00), to be issued in series of five hundred thousand dollars ($500,000.00), the series to be numbered one (1) to thirty-eight (38) both inclusive, said bonds to be retired in the order of their serial number on the dates hereinafter mentioned, or after July 31st, 1912, at the option of the railroad company, as hereinafter provided, viz:

Series 1, payable August first, nineteen hundred and seven (1907).
Series 2, payable February first, nineteen hundred and eight (1908).
Series 3, payable August first, nineteen hundred and eight (1908).
Series 4, payable February first, nineteen hundred and nine (1909).
Series 5, payable August first, nineteen hundred and nine (1909).
Series 6, payable February first, nineteen hundred and ten (1910).
Series 7, payable August first, nineteeen hundred and ten (1910).
139 Series 8, payable February first, nineteen hundred and eleven (1911).
Series 9, payable August first, nineteen hundred and eleven (1911).
Series 10, payable February first, nineteen hundred and twelve (1912).

Series 11, payable August first, nineteen hundred and twelve (1912).
Series 12, payable February first, nineteen hundred and thirteen (1913).
Series 13, payable August first, nineteen hundred and thirteen (1913).
Series 14, payable February first, nineteen hundred and fourteen (1914).
Series 15, payable August first, nineteen hundred and fourteen (1914).
Series 16, payable February first, nineteen hundred and fifteen (1915).
Series 17, payable August first, nineteen hundred and fifteen (1915).
Series 18, payable February first, nineteen hundred and sixteen (1916).
Series 19, payable August first, nineteen hundred and sixteen (1916).
Series 20, payable February first, nineteen hundred and seventeen (1917).
Series 21, payable August first, nineteen hundred and seventeen (1917).
Series 22, payable February first, nineteen hundred and eighteen (1918).
Series 23, payable August first, nineteen hundred and eighteen (1918).
Series 24, payable February first, nineteen hundred and nineteen (1919).
Series 25, payable August first, nineteen hundred and nineteen (1919).
Series 26, payable February first, nineteen hundred and twenty (1920).
140 Series 27, payable August first, nineteen hundred and twenty (1920).
Series 28, payable February first, nineteen hundred and twenty-one (1921).
Series 29, payable August first, nineteen hundred and twenty-one (1921).
Series 30, payable February first, nineteen hundred and twenty-two (1922).
Series 31, payable August first, nineteen hundred and twenty-two (1922).
Series 32, payable February first, nineteen hundred and twenty-three (1923).
Series 33, payable August first, nineteen hundred and twenty-three (1923).
Series 34, payable February first, nineteen hundred and twenty-four (1924).
Series 35, payable August first, nineteen hundred and twenty-four (1924).

Series 36, payable February first, nineteen hundred and twenty-five (1925).

Series 37, payable August first, nineteen hundred and twenty-five (1925).

Series 38, payable February first, nineteen hundred and twenty-six (1926).

Now, this agreement witnesseth:

First. It is agreed that fifty-eight thousand one hundred and seventy-eight (58,178) shares of the capital stock of Coxe Brothers and Company, Incorporated, at the par value of two million nine hundred and eight thousand nine hundred dollars ($2,908,900) and twenty-nine thousand nine hundred and sixty-five (29,965) shares of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company of the par value of one million four hundred and ninety-eight thousand two hundred and fifty dollars ($1,498,250),
141 being the entire capital stocks of the said companies respectively, with the exception of twenty-five shares (25) of the par value of twelve hundred and fifty dollars ($1,250) of the capital stock of Coxe Brothers and Company, Incorporated, and thirty-five (35) shares of the par value of seventeen hundred and fifty dollars ($1,750) of the capital stock of the Delaware, Susquehanna & Schuylkill Railroad Company, held by the directors thereof (the certificates thereof to be held by the trustee subject to the terms of this agreement) shall be this day transferred to and deposited with the trustee, for the purpose of securing an issue of bonds in the following form:

(Form of coupon bonds.)

Series .

United States of America, State of Pennsylvania.

No. .

Lehigh Valley Railroad Company. Collateral trust four per cent gold bond. Total issue, $19,000,000.

Know all men by these presents, that the Lehigh Valley Railroad Company, for value received, acknowledges itself indebted to the bearer hereof in the sum of one thousand dollars in gold coin of the United States of America, of the present standard of weight and fineness, which sum the said railroad company promises to pay in like gold coin to the bearer, or if registered, as hereinafter provided, to the registered owner of this bond, at the office or agency of the said railroad company in the city of Philadelphia, Pennsylvania, on the first day of A. D. 19 , with interest thereon from the
142 first day of August, A. D. 1905, at the rate of four per centum per annum, payable semiannually, in like gold coin, on the first days of the months of February and August in each year, on delivery of the annexed coupons therefor. The principal and interest of this bond are payable without deduction from either principal or interest for any tax or taxes which may be payable under any present

or future laws of the United States of America, or of any State or municipality thereof for national, state, or municipal purposes, the said railroad company hereby agreeing to pay any such tax, or taxes, which it may now, or hereafter be required by any such law to retain therefrom.

This bond is one of an issue of bonds of like tenor and date, but maturing at various times, amounting in the aggregate to nineteen million dollars ($19,000,000), secured by, and subject to, the provisions of an agreement duly executed and delivered by the Lehigh Valley Railroad Company to the Girard Trust Company, bearing even date herewith, assigning and transferring to the said Girard Trust Company, in trust, fifty-eight thousand one hundred and seventy-eight (58,178) shares of the capital stock of Coxe Brothers and Company, Incorporated, and twenty-nine thousand nine hundred and sixty-five (29,965) shares of the capital stock of the Delaware, Susquehanna and Schuylkill Railroad Company, upon the terms and conditions which by said agreement will appear, to all the terms of which reference is had and of which the holder hereof is required to take notice. The modes prescribed in said agreement for the recovery of the principal and interest of the said bonds are exclusive of all others. This bond shall pass by delivery unless registered The holder hereof may have the ownership of this bond registered on th books of said railroad company, in the city of Philadelphia, Pennsylvania, such registry being noted on the bond, after which no transfer shall be valid unless made on the said books by the registered holder in person or by attorney duly authorized, and noted on the bond; but the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transfer-
143 able by delivery, such registration, however, shall not affect the negotiability of the coupons by delivery merely. Or the holder hereof may at any time surrender to the said railroad company all the coupons hereto annexed, not then due, for cancellation, and have this bond entered on the company's books as a registered bond, transferable only on the books of the company, and the interest thereon semiannually at the rate of four per centum per annum, and the principal thereof, when due, shall be payable only to the registered holder hereof or his legal representatives or assigns.

The railroad company may redeem any of the bonds due and payable after July thirty-first, 1912, on the first day of August and February in any year, after said thirty-first day of July, 1912, at two and a half per cent premium upon sixty days' notice thereof, advertised not less than once a week in a newspaper published in the city of Philadelphia, Pa., and in one published in the city of New York, N. Y., under and in pursuance of the terms and provisions in said agreement contained. Upon the dates so fixed for redemption, interest hereon shall cease.

This bond is not to become obligatory upon the railroad company until the certificate indorsed hereon shall have been signed by the trustee under said agreement.

In witness whereof, the said Lehigh Valley Railroad Company has caused these presents to be signed by its president or by its vice-president, and its corporate seal to be hereunto affixed and attested by its secretary, and coupons for said interest with the engraved signature of its treasurer to be attached hereunto, this first day of November, 1905.

LEHIGH VALLEY RAILROAD COMPANY,

[L. S.] By , *Vice-President.*

Attest:

, *Secretary.*

(Coupon.)

144 On the first day of the Lehigh Valley Railroad Company will pay to bearer twenty dollars in gold coin at the office or agency of the said Lehigh Valley Railroad Company, in Philadelphia, Pennsylvania, being six months' interest then due on its collateral trust gold bond No. .

$20.

Treasurer.

(Trustee's certificate.)

This bond is one of a series of nineteen thousand bonds of one thousand dollars each, referred to in the within-mentioned trust agreement executed by Lehigh Valley Railroad Company, and delivered to the undersigned.

GIRARD TRUST COMPANY, *Trustee.*

By , *Vice-President.*

145 Second. The said bonds shall be issued in series and amounts as above stated. The railroad company shall execute said bonds, and upon receipt of the collateral hereinbefore mentioned the trustee shall certify and deliver said bonds to the railroad company upon the written order of the president of the railroad company. The railroad company hereby expressly reserves the right to be exercised by itself or the trustee by the use of any funds under the control of the railroad company to redeem any bond or bonds hereby secured, the principal whereof is payable after July 31, 1912, on the first day of August and February in any year after said 31st day of July, 1912, at par with two and a half per cent premium added thereto (in addition to all interest accrued on such bond to such date of redemption) after sixty days' notice published not less than once a week in one newspaper published in the city of Philadelphia, Pa., and in one published in the city of New York, N. Y. Such notice shall designate by serial number the bonds so to be redeemed, unless all the outstanding and theretofore uncalled bonds be called in, in which case a statement to that effect will be sufficient. All bonds hereby secured when and as redeemed shall be cancelled by the trustee and surrendered to the railroad company.

In making any redemption of less than all the bonds hereby secured at such time outstanding and uncalled, the bonds so to be redeemed

shall be in the order of their serial number, but not less than all of any one series, and the bonds so redeemed shall be redeemed on the first day of August or the first day of February next thereafter ensuing after advertisement as aforesaid.

Third. If at any time the railroad company shall make
146 default in the payment of interest or principal of said bonds when and as the same shall severally be due and payable, and such default shall continue for sixty (60) days after such interest and principal or either of them shall become due and payable, or if the said railroad company shall at any time fail to pay the rents or royalties reserved in the several coal leases to said Coxe Brothers and Company, Incorporated, for a period of sixty days from the times fixed in said several leases for the payment of said rents or royalties, or shall fail in the performance of any of the covenants and conditions herein provided, then and in such case, the trustee may and upon the written request of the holders of a majority in amount of the said bonds outstanding and unpaid, shall sell at public sale at the best price that can be obtained therefor, the whole of the said stocks then in possession of the trustee, or so much thereof as may be necessary to pay the said bonds and all arrears of interest thereon, and any surplus remaining after the application of the net proceeds of such sale of stocks by the trustee shall be paid over to the railroad company; if after the sale of the said stocks any balance shall still remain unpaid of the amount due upon said bonds the holders thereof may proceed to collect the same directly from the obligor; it being expressly understood by and between the parties hereto that in case default in payment of principal or interest, or of the rents or royalties or in the performance of any of the covenants and conditions herein provided, shall be made as aforesaid, then the whole of the said bonds outstanding and unpaid shall, upon the demand of the holders of a majority thereof being made as aforesaid, become due and payable forthwith; and except as herein otherwise provided any proceeding at law or in equity to enforce any covenant of the
147 railroad company contained herein or in the said bonds shall be only in the name of the trustee for the benefit of the holders of all the bonds then outstanding.

Fourth. Until default shall be made in the payment of interest or principal as herein provided, or of the rents or royalties as aforesaid, the said trustee shall permit and suffer the railroad company to retain and exercise all the rights, powers, and privileges belonging to or incident to the ownership of the stocks hereby deposited with the trustee, and to receive the dividends thereon, and the said trustee shall and will from time to time execute and deliver to the railroad company powers of attorney or orders for the collection of such dividends, and proxies to be used at annual or special meetings of stockholders for the election of directors, or for any purpose incident to the ordinary and usual business of the company, except, however, and provided always, that such proxies shall in no case be used for the creation of any mortgage indebtedness of Coxe Brothers and Com-

pany, Incorporated, or of the Delaware, Susquehanna and Schuylkill Railroad Company; it being understood and agreed, that until the payment of the last instalment of principal as hereinbefore provided and the termination of this agreement, the railroad company will not, as the owner of the capital stock of Coxe Brothers and Company, Incorporated, or of the Delaware, Susquehanna and Schuylkill Railroad Company, consent to the sale or encumbering of the property of the said companies or either of them or cause or consent to the increase of the capital stock of either of said companies, or to the increase of the indebtedness to any extent that will diminish the value of the capital stock, and that no indebtedness beyond that arising in the ordinary and usual conduct of the business of either of said companies shall be created.

148 And the railroad company also agrees that it shall not suffer or allow any leases now held by Coxe Brothers and Company, Incorporated, to be forfeited, nor cause or permit any breach of the lessee's covenants in any of the said leases.

Fifth. It is hereby further covenanted and agreed and this trust is accepted upon the express condition that neither the said trustee nor any successors in the trust shall incur any responsibility or liability by reason of permitting and allowing the railroad company to retain and preserve the powers and authority hereinbefore provided for in regard to the stock of Coxe Brothers and Company, Incorporated, and the Delaware, Susquehanna and Schuylkill Railroad Company, nor shall the said trustee or any successors in the trust be in any way responsible for any other matter or thing whatever except its negligent, wilful, or intentional breaches of the trust herein expressed and contained; and the said trustee or any successors in the trust shall not at any time be bound or required to undertake any proceeding at law or in equity or otherwise for the protection of the bondholders, involving expenditures of or liability for the payment of money; unless (if the trustee shall see fit to require it) adequate indemnity against such liability or outlay be furnished it by the bondholders asking of it such action or proceeding.

Sixth. The railroad company agrees to pay the charges of the trustee and the expenses attending the execution of this trust, and of any sale or sales thereunder.

Seventh. The railroad company shall from time to time execute any other and further instruments or assurances necessary or requisite to carry out the purposes hereof.

149 Eighth. If the interest and principal of the said bonds shall be paid when and as the same shall become payable according to the tenor and effect of the said bonds, and according to the provisions of this agreement, then the said trustee, at the request of the railroad company, shall retransfer and deliver to the railroad company the said stocks, and upon such transfer and delivery and full settlement of the trust account with the railroad company,

the said trustee shall be thenceforth discharged from further duties under this trust, and this agreement shall thereupon be terminated.

In witness whereof, the Lehigh Valley Railroad Company, the party hereto of the first part, has caused this agreement (executed in duplicate), to be signed by its president, and its corporate seal to be hereunto affixed, and the same to be attested by the signature of its secretary; and the Girard Trust Company, the party hereto of the second part, has caused this agreement to be signed by its vice-president, and its corporate seal to be hereunto affixed, and the same to be attested by its secretary, the day and year first above written.

LEHIGH VALLEY RAILROAD COMPANY,
By E. B. THOMAS, *President.*

[Seal Lehigh Valley R. R. Co.]

Attest:
D. G. BAIRD, *Secretary.*

GIRARD TRUST COMPANY,
By W. N. ELY, *Vice-President.*

[Seal Girard Trust Co.]

Attest:
E. S. PAGE, *Secretary.*

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, *vs.* LEHIGH VALLEY RAILROAD COMPANY, defendant.	April session, 1908. No. 97. In Equity.

It is stipulated and agreed between counsel in the above cause that its submission on bill and answer and any averment or admission in the pleading of either party contained shall in nowise prejudice the said parties in any other suit or proceeding heretofore or hereafter instituted, and shall be operative and take effect only with respect to the present suit and for the purposes thereof.

CHARLES J. BONAPARTE,
Attorney-General.

JOHN G. JOHNSON,
Atty. for Deft.

ROBERT W. DE FORREST,
Atty. for Deft.

(Endosed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. Equity. U. S. v. Lehigh Valley Railroad Company. Stipulation of counsel. Filed June 16, 1908. Henry B. Robb, Clerk. L.

156 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, complainant, vs. LEHIGH VALLEY RAILROAD COMPANY, defendant.	April session, 1908. No. 97. In Equity.

The complainant in this cause hereby joins issue with the defendant, Lehigh Valley Railroad Company, and will submit the cause, by permission of the court, on bill, answer, and the stipulation and agreement between counsel in said cause filed.

CHARLES J. BONAPARTE,
Attorney-General.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. Equity. U. S. v. Lehigh Valley Railroad Company. Replication. Filed June 16, 1908. Henry B. Robb, clerk. L.

[NOTE.—Here follow opinions, which are omitted in printing this record by stipulation of counsel. The opinions will be found printed in the record of the case of the United States ex rel. the Attorney-General of the United States, plaintiff in error, vs. the Delaware, Lackawanna & Western Railroad Company, No. 562, of October term, 1908.]

233 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA vs. LEHIGH VALLEY RAILROAD COMPANY.	April sessions, 1908. In Equity. No. 97.

Before DALLAS, C. J.

And now, this sixth day of October, one thousand nine hundred and eight, the above cause having come on to be heard upon bill and answer, it is ordered and decreed that the bill be dismissed.

BY THE COURT.

Attest:

HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. U. S. vs. Lehigh Valley Railroad Company. Decree dismissing bill. Filed Oct. 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

234 No. 97. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

Now comes the complainant, the United States of America, through Charles J. Bonaparte, Attorney-General of the United States, and makes and files, on behalf of said United States, its assignment of errors, upon which it will rely upon its appeal to the Supreme Court of the United States from the judgment and decree made and entered in this case by the Circuit Court of the United States for the Eastern District of Pennsylvania, on the sixth day of October, in the year nineteen hundred and eight, that is to say:

1. That the Circuit Court erred in dismissing the bill of complaint in this case;

2. That the Circuit Court erred in refusing the injunction prayed in this case;

3. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States;

4. That the Circuit Court erred in holding that the enactment of paragraph 5 of section 1 of the act to regulate commerce, approved June 29, 1906, and generally known as the "Commodities
235 clause," was not a valid exercise by the Congress of its powers under the third clause of the eighth section of article one of the Constitution of the United States in so far as it affects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the said so-called "Commodities clause;"

5. That the Circuit Court erred in holding that the said so-called "Commodities clause" is not a regulation of interstate commerce within the true meaning of the third clause of the eighth section of article one of the Constitution of the United States;

6. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, deprives the defendant of its property in violation of the fifth amendment of the Constitution;

7. That the Circuit Court erred in holding that the said so-called "Commodities clause" constitutes a prohibition and not a regulation of interstate commerce and, as such, exceeds the constitutional powers of the Congress conferred by the third clause of the eighth section of article one of the Constitution of the United States;

8. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, is discriminative in its provisions, and, therefore, constitutionally invalid;

9. That the Circuit Court erred in holding that the said so-called "Commodities clause," being the legislation above mentioned, constitutes an attempt to deprive the defendant of the right to use and enjoy its private property, and, as such, is incompatible with free government and inconsistent with the constitutional prohibitions against taking private property for public use without just compensation and depriving any person of liberty or property without due process of law;

236 10. That the Circuit Court erred in sustaining the objections raised by the defendant's answer to the constitutional validity of the so-called "Commodities clause," the legislation above mentioned, and in not overruling each and all of the said objections.

Wherefore the said complainant and petitioner prays that the said judgment and decree of the Circuit Court of the United States for the Eastern District of Pennsylvania be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
J. WHITAKER THOMPSON,
United States Attorney.

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In Equity. United States of America vs. Lehigh Valley Railroad Company. Assignment of errors. Filed October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

237 No. 97. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

To the honorable, the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

The United States of America, through Charles J. Bonaparte, Attorney-General of the United States, feeling itself aggrieved by the judgment and decree entered in the above entitled case, on the sixth day of October, in the year nineteen hundred and eight, does hereby appeal from said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers

upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

CHARLES J. BONAPARTE,
Attorney-General.

J. WHITAKER THOMPSON,
United States Attorney.

Dated, October sixth, 1908.

238 (Endorsed:) U. S. C. C., E. D. of Penna. No. 97, April session, 1908. In equity. United States of America vs. Lehigh Valley Railroad Company. Petition for Appeal. The clerk will please file within petition for appeal, the assignment of errors herewith, and order of court allowing appeal when granted. Charles J. Bonaparte, Attorney-General, J. Whitaker Thompson, U. S. attorney. Filed, October 6, 1908. Henry B. Robb, clerk. By L., deputy clerk.

239 No. 97. April session, 1908. In Equity.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT.

Before DALLAS, C. J.

It is hereby ordered, that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

BY THE COURT.

Attest:
HENRY B. ROBB, *Clerk.*

(Endorsed:) U. S. C. C., E. D. of Penna. No. 97. April session, 1908. In Equity. United States of America *vs.* Lehigh Valley Railroad Company. Order of court allowing appeal. Filed, October 6th, 1908. Henry B. Robb, clerk. By L., deputy clerk.

240 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to Lehigh Valley Railroad Company, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of within thirty days, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein United States of America is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned,

should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable George M. Dallas, judge of the Circuit Court of the United States this sixth day of October, in the year of our Lord one thousand nine hundred and eight.

By the Court.

Attest:
Henry B. Robb, *Clerk.*
Service accepted,
John G. Johnson
For J. W. Bayard,
Attorney for Appellee.

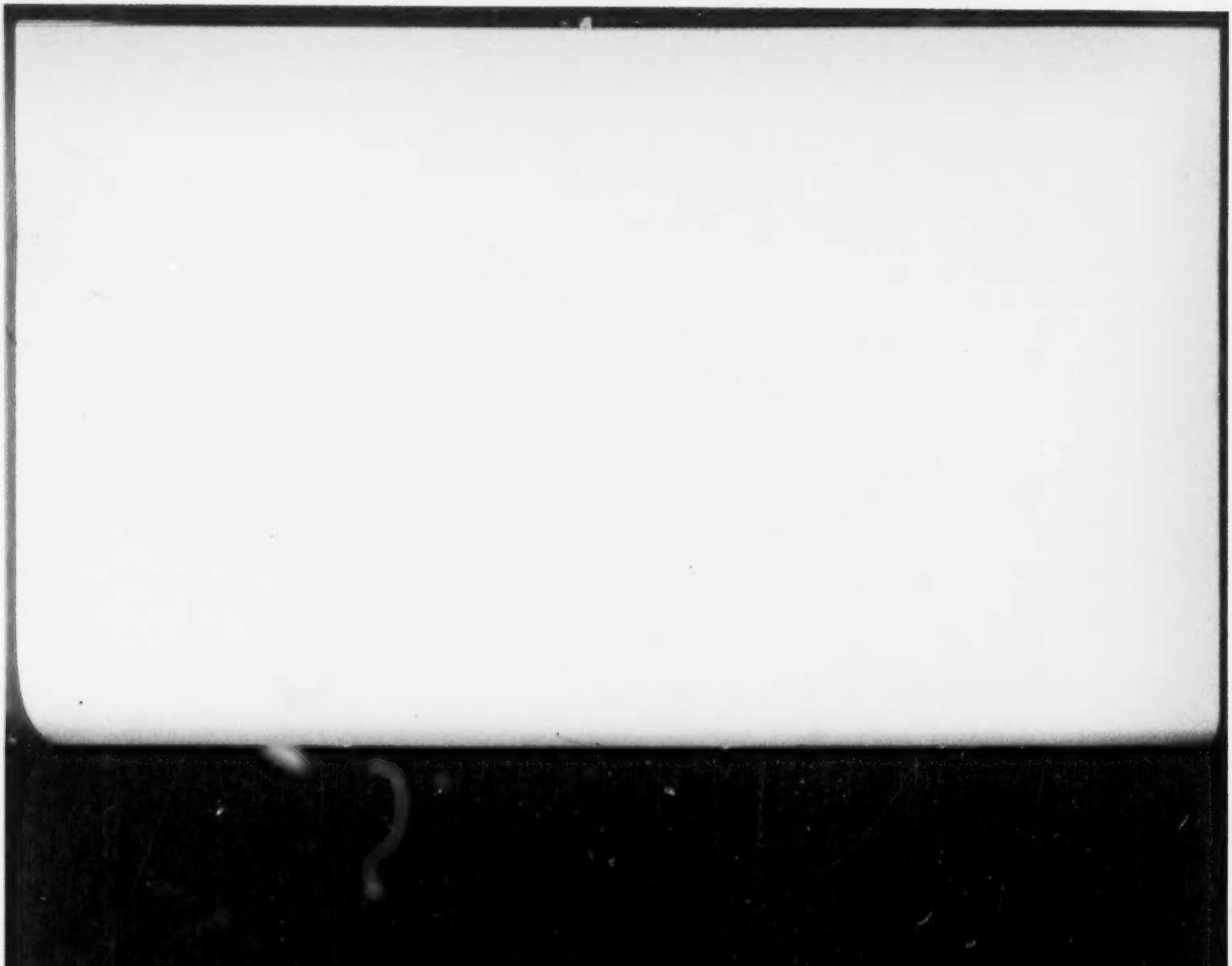
241 United States of America,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of United States of America v. Lehigh Valley Railroad Company, No. 97, April session, 1908, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[seal.] Henry B. Robb,
Clerk of C. C.

(Indorsement on cover:) File No. 21366. E. Pennsylvania C. C. U. S. Term No. 570. The United States of America, appellant, vs. Lehigh Valley Railroad Company. Filed October 10th, 1908. File No. 21366.



In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, EX REL. THE ATTORNEY-GENERAL OF THE UNITED STATES, PLAINTIFF IN ERROR, *v.* THE DELAWARE AND HUDSON COMPANY.	No. 559.
SAME *v.* ERIE RAILROAD COMPANY.	No. 560.
SAME *v.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.	No. 561.
SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.	No. 562.
SAME *v.* THE PENNSYLVANIA RAILROAD COMPANY.	No. 563.
SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.	No. 564.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT, *v.* THE DELAWARE AND HUDSON COMPANY.	No. 565.
SAME *v.* ERIE RAILROAD COMPANY.	No. 566.
SAME *v.* THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.	No. 567.
SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.	No. 568.
SAME *v.* THE PENNSYLVANIA RAILROAD COMPANY.	No. 569.
SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.	No. 570.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

These cases raise the question of the constitutionality and construction of the "Commodities

Clause" of the Hepburn law of June 29, 1906, which provides:

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier. (34 Stat., 584, 585.)

STATEMENT.

A.—THE CASES AND THE PROCEEDINGS BELOW.

The first six cases were petitions for mandamus on the relation of the Attorney-General against the defendant corporations, respectively, and the other six cases were bills in equity filed by the Attorney-General on behalf of the United States against the same corporations—all in the Circuit Court of the United States for the Eastern District of Pennsylvania—both the petitions and the bills being founded upon the same acts in violation of the commodities clause, or upon the same threatened violations.

The charge in the bills and petitions is, in substance, that the defendants have long operated their

railroads through the anthracite coal fields of Pennsylvania into other States, and throughout the period have been engaged in the interstate transportation of anthracite coal from the mines in Pennsylvania to other States, and that the coal so transported has been in large measure owned by the respective defendants either through conveyances and leases, and as being thus the product of their own mines and coal lands, or by reason of their ownership of the stock of other companies owning and mining coal, and that the interstate transportation of coal so owned will continue, and therefore the defendants have violated, and will continue to violate, the commodities clause of the act of 1906.

The bills and petitions also alleged that the anthracite coal in question, being an article or commodity other than timber and the manufactured products thereof, is not within the exception of the commodities clause and is an article in which the defendants have and will have a direct or indirect interest, and is not an article necessary or intended for use in their business as common carriers.

The bills in equity prayed for injunctions to enjoin and prohibit the various defendants, respectively, "from further transporting in interstate commerce the anthracite coal which it is the purpose of the said defendant to transport as hereinbefore stated in violation of the law hereinbefore quoted."

The prayer of the petitions for mandamus was for the issuance of alternative writs and rules nisi.

The alternative writs were issued; the returns or answers to the petitions and bills set up various matters of defence and claims of right presently to be referred to; the cases were heard on these pleadings, and the court below decided (Gray, Circuit Judge, delivering the opinion of the court; Dallas, Circuit Judge, filing a concurring opinion; Buffington, Circuit Judge, dissenting and filing an opinion) that the commodities clause is not a constitutional enactment because it deprives the defendants of their liberty and property within the meaning of that clause of the fifth amendment to the Constitution, which forbids that any person shall be deprived of life, liberty, or property without due process of law; that the commodities clause not indirectly but directly works a practical confiscation of the railroads' property; that the law is unreasonable and consequently invalid, and that the restriction of the law in its nature and effect is discriminative prohibition.

The United States then sued out writs of error and took appeals to this court, and the cases were advanced for hearing.

B.—THE PLEADINGS; THE ESSENTIAL CLAIMS OF DEFENDANTS; THE OPINIONS OF THE CIRCUIT COURT.

The Government's pleadings show that the defendants are corporations of the State of Pennsylvania or of other States, but doing business and maintaining offices in Pennsylvania, and are common carriers within the interstate commerce laws; that the transportation here is interstate commerce; that

the defendants own coal and coal lands through conveyances and leases, or own the entire capital stock or a large majority of the capital stock of certain coal companies which are corporations of the State of Pennsylvania, and by reason of this stock ownership exercise full control and direction over the operations of these coal companies, or own all or some part of the capital stock of other corporations of the State of Pennsylvania which own coal lands and mine and sell coal under the direct management of officers and directors who are also officers or directors of the defendant companies.

The answers show in substance as follows:

THE DELAWARE AND HUDSON.

Incorporation under a law of New York and the claim of authority thereunder to construct a canal from the anthracite district in Pennsylvania to the Hudson River, to purchase coal lands in Pennsylvania and to transport to market the coal mined; later supplemental acts of New York; various acts of Pennsylvania between 1823 and 1871 alleged to authorize defendant to purchase and hold coal lands and to mine and transport the coal mined from such lands. All these acts are set forth as exhibits. Because of the supposed public policy of Pennsylvania and New York with reference to early conditions in the coal trade to develop and foster the same, and under claims based upon the respective state legislation referred to, defendant is averred to be a coal mining company and not a railroad

company within the meaning of the commodities clause, although having power to acquire canals and railroads principally for the transportation of its own coal and incidentally only as a common carrier for others.

That coal leases held on annual minimum royalties can not be assigned without the lessor's consent; that defendant could never have acquired its railroads except in the expectation that it could utilize these means for interstate transportation of coal mined by it, and the denial of such right of transportation is a destruction of vested rights acquired from New York and Pennsylvania and on the faith that the freedom of commerce is guaranteed by the Constitution of the United States; that in specified, direct and indirect, ways particular properties and defendant's earning capacity and general property rights would be largely destroyed if it is prohibited from mining coal and transporting the same upon its railroads. It is admitted that the defendant owns all the shares of the capital stock of the three coal-mining companies referred to in the petition and bill, but is averred that these stocks were acquired before any of the interstate commerce laws were enacted, although it does not appear when they were acquired. It is claimed that except as to steam sizes, the coal mined is sold at the mines to third persons before interstate transportation begins, and as to the steam sizes, they are transported into the State of New York and there stored until sold or

used. As to the coal sold at the mines, therefore, it denies that it owns it when the interstate transportation begins or during the same. As to the steam sizes it is denied that such transportation of such coal "for its own account over its own railroad" constitutes interstate commerce or is within the commodities clause.

The defences based upon the various averments are thus summed up:

That the commodities clause is invalid because it would deprive defendant of the valuable enjoyment of property lawfully acquired and held, without compensation and without due process of law, contrary to the fifth amendment to the Constitution; that the right to engage in interstate commerce is not a right created either by the Constitution of the United States or by Congress, but one which existed previous to and independently of both; and that the investments made by the defendant under the authority of the state laws have resulted in vested rights beyond the power of Congress to impair or take away.

That the legislation is invalid under the fifth amendment because it discriminates between common carriers which are corporations and those which are not; between carriers which are railroads and those which are not; between common carriers of timber and common carriers of other commodities.

That the legislation is invalid because its operation and effect are not merely to regulate interstate commerce but to prohibit it.

That it is invalid under the eighth amendment because it imposes excessive fines for its violation.

That it is invalid under the tenth amendment because it seeks to exercise a power which has been expressly reserved to the States and the people thereof. (No. 559, pp. 17–18.)

THE ERIE.

Is organized under a general law of New York, and succeeded upon reorganization thereunder to the property and franchises of predecessors. Its original predecessor was chartered by New York in 1832 to build a railroad from New York City to Lake Erie, and by subsequent acts of New York and Pennsylvania was authorized to construct a portion of its road through Pennsylvania. A branch railroad in Pennsylvania for the transportation of coal chiefly was acquired by lease in 1869. Under the authority of other legislation by New York and Pennsylvania, and by contract, and as a result of the various reorganizations, the defendant came into possession of the coal road of the Pennsylvania Coal Company, and operates it through a subordinate railroad corporation, and has lawfully acquired nearly all the capital stock of that coal company and of the Hillside Coal and Iron Company, companies organized under Pennsylvania law with the power (*inter alia*) to engage in the usual business of mining and selling coal, to buy coal lands, to construct railroads, or to connect with other railroads, and a small minority of the stock of the Temple Iron Company, another Penn-

sylvania corporation whose charter powers are not set forth.

If defendant and its connections can not transport coal mined, owned, and shipped by the Pennsylvania Company and the Hillside Company, whose mines can only be conveniently reached and the coal transported to interstate markets by the railroad lines of this defendant, a portion of the property of the said coal companies will be substantially valueless and the property rights of the defendant will be greatly impaired. Defendant, although admitting its stock ownership as above, denies that it owns the anthracite coal lands or coal of the said coal companies or any other anthracite coal lands, in whole or in part, directly or indirectly; avers that the commodities clause is not a reasonable or lawful regulation of the interstate transportation of anthracite coal; avers that its property, including all its stock in said coal corporations has been mortgaged as security for various issues of bonds and the mortgages contain no provision for the release of said stock; asserts the same constitutional objections as the Delaware and Hudson, and others not necessary to specify. (No. 560, pp. 10–22.)

CENTRAL RAILROAD OF NEW JERSEY.

Was originally incorporated under an act of New Jersey of 1847. Sets up its right under the general corporation law of that State to purchase, hold, and dispose of the shares or bonds of any other corporation of that or any other State, and a similar right

under general statutes of Pennsylvania. Admits among other things that it is a common carrier engaged in the interstate transportation of anthracite coal, among other commodities, and admits the ownership of a majority of the stock of the Lehigh and Wilkes-Barre Coal Company, a corporation of Pennsylvania, organized by consolidation and merger of other corporations under general laws of that State, all of which companies were authorized to purchase or lease coal lands in Pennsylvania. Nevertheless denies any interest in coal lands, mines, or coal. Sets out the reorganization of the Lehigh and Wilkes-Barre Coal Company, the defendant's acquisition of the stock of the predecessor coal companies "for the purpose of securing for itself the transportation of the anthracite coal produced by the mines owned by these companies and other companies," and its control through lease and successive agreements of the Lehigh Coal and Navigation Company and its railroad, the Lehigh and Susquehanna Railroad.

Avers that this lease is a valuable asset only so long as it continues to transport the coal of the Lehigh and Wilkes-Barre Company in interstate commerce, and that the lease, like its stock in said coal company, is included in assets covered by its general mortgage; that about half its gross earnings are derived from its anthracite coal traffic and the greater part of that amount is derived from the transportation of the Lehigh and Wilkes-Barre coal. Stating that its railroads are the only convenient avenues of transporting

the coals produced from said properties, and stating that it has made large expenditures for branches and sidings and terminal facilities, it avers that the value of its properties would be to a large extent destroyed if it is deprived of the right to transport the coal mined by its coal companies; sets out the demand for and wide distribution of anthracite as an article of prime necessity throughout the country; and, in addition to other constitutional objections already stated, emphasizes the claim that the law is class legislation and unjustly discriminative; that the penalties thereunder are so excessive as to be destructive of property and franchises, and to constitute a denial of the equal protection of the law, and that the effect of the law is to cause the coal to be brought for shipment to ports of Pennsylvania and thus to give a preference to the ports of one State over those of other States.

This answer sets forth the following statistical statements: That the source of the entire anthracite supply is within the three "regions" of Pennsylvania—the Wyoming or Lackawanna, the Lehigh, and the Schuylkill; that "90 per cent approximately of the entire unmined area of anthracite coal is owned or controlled by" these defendants along with the Reading and the New York, Ontario and Western and their "subsidiary coal companies;" that about 75 per cent of the annual supply of anthracite has been for many years past produced by these companies and their subsidiary agencies; that approximately four-fifths of the entire production has been

transported over these railroads to markets in other States and Canada "for many years before 1905 and ever since." (No. 561, pp. 10–19.)

DELAWARE, LACKAWANNA & WESTERN.

Shows incorporation under laws of Pennsylvania, averring that all railroad lines owned are wholly within that State and that it operates lines in New Jersey and New York as lessee; is a common carrier in interstate commerce, and owns and leases large tracts of coal lands in Pennsylvania and is engaged in mining coal from such lands and in the interstate transportation of same over its railroads; is owner of substantially all of the capital stock of the two coal companies mentioned in the petition and of part of the stock of the Temple Iron Company, but denies that this constitutes ownership of coal mines or lands. Sets forth in detail the acts of Pennsylvania by which defendant was incorporated in 1832 to construct a railroad from a point near Scranton to the New York state line, and by which additional powers were conferred, including the right under an act of 1851 "to purchase and hold a reasonable amount of coal lands" which "shall in no case exceed one thousand acres," and by which its corporate name and title were changed and consolidations were effected embracing the merger of various Pennsylvania corporations into each other and finally into the defendant company, which corporations possessed various rights and powers including the right and power to construct lateral railroads and the right and power

to purchase anthracite coal lands and mine and sell coal.

By an act of 1855 defendant's direct right to hold coal lands was increased to two thousand acres, and it was given the right to mine, transport, and vend coal, and was authorized to make contracts with citizens of New York and New Jersey in the prosecution of the business of transporting and vending coal. Various other acts of Pennsylvania and New Jersey and New York are set forth, authorizing defendant to lease a railroad in New Jersey and to hold lands in New Jersey and New York in connection with the transportation and sale of coal. Defendant alleges it purchased the stock of the coal companies mentioned in the petition prior to 1899, pursuant to the Pennsylvania act of 1869 authorizing railroad and canal companies to aid in the development of the coal and other material interests of the State by the purchase of their capital stock or bonds. Insisting on its rights thus shown to own and lease coal lands and to mine and sell coal, defendant avers that its railroads in New York and New Jersey have been acquired under leases, in order to market its coal; that it is under many and various obligations to pay charges and dividends by the terms of said leases, and that about 50 per cent of its transportation earnings from the operation of its leased lines has been derived from the carriage of its anthracite coal. Similar claims are made as in the previous cases respecting expenditures and investments in reliance

upon charter rights, and a similar statement of losses which would result to defendant if it is forbidden to transport and market its coal. And the same constitutional objections are urged. (No. 562, pp. 10–24.)

THE PENNSYLVANIA.

Avers incorporation by an act of Pennsylvania of 1846, and the possession of rights and powers under that and supplementary acts, and under the two general statutes of Pennsylvania of March 31, 1868, and April 15, 1869 (heretofore referred to), authorizing, respectively, incorporated companies to invest in stocks and other securities, and railroad companies to aid in the development of the material interests of the State by the purchase of the stock, etc., of coal, iron, and other companies. Defendant owns the entire capital stock of the Susquehanna Coal Company, a Pennsylvania corporation authorized to own and operate anthracite coal lands. Defendant acquired this stock in part December 31, 1873, and the balance thereafter at various times until January 5, 1886. It also owns the whole capital stock of the Summit Branch Mining Company (a coal mining corporation constituted under Pennsylvania law by purchases at judicial sale of the property and franchises of preceding corporations), which is authorized to purchase or lease anthracite coal lands in Pennsylvania, defendant making the first purchase of the stock of that company in 1871 and subsequently and down to the year 1899 making additional purchases. It also owns a part of the capital stock of

the Mineral Railroad and Mining Company, a corporation of Pennsylvania which is authorized to own and operate anthracite coal lands in Pennsylvania. The same formal admissions are made, and the same denial of any interest, direct or indirect, in the coal lands or coal within the purview of the law as in the preceding cases, and the same claims of the invalidity of the law on constitutional grounds are presented. (No. 563, pp. 10–15.)

LEHIGH VALLEY.

Incorporated by an act of 1846 of Pennsylvania; routes, location, and corporate powers extended and amended by later supplementary acts. Other railroad corporations of that State were consolidated and merged into defendant pursuant to law, as well as railroad and coal companies possessing the right to mine, transport, and vend coal. Defendant has acquired the entire capital stock of still other railroad companies, including the Lehigh Valley Railroad Company of New Jersey and the Lehigh Valley Railway Company of New York, and leases and operates still other lines in Pennsylvania and New York. The acts of 1868 and 1869 are cited as authority to acquire the stock of the coal companies named in the petition. The ownership of the entire capital stock of the Lehigh Valley Coal Company is admitted and the history of the organization of that company out of prior companies is traced through the Pennsylvania laws. Similarly the ownership of the majority and control of the stock of the New York and Middle

Field Railroad and Coal Company, of the entire capital stock of Coxe Brothers Company (Incorporated), of a minority interest in the stock of the Highland Coal Company, and of the majority and control of the stock of the Locust Mountain Coal and Iron Company is admitted, and the legislative history of those corporations, all being Pennsylvania corporations, is cited.

A minority interest in the Packer Coal Company and in the Temple Iron Company, also Pennsylvania corporations, is admitted. And all these stocks are averred to have been acquired and to be owned and held under the authority of the statutes mentioned. But it is not averred when they were acquired, except in a general way and by inference as to two of the minor companies. It is averred that the said coal companies are empowered by their respective charters to mine, ship, and sell coal, and pursuant to said powers have acquired by purchase or lease coal lands and mines and are engaged in producing or selling coal in Pennsylvania and in shipping it by defendant's lines from that State to market in other States for sale. The same general admissions and denials are made as in the other cases, and the same claims as to the coal trade, earnings, expenditures, the effect of the prohibition in causing losses and as impairing contracts and mortgage security, the destruction of the value of branch lines built to reach collieries, etc. The constitutional objections are substantially the same. (No. 564, pp. 11–23.)

The general claim, then, common to all the defendants is this: That by force of their state charters and of supplemental powers derived from the States by later legislation, and through the other corporate franchises so acquired, they have vested rights of property and of free commerce in property which can not be impaired; and that the exercise of federal power over interstate commerce by the commodities clause is not a regulation but a prohibition of commerce and deprives them of their property in violation of the Constitution.

Epitomizing the opinion of the court,—it states the fundamental question to be whether the commodities clause is in excess of the legislative authority granted to Congress by the Constitution. Considering this question in the light of relevant industrial conditions, it is said that it has long been the policy of the State of Pennsylvania, as is evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands so that the product of her mines might be conveniently and profitably conveyed to markets in Pennsylvania and other States, and that the rights and property interests of defendants have been acquired in conformity to the constitution and laws of Pennsylvania, and their right to the enjoyment of the same has never been doubted or questioned by her courts or people, but has been

fully recognized and protected by both. It is said that the enforcement of the act must necessarily result either in the defendants holding their coal properties and refraining from transporting coal to other States, confining themselves to the mining of coal used in Pennsylvania, or in their divesting themselves by sale or surrender of all title in said properties; that the demand for anthracite outside of Pennsylvania is very large, and the adoption of the former alternative therefore would entail an amount of suffering hard to forecast, while a forced resort to the latter would inflict upon the defendants and their stockholders most disastrous loss.

It is said that no assertion of the power over interstate commerce hitherto by Congress has been so far-reaching or affected so seriously individual liberty and property rights under the Constitution and laws of a State as the commodities clause; that the right to carry in interstate commerce coal owned is a common and most important right of property neither denied nor disputed by the common or statute law of Pennsylvania; and that to the defendants, innocently and lawfully engaged in the transportation of coal which they own, comes this act of Congress and declares that the whole business is unlawful and that the future exercise of a vested right of ownership, long enjoyed in the belief that it was an ordinary and innocent right of property enjoyed by all alike and inviolable, is a crime. The question whether the power over interstate commerce is an absolute one without any

limitation upon its exercise than the will of the legislative branch of the Government is then considered, and it is held that the plenary power of Congress is subject to the limitations which the Constitution itself places on the power to regulate commerce, and it is declared that the history of the formation of the Constitution shows that in conferring upon Congress and in denying to the States the power of regulation of interstate commerce it was meant to preserve and not to destroy or impair that right of property which consists in the ability to transport it into other States free from state inhibition and harassments, and this is declared to be an important right of property, essential to its full enjoyment and of the individual liberty of which it is a part.

It is the opinion of the court that the enactment is not a regulation of commerce within the proper meaning of the Constitution and therefore not within the power granted by the commerce clause; that Congress can not in the exercise or pretended exercise of any legislative power conferred upon it, including power under the commerce clause, deprive any person within its jurisdiction of his liberty or property without due process of law.

In considering whether the commodities clause does in fact violate this inhibition of the Constitution, the opinion alludes to the enormous aggregate of property affected, its possession by defendants for a long period, the harmless character of the ownership, the invitation and encouragement by the State

to the defendants so to invest their funds; finds the transportation right to be the most valuable and important of the rights of property in and to the coal owned, and details and emphasizes the enormous losses which will occur if defendants either do not mine and ship their coal or throw their coal properties on the market; and the conclusion is that the statute is a practical and substantive violation of the letter and spirit of the fifth amendment. In reply to the argument that the exercise of police powers by the States has been exempted by judicial decision from the similar inhibition of the fourteenth amendment, and that the power of Congress to regulate commerce is the equivalent of state police powers in this respect, it is said that the federal commerce power is complete in itself, distinct and substantive, while state police powers comprise an indefinite mass of powers, and that there is no equivalency between them and the power to regulate commerce which does not pertain to other powers granted to Congress; that the reasonableness of the exercise of the police power is the question in every case, and, on the one hand, the courts will not permit those powers to constitute a palpable invasion of rights secured by fundamental law, nor, on the other hand, allow indirect and incidental consequences to personal or property rights to affect adversely their validity.

The court finds that the same test of the reasonableness of the exercise of the power in the particular

case has been applied by this court in cases involving the power to regulate interstate commerce, especially the *Lottery Case*, which is held to rest upon the pernicious and immoral character of the traffic, while here the traffic is admittedly lawful and innocent business. Reviewing and distinguishing certain authorities and distinguishing the case of the *New Haven Railroad* v. *Interstate Commerce Commission* as not sustaining the argument in favor of the commodities clause, the statute is held to be unreasonable as extirpating and destroying an entirely lawful business in order to stamp out evils which may be practiced in its conduct. It is declared to be a judicial question whether the enactment, in view of the character of the discriminations made as between owners of property, and of the inhibition of the fifth amendment, is a reasonable exercise of the power conferred upon Congress. Passing the discriminatory features, the conclusion is restated that there has been a deprivation as to each of the defendants of its liberty and its property within the meaning of that clause of the fifth amendment which forbids that any person shall be deprived of life, liberty, or property without due process of law.

The view that the act is retroactive is suggested because it affects property lawfully acquired long prior to its enactment and innocently enjoyed under the sanction of the state laws during a long period prior thereto, and is not confined to the dual ownership of transportation and property acquired after the

passage of the act. It is held that the commodities clause is practically a direct confiscation of property, that the unreasonableness and consequent invalidity of the statute is apparent, that it invades the rights of the State by striking down the liberty hitherto innocently enjoyed by its citizens under the laws and usages of the Commonwealth to engage in interstate commerce to the fullest extent as to all harmless articles, whether owned or not owned by the carrier, and deprives of their property these defendants contrary to the letter and spirit of the fifth amendment. (No. 562, pp. 26–61.)

The concurring opinion holds that:

> The question is not whether the carriage from State to State of coal produced by the carrier is interstate commerce, for of course it is; but whether, being a kind of commerce which is not inimical to safety, health, or morals, and which therefore anyone is entitled to pursue "as of right," Congress may restrict a railroad company's interstate transportation of coal to coal not mined or owned by it and in which it has no interest. Any such restriction, whatever it may be called, in its nature and effect is discriminative prohibition; and that the restrictive provision now in question was enacted, not actually for the regulation of interstate commerce, but really to coerce the conformity of intrastate business with a "policy" approved by Congress, seems practically to be admitted

> and could not with candor be denied. * * * The inherent right of the States to unrestricted innoxious commercial intercourse never has been relinquished nor made dependent upon the sufferance of the body to which its regulation was confided, not for its suppression in whole or in part, but to foster its benefits and preclude its obstruction. * * * Congress, unless in aid of the unfeigned exercise of a power possessed by it, has no authority whatever to divest, limit, or impair any property right which a competent state law recognizes and protects. Yet we are confronted in these cases with an attempt to subvert by congressional edict the right to use and enjoy property of the utmost value which was acquired and has long been held under state law of unquestionable validity. * * * Such legislation is incompatible with free government, and in my opinion it is simply impossible to find support for it in a grant of power to regulate commerce, coupled with a mandate that private property shall not be taken for public use without just compensation, and that no person shall be deprived of liberty or property without due process of law. (No. 562, pp. 61–62.)

The dissenting opinion observes that the act does not forbid a railroad to own mines or preclude sale of its product or to debar carriage from the State. It puts a carrier owner on the basis of all other owners of commodities, namely, transportation by a disinterested carrier, and its manifest purpose is to prevent

favors and secure fairness to all. It is noted that prior action of the State can not detract from the power of Congress thereafter to regulate interstate commerce; that the purchase of property under state authority creates no obligation on the part of Congress never to enact a law regulating commerce in such property, and the mere omission to exercise a constitutional power can not estop Congress. Such a doctrine would compel Congress to forestall the laws of every State and seriously impair the exercise of the power to regulate commerce, and in effect give each State a veto on the power of Congress.

The provision of the constitution of Pennsylvania forbidding the dual relation of miner and carrier is cited, and it is said, on the assumption that this provision is not self-operative, that it certainly strips every purchase in Pennsylvania since 1874 of mining properties by common carriers of the status of innocent purchases, and the answers do not allege that the purchases were prior to the constitution, or show whether the defendants had elected to accept its provisions. It is said, in substance, that the dominant public purpose of railroad common carriers enforced by this law requires them to divorce their public duty as carriers from their private interest in carrying their own products, and forbids them to become competitors of their own customers; and so far as this dominant purpose is concerned, their lawful ownership of private property is an incident to enable them to fulfill and not to thwart this public duty.

On the view that the question before the courts is one of power only and not of policy, the following passage from the New Haven Railroad case is quoted:

> If the result of applying the prohibitions as we have interpreted them will be practically to render it difficult if not impossible for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist.

That the regulation of interstate commerce was the object of the law is shown from the statement of its proposer that it was intended "to divorce transportation from production on the part of the railroads engaged in transporting coal they mined and sold in competition with other shippers, which was a great abuse." The inconsistency of the dual relation of public carrier and private purchaser is further shown from the English case of the Great Northern Railway, wherein it was held that the grant of a charter to operate a railroad implies a prohibition against the company engaging in other business, the court saying:

> Here we find this company having the traffic from the north of England where the great coal fields are * * * supplying the country with coal * * * ; this company buys the coal, which gives to the company an interest in checking as much as possible those who will not deal with them; and it is quite clear that it is possible by the mode in which this company may * * * exercise such

> powers as either it has or assumes to have—this company may get into their hands the traffic—that is, the dealing—in all the coal in the large districts supplying coal to the country.

In that case an injunction was granted, and it seems that its principles now are and since 1860 have been the law of England on the dual relation of common carriers.

The same objection to this dual relation was thus set forth in the *New Haven Railroad* case:

> Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly.

It must be presumed, says the dissenting opinion, that Congress in passing this act sought not to confiscate private property, but rather to avert by due regulation the evils the carrier had itself brought about by allowing private interest to injuriously affect public duty; and it is said that the recognition by courts of an evil to be remedied and the avowed purpose of Congress to stop such evil may throw some light on that which, after all said, is a question of fact rather than law, namely, whether this act is a real regulation of commerce or under the guise of regulation a prohibition against holding property. The

facts set forth in one of the answers as to the demand for anthracite coal and the control of the supply are cited and suggested as being in the mind of Congress to justify restricting transportation regulations when it saw that these private acquisitions by public carriers up to 90 per cent of the entire anthracite supply had resulted from the mere inaction of Congress to restrict carriers in their interstate relations to their public and primary service of transportation.

It is declared that to be effective the power to regulate commerce must include the power to regulate the carrier; that the right to regulate the interstate carrier's efficient performance of duty rests in Congress and not in the State, and that the regulation of Congress must prevail, and that it is no answer to say that sufficient power to regulate and control exists in Congress in forbidding rebates and enforcing uniform rates; for to concede to Congress power to regulate carriers by such means is to concede it power to regulate by other means. The dissenting opinion concludes with these three propositions: That under the Constitution the power to regulate commerce between the States is vested in Congress; that such power includes the power to regulate carriers thereof; that the divorce of the dual relation of public carrier and private transporter is a regulation of commerce, and the law therefore is constitutional. (No. 562, pp. 63–72.)

C.—THE ASSIGNMENTS OF ERROR.

(e. g., No. 562, pp. 73, 74.)

The important assignments are that the court erred in holding that the commodities clause "was not a valid exercise by the Congress of its powers under the third clause of the 8th section of Article I of the Constitution of the United States" in so far at least "as it effects the transportation of property owned, acquired, manufactured, mined, or produced by the defendant prior to the enactment of the so-called 'commodities clause.'" (Pars. 3 and 4.)

That the court erred in holding that the commodities clause constitutes a prohibition and is not a regulation of interstate commerce within the true meaning of that clause of the Constitution, and therefore exceeds the constitutional powers of Congress so conferred. (Pars. 5 and 7.)

That the court erred in holding that the commodities clause is discriminative in its provisions and therefore invalid (par. 8); and that it deprives the defendant of its property without compensation and without due process of law in violation of the fifth amendment to the Constitution (pars. 6 and 9).

The assignments of error thus rest upon three principal propositions, viz:

1. The power of Congress to pass this statute is plenary and absolute.

2. The statute is a valid regulation of interstate commerce.

3. There is no taking of private property for public use without compensation and without due process of law.

ARGUMENT.

I.

THE POWER OF CONGRESS.

The question of reasonableness is for the legislature, but this statute is a proper and reasonable exercise of the power.

If a statute pertains to a subject exclusively committed to Congress, the statute is within the scope of constitutional power; this statute is within the scope of power conferred by the Constitution.

In the *Lottery Case* (188 U. S., 321, 357) it was said:

> If it be said that the act of 1895 is inconsistent with the tenth amendment, reserving to the States respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

To same effect are *Northern Securities Co.* v. *United States* (193 U. S., 197, 344); *The Daniel Ball* (10 Wall., 557, 566).

That congressional nonaction lends no color of authority or validity to State regulations of anything properly pertaining to interstate commerce is settled doctrine. (See *Leisy* v. *Hardin*, 135 U. S., 100, 109, 110–122; *Addyston Pipe, etc., Co.* v. *United States*, 175 U. S., 216, 229, 232; *Crandall* v. *Nevada*, 6 Wall., 35, 48, 49; *Houston* v. *Moore*, 5 Wheat., 23; *Union Bridge Co.* v. *United States*, 204 U. S., 364, 386.) In

In re Rahrer (140 U. S., 545, 555), Chief Justice Fuller delivering the opinion, it was held that Congress might limit the operation of the rule which enforces freedom of commerce in the absence of congressional action; and State laws may, in some instances, indirectly affect the unexercised commercial power of the Federal Government. But when the Federal power is at length exercised, that is by the express terms of the Constitution the exertion of a supreme will, and the State regulation must, in so far as there is a conflict, give way. (*Gibbons* v. *Ogden, supra; McCulloch* v. *Maryland*, 4 Wheat., 422; *Asbell* v. *Kansas*, 209 U. S., 251, 254; *Leisy* v. *Hardin*, 135 U. S., 100, 109.)

If doubt or misapprehension on this subject may have formerly existed, it is removed by the clear and full expressions in the *Addyston Pipe Co.* case (*supra*). (See also, *Union Bridge* case (204 U. S., 364); *Atlantic Coast Line* v. *Wharton*, 207 U. S., 328, 334; *Asbell* v. *Kansas*, 209 U. S., 251, 254.)

In *Houston* v. *Moore* (5 Wheat., 1, 23) the court said:

> I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with each other.

The same thought has been often expressed. (See *Gibbons* v. *Ogden*, 9 Wheat., 1, 196, 199; *Brown* v. *Maryland*, 12 Pet., 446; *Groves* v. *Slaughter*, 15 Pet.,

448, 510, 511; *New York* v. *Miln*, 11 Pet., 102, 157–9.)

To give to rights under a state charter the effect insisted upon by the defendants in these cases is to make the charter a regulation of interstate commerce, which is directly in conflict with the foregoing decisions of the Supreme Court. Not even a State, still less one of its artificial creations, can stand in the way of the enforcement of an act of Congress constitutionally passed, under its authority to regulate commerce. If it were otherwise, the Government and its laws might be prostrated at the feet of local authority. (*Northern Securities Co.* v. *United States*, 193 U. S., 197, 333; *McCulloch* v. *Maryland*, 4 Wheat., 427, 429, 432, 435; *Cohen* v. *Virginia*, 6 Wheat., 264, 385, 414.)

Corporations created by the States are as much subordinate to the powers of Congress, in the regulation of interstate commerce, as if they had been created by acts of Congress. (*Hale* v. *Henkel*, 201 U. S., 43, 75.)

Of course, the state laws chartering the defendants are not on their face regulations of interstate commerce; but the construction placed upon them by the Circuit Court and the effect given them in contravention of the power of Congress amount to the claim of a state right to enact laws whose operation is to forestall the exercise of congressional power over interstate commerce.

The Constitution declares that laws made pursuant to its provisions shall be the supreme law of the land, regardless of all other laws. If a State can by so simple an expedient as the creation of a corporation and conferring upon the incorporators certain powers anticipate and forestall the operation of federal laws before their enactment, this declaration is empty, and the States may thus preempt and appropriate the whole field of that commerce which the courts have uniformly held to be interstate and subject exclusively to national regulation.

In *Union Bridge Co.* v. *United States* (204 U. S., 364) a bridge had been built under a Pennsylvania charter across a navigable river which, however, did not obstruct navigation as then conducted. A subsequent act of Congress requiring extensive and costly alterations was sustained as a regulation of interstate commerce, though it rendered the corporation bankrupt and made no provision for compensation.

This court has uniformly and carefully avoided giving recognition to any rule or doctrine which might open the way to evasions or invasions of federal authority. Thus, in the *Daniel Ball* case (10 Wall., 557, 566), where it was strenuously insisted that Congress had no jurisdiction over commercial navigation of waters wholly within a State, the court said:

> If its authority does not extend to an agency in such commerce, when that agency is confined

> within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter.

It was said in *Henderson* v. *Mayor of New York* (92 U. S., 259, 272) to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States."

(Quoted and approved, *Railroad Co.* v. *Husen*, 95 U. S., 471.)

In another case, the court said:

> A state statute, although enacted in pursuance of a power not surrendered to the General Government, must, in the execution of its provisions, yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress; and this, as was said by Mr. Justice Nelson, speaking for the court in *Sinnot* v. *Davenport*, above cited, "*without regard to the source of power whence the state legislature derived its enactment.*" (*Missouri, K. & T. Ry. Co.* v. *Haber*, 169 U. S., 613, 626.)

The prohibitions contained in this statute do not prevent its constituting legislation which Congress may enact under the commerce clause of the Constitution.

Congressional power over commerce among the States is analogous to the same power over foreign commerce. Thus in *Crutcher* v. *Kentucky* (141 U. S., 57) it was said:

> It has been frequently laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. * * * No difference is perceivable between the two.

Other cases giving sanction to the same view are *Brown* v. *Houston* (114 U. S., 622, 630), *Gibbons* v. *Ogden* (9 Wheat., 1, 192).

The recognized powers as to foreign commerce, such, for instance, as laying an embargo as to products of other nations in a time of peace, and the power to forbid and punish introduction of coins of foreign nations (*U. S.* v. *Marigold*, 9 How., 560, 566), illustrate congressional power to forbid transportation of commodities from State to State, under circumstances requiring such prohibition in the national interest.

In *United States* v. *Marigold* (*supra*) Justice Daniel, delivering the opinion, said:

> Congress are, by the Constitution, vested with the power to regulate commerce with foreign nations; and however, at periods of high excitement, an application of the terms "to regulate commerce" such as would embrace absolute prohibition may have been ques-

> tioned, yet, since the passage of the embargo and nonintercourse laws, and the repeated judicial sanctions those statutes have received, it can scarcely at this day be open to doubt that every subject falling within the legitimate sphere of commercial regulation *may be partially or wholly excluded*, when either measure shall be demanded by the safety or by the important interests of the entire nation.

We may admit that there are limitations upon the exercise of the power over interstate commerce not found in dealing with foreign commerce. These consist in the express prohibitions of the Constitution which will be hereafter considered. But *within its scope* the interstate power is as absolute as is the power over foreign commerce.

The Circuit Court in the present case says (Rec., pp. 49–50):

> All the argumentation of counsel for the Government in support of the validity of this legislation would be equally applicable to any assertion of the power of Congress to regulate commerce, however arbitrary it might be, or to whatever extent, by prohibition or otherwise, it might affect the liberty or property of the citizen. If, as the Attorney-General contends, the power of Congress to prohibit interstate commerce is as absolute as that exercised over foreign commerce in the embargo and nonintercourse acts, Congress may, for any reason or no reason, prohibit, in whole or in part, the interstate transportation of necessary and harmless commodities and restrain the liberty of the citizens of the

> several States, or of certain classes of them, from engaging in interstate commerce therein. If the propositions laid down by the Attorney-General are sound, it is hard to conceive upon what ground legislation could be challenged which arbitrarily prohibited farmers from carrying their own corn, by their own teams, to market across the boundary line between their own and another State. Such a power would be a mockery for the purpose of which the Constitution was formed, and destroy that freedom of interstate trade which it was intended to secure.

In saying this, the court overlooks the reasons urged in legislative debate and at the bar to show a pressing public necessity for this legislation in the interest of all the people in interstate commerce, and that it was merely adequate to meet the exigencies of the case. The majority of the court may have differed from Congress as to the policy of this enactment but, without giving consideration to these features of the case, the court was hardly justified in describing the legislation as "arbitrary."

The court appears also to have here overlooked the public character of common carriers. Interstate railroads are peculiarly subject to regulation by reason of their performance of public functions and duties. They are vested with public rights to enable them to serve public interests as common carriers, and Congress has the power to divorce their public duties as such public servants from their private interests in carrying their own products. (*New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S., 361.)

In *Cherokee Nation* v. *South Kansas Railroad Co.* (135 U. S., 657), this court said:

> The question is no longer an open one as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends.

The circuit court seeks to distinguish the *Lottery Case* from this by pointing out the pernicious and immoral character of that traffic and assumes to pass judgment upon the reasonableness of the commodities clause.

As matter of fact, no act of Congress which was within its power under the commerce clause, nor any act of a state legislature not in conflict with the federal Constitution or that of the State, was ever set aside for mere unreasonableness. The question of reasonableness or of the wisdom of the enactment is not for the courts, but for the legislature. (*Silz* v. *Hesterberg*, 211 U. S. 31, 40; *State* v. *Hyman*, 98 Md., 618, 619; *City of Baltimore* v. *Radecke*, 49 Md., 217, 229, 230.)

We respectfully submit that if the question of the constitutionality of a federal statute is one of power and not of policy the courts have nothing to do with its reasonableness or unreasonableness. If the statute is within a delegated power and is not prohibited it is constitutional, no matter how unreasonable or inexpedient it may appear to the judicial mind. On the other hand, if it be outside the powers conferred, or subject to a prohibition, it is immaterial how rea-

sonable it may appear, or to what extent it might, if constitutional, promote the public welfare.

There is no proper analogy between a federal statute and a municipal ordinance. In the case of an ordinance the delegation of legislative power must be strictly construed. The difference in that respect between a municipal ordinance and an act of the legislature is clearly pointed out in *State* v. *Hyman* (98 Md., 618). But while a delegation of legislative power to a municipality must be strictly construed, the unreserved and exclusive grant of legislative power over interstate commerce to Congress is subject to no such rule of construction.

In support of its conclusion, that the commodities clause is unwarranted as a regulation of commerce, in that it interferes with business which in itself is innocent and even beneficial, the majority of the court fall into the line of argument followed by eminent counsel in the case of *In re Rapier* (143 U. S., 110), which was not sustained. The circuit court says: "It should not escape observation and comment that the traffic in lottery tickets, as prohibited by Congress, was regarded as *malum in se*." Now, in the *Rapier* case the power of Congress to legislate under the postal clause was involved, but that power is no more exclusive or extensive than the power to regulate interstate commerce. The court said in that case (p. 134):

> The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the

> mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but can not do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

And in *United States* v. *Joint Traffic Assn.* (171 U. S., 573), the court said:

> Notwithstanding the general liberty of contract which is possessed by the citizen under the Constitution, we find that there are many kinds of contracts which, while not in themselves immoral or *mala in se*, may yet be prohibited by the legislation of the States or, in certain cases, by Congress. The question comes back whether the statute under review is a legitimate exercise of the power of Congress over interstate commerce and a valid regulation thereof.

We search the opinion in the *Lottery Case* in vain for an assertion that traffic in lottery tickets was *malum in se*, and this court has decided otherwise. (*Stone* v. *Mississippi*, 101 U. S., 814, 821.) It is true

that the court pointed out the pernicious and demoralizing character of the traffic, but many acts in recent times have become so mischievous in their effects upon morals, health, or comfort as to be prohibited, though not *mala in se*. Congress in the enactment of the commodities clause is protecting the national interests in interstate commerce from the injury which results from a union of production and transportation in the same hands.

The Circuit Court, in illustrating the inapplicability of the *Lottery Case* as authority for the Government, says:

> Nothing like this is true of the case before us. The traffic sought to have prohibited was, admittedly, up to the time of the enactment in question, lawful, moral, and innocent at both ends. The one who bought the coal from the owner who delivered the same over his own road was innocently enjoying a liberty of buying where he could buy to his own advantage, a liberty characteristic of healthy business activities everywhere.

Clearly the court here enters upon the domain of policy.

Besides the doctrines and authorities already invoked the following statements and cases are in point:

Arguments *ab inconvenienti* can not be considered unless the language of the act be ambiguous. (*Ex parte Kearney*, 7 Wheat., 44; *Beardstown* v. *Virginia*, 76 Ill., 34; *Greencastle* v. *Black*, 5 Ind., 557; *Smith* v. *Thursby*, 28 Md., 244; *Henshaw* v. *Foster*, 9 Pick. (Mass.), 312, 316; *Gage* v. *Currier*, 4 Pick. (Mass.), 399.)

The courts are not at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in its words. (Cooley Const. Lim. (Fifth Ed.), 205; *People* v. *Fisher*, 24 Wend., 215, 220; *State* v. *Staten*, 6 Coldw. (Tenn.), 238; *Walker* v. *Cincinnati*, 21 Ohio St., 14; *People* v. *Rucker*, 5 Colo., 455; *Commonwealth* v. *McCloskey*, 2 Rawle, 374.)

The presumption is in favor of validity, and only when the question is free from reasonable doubt will the Supreme Court hold an act of Congress to be in violation of the Constitution. (*Nicol* v. *Ames*, 173 U. S., 509; *Fletcher* v. *Peck*, 6 Cranch, 126.)

For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature. (*Covington Bridge* case, 105 U. S., 470, 482.)

Authority for the above rule is found in the *Lottery Case* (188 U. S., at p. 321), where it was said:

> There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that

> suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

In the *Joint Traffic Ass'n* case (171 U. S., 505, 573), it was said by this court that it need not inquire whether the method adopted in a particular instance was the best or only means of regulating the business; that the question was "one of power only, and not of policy." In the *Northern Securities* case (193 U. S., at p. 337), Mr. Justice Harlan, delivering the opinion, said:

> As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

See also *Beebe* v. *State*, 6 Ind., 501, 528; *Johnston* v. *Commonwealth*, 1 Bibb, 603; *Flint River Steamboat Co.* v. *Foster*, 5 Ga., 194; *State* v. *Kruttschnitt*, 4 Nev., 178; *Walker* v. *Cincinnati*, 21 Ohio St., 14; *Hills* v. *Chicago*, 60 Ill., 86; *Ballentine* v. *Mayor, etc.*, 15 Lea, 633; *State* v. *Traders' Bank*, 6 Sou. Rep., 582 (La.).

In the *Northern Securities* case the court said:

> The law, this court said in *United States* v. *Lee* (106 U. S., 196, 220), is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law. * * *
>
> But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress

> was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect, declared that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy, or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court can not disregard that declaration, unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it can not be so held consistently with the provisions of that instrument. (193 U. S., 197, 350, 351, 352.)

If power exists, it is to be assumed that legislative discretion has been properly exercised. (Cooley Const. Lim., 6th ed., 220; *People* v. *Lawrence*, 36 Barb., 177; *People* v. *N. Y. Cent. R. Co.*, 34 Barb., 123; *Baltimore* v. *State*, 15 Md., 376; *Goddin* v. *Crump*, 8 Leigh, 154).

No more concise and comprehensive rule has been stated than by this court in *Loon Hing* v. *Crowley* (113 U. S., 703), where it was said that courts can not inquire into legislative motives "except as they may be disclosed on the face of the acts, or be inferable from their operation considered with reference to the condition of the country and existing legislation."

The true test of constitutionality of a statute is its purpose. It is wholly immaterial whether the restraint or monopolization of interstate commerce, against which the commodities clause is aimed, is a new or old form of these evils, or how joint ownership of production and transportation affects interstate commerce, provided it is affected directly.

Upon the relative importance of public and private interests in such a case the following passage from the opinion in the *Northern Securities* case is in point:

> The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations can not be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vexatious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign nations. (193 U. S., at p. 352.)

And the language of Mr. Justice Brewer, concurring in that decision (p. 362), is also applicable:

> If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company, and acting in obedience to the wishes of a majority of its stockholders, would control the action of the Securities Company, and through it the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country.

No more is needed than the showing made by the defendants themselves to justify the assertion that no individual loss, no temporary distress and inconvenience to the public, should weigh in the scale against the menace and peril to permanent public interests, and to all the people, which are inherent

in the conditions brought about by the defendant railroads themselves, with full knowledge and warning of the federal power confronting them and ready and liable to be exercised at any moment. Notwithstanding the allegations of commendable purposes, and even of public spirit enlisted in the rapid development of a state's resources, the fact remains that seven railroad companies have obtained sole access to the entire source of supply of a commodity which all of them admit is indispensable to manufacturers, and practically to the entire population in almost the total area of the United States. Not only so, but they control practically all the anthracite coal lands in the nation. This control consists, in some instances, of outright ownership; in others, it is a control to last during the lives of long leases, and in still others, it may continue forever or so long as corporations see fit to continue the relation as stockholders.

In some cases they control through ownership of all or of a majority of the capital stocks of the owning companies. In still others they own stocks which, though a minority, are sufficient, when supplemented by the circumstance of their lines being the only outlets to markets and of their acting with each other in a community of interest, to enable them to elect or dictate the election of directors of the coal companies. In such instances the coal companies only nominally and technically own the coal properties and the products thereof.

Likewise the answers show such a concentration of the selling department of the coal business in and around New York Harbor as could not result otherwise than from a mutual understanding and combination between these seven producers, who are not only the producers but the sole agencies by or through which the product can be marketed at all. And the court may well observe that by such concentration all that portion of the United States south and west of New York and Pennsylvania, with its millions of population and myriad forms of manufactures, must stand the brunt of double transportation by rail for its supplies of hard coal, and that both shipments must be made over one or more of these seven railways.

The Circuit Court appears to have failed to grasp the real meaning and effect of the statute. It does not purport to regulate the production of commodities in Pennsylvania or in any particular State, nor does it make any rule affecting generally the mere transportation of commodities. It relates to the agencies or instrumentalities of interstate commerce and it purports to regulate their participation in interstate commerce, and does not deal at all with the laws or policy of Pennsylvania, or any business or industry of the defendants, except that one phase of their business which is fairly under federal jurisdiction. If defendants must readjust their affairs within that State to enable them to conform to this rule of interstate commerce, that is such an effect as is incident to all changes made by statutes. Many very important and expensive changes of method and relation to each

other and to shippers have had to be made by the railroad companies in each instance of a congressional regulation, notably when the antitrust act was passed, when the other Hepburn amendments were passed in 1906, and upon the passage of the safety appliance act.

It is relevant and proper, though not essential, to show that the facts set forth in these answers, and the admissions contained in them, constitute combinations affecting interstate commerce detrimentally.

In this case, the majority of the Circuit Court appear to have misconceived the purpose of Congress in enacting the commodities clause. The court saw no other design on the part of Congress in the enactment of the commodities clause than the prevention of discriminations.

The opinion, after referring at length to *New Haven R. R. Co.* v. *Interstate Commerce Commission* (200 U. S., 361), says:

> Applying the philosophy of this case to those before us, it is obvious that, instead of a competent and efficient regulation of commerce, directly dealing with the evil of the situation, by explicitly forbidding and penalizing all such discriminations in freight rates as were possible of commission under guise of the ownership of the commodity carried, the enactment in question has excluded from interstate commerce all commodities owned by the carrier, whether their transportation be carried on in conformity with the legal requirements against discrimina-

> tion or not. Such an exclusion can only be justified by the assumption that a carrier who transports his own coal, as well as that of others, *must* discriminate. It could hardly be more unreasonable to forbid the burning of coal on the locomotive, and compel a resort to wood for fuel, because the carriage and distribution of such coal might furnish the opportunity for the attempt to discriminate in freight rates as to the coal necessarily remaining after the preparation of coal for their own steam purposes (Rec. No. 562, p. 57.)

It can not be doubted that as *an incidental result* of this legislation, if upheld and enforced, a more effective remedy for discrimination will be found than has previously existed, for the reasons stated in the *Coxe & Co.* and *Haddock* cases cited by the court—reasons founded upon the lack of jurisdiction in the Interstate Commerce Commission. At the same time the menace to other vital interests in interstate commerce in anthracite coal will also be removed. The fact, however, that two or more evils will be remedied instead of one certainly argues nothing against the necessity of the statute, and merely enables us to point to an additional purpose in the minds of Congress in enacting it.

The prevention of monopoly has long been a legitimate object of legislation. Thus in *Pearsall* v. *Great Northern R. R. Co.* (161 U. S., 646, 676), the court said:

> There is and has been, for the past three hundred years, both in England and in this

> country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We can not say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. * * * Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines, but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points, also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

Monopolies and monopolistic combinations are tested as to their existence and illegal character by the same rules, whether affecting intrastate or interstate commerce. In previous cases, the court resorted for authority freely to state decisions in cases which in no way involved interstate commerce. After a

review of many such cases, the court, in the *Northern Securities* case (193 U. S. App., 341), said:

> The cases, just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within their limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 Wheat., 1, 197)—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States."

Far stronger reasons, referable to a well-founded fear of monopoly, exist for prevention of a union of ordinary occupations, such as trading and producing, with transportation by railroad corporations, than can be urged against consolidations such as were forbidden in the *Northern Securities* case.

That the law has a settled policy against monopoly and in favor of free competition is shown by numerous statutes and court decisions. The main purpose of all our interstate commerce laws has been to end ine-

quality in enjoyment of opportunities and benefits of interstate commerce, whether such were produced by restrictive agreements, combinations, discriminations, or otherwise. The union of the relation of owner or shipper with that of carrier is condemned by the commodities clause because of the opportunity it gives for producing the evils aimed at in prior legislation.

Rebates and concessions are forms of discrimination, and all discriminations promote and create monopolies. The evil at which the commodities clause is aimed has the same results, the same destruction of competition, the same gathering under one control of all the business of production at one end of the line and that of distribution at the other.

The *Northern Securities* case dealt with a combination of two railroads. Would the decision have been different had one of the corporations been a coal company? And the form of the combination is also immaterial. It may exist by the railroad company acquiring a majority of the stock in the coal company, or vice versa.

A combination between corporations, especially if one of them be a public service corporation, was illegal at common law, and an attempt by two or more combining corporations to suppress competition amounted to an unlawful, if not criminal, conspiracy warranting the State in revoking their charters, aside from any injury to commercial or economic interests. (*People* v. *North River Refinery*

Co., 121 N. Y., 696; *Ward* v. *Farwell*, 97 Ill., 593; *Insurance Co.* v. *Needles*, 113 U. S., 574.)

The policy underlying the commodities clause was discussed in *New Haven R. R. Co.* v. *I. C. C.* (*supra*). A weighty reason for the decision in that case was the opportunity afforded a railroad company allowed to deal in a commodity transported by it to obtain a monopoly of trade in that commodity (pp. 391–395). The same danger is inherent in the conditions sought to be changed by the commodities clause. In fact, if the roads ought not to buy and sell they should not own, and *vice versa*. It is inconsistent to deny them the right of engaging in the purchase and sale of commodities if they are left free to own the sources of supply.

In the *Beef Trust Case* (*Swift & Co.* v. *United States*, 196 U. S., 375) the court held that a course of dealing between live-stock growers and dealers amounting to a current of commerce could be restrained and monopolized by contrivances of those engaged in the business and thus constitute a case calling for relief under the antitrust act; and the like ability to control a course of dealing or current of trade was mentioned in the *New Haven Railroad* case. If a railroad is engaged in the continued transportation of a commodity, whether produced by itself or others, that constitutes a current of commerce; if the same company is also the owner, or is interested in, or mines or manufactures the commodity, these facts amount to a combination carrying with it *the power to*

monopolize a current of commerce, which is sufficient to justify congressional action. (*Beef Trust Case*, 196 U. S., 375; *Northern Securities* case, 193 U. S., 197; *Addyston Pipe, etc.*, case, 175 U. S., 211.)

Restraint and monopoly were condemned by state courts prior to the passage of the antitrust act. Combinations between owners, producers, miners, or manufacturers and common carriers were under the ban of the law before the enactment of the commodities clause, for they come within the principle of the *New Haven Railroad* case (200 U. S. 361), and the clause merely placed an additional badge of illegality upon them, and provided a more effective remedy.

The term "commerce," as used in the Constitution, embraces the instrumentalities by which commerce is carried on. (*Northern Securities Company* v. *United States*, 193 U. S., 197; *Railroad Company* v. *Fuller*, 17 Wall., 500, 508; *Pensacola Tel. Co.* v. *Western Un. Tel. Co.*, 96 U. S., 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 196, 203.) When a railroad is engaged, as are the roads owned by the defendants, in interstate commerce, it is necessarily an instrumentality of interstate commerce. When therefore they entered into such combinations as are shown in this case, such restrictive arrangements gave them the essential character of contracts, combinations, or conspiracies in restraint of trade or commerce, whereby the defendants monopolized, or attempted to monopolize, trade or commerce among the several States or with foreign nations.

In the findings of the Interstate Commerce Commission in the case of *Coxe Brothers & Co.* v. *Lehigh Valley Railroad Co.* (4 I. C. C. Rep., 468), the destruction of competition at both ends of the line which results from such combinations is clearly pointed out by the Commission. It says:

> The tendency of all such interested management as is indicated by the above constitutional provisions is toward the destruction of legitimate competition, whether the interest is in the carrier or in its officers and those who direct and control it. If railroad companies and those who direct and control their roads were limited to the business of transportation, it would take away from both the opportunity to unlawfully prefer themselves as shippers. Disinterested and impartial control is essential to prevent illegal favoritism and abuse of the privileges with which carriers are invested for the benefit of the public.
>
> The railroad companies, including the defendant, produce or control, directly or indirectly, three-fourths of the coal carried by them; by agreement they fix the rate of transportation and, by nominal association with the individual operators, who represent less than one-fourth of the anthracite output, fix the selling price in the principal market. * * *
>
> Where the carrier is both carrier and producer or operator, as is true of some of the railroad companies, which in their corporate name are miners, buyers, and sellers, as well as carriers of anthracite, it matters little, so far as relates

> to its gains and profits, how much such a carrier charges itself for carrying its own coal. Nor is it essential to the pecuniary interest of the Lehigh Valley Railroad Company whether it charges its coal company as a miner and shipper very high or very low transportation rates, entitled as the railroad company is to the earnings of both. The case is different with the complainants, who have only so much of the market price as remains after paying for transportation, and suffer the loss of any excessive charges. Besides being competitors, as they are, for the same markets, any excessive charges made or burdens imposed on complainants, and not made and imposed on said coal company, give it unlawful preference and subject complainants to the unreasonable disadvantage of paying more to reach a common market from the same places of production.

Similar views are found in *New Haven R. R.* v. *I. C. C.*, already quoted, but it should be noted that to permit the interstate carriers to buy and sell commodities, while itself a menace to commerce, is not so permanent nor so much to be dreaded as the form of combination and control against which this statute guards. The court (200 U. S., pp. 392, 393) said:

> Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules.

That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. *Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which are held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly.* To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell, to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to

> which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately and not merely remotely to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record.

In the present case, the majority of the Circuit Court concede to the defendants the right of judging for themselves as to the best methods of subserving public interests which the railroad companies claimed in the New Haven Railroad case, and as to which this court, in that case, said:

> In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line and thereby, as it conceived, to increase the carriage of that commodity and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake and Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. * * * That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake and Ohio of the economic conceptions upon which the Interstate Commerce law rests, and a substitution in their stead of the conceptions of the Chesapeake and Ohio as to what was best for itself and for the public.

That a large restraint is placed upon interstate commerce by the general conditions these defendants have created is clearly shown by the answers, though not fully or frankly admitted. It is stated in detail by the answer of The Central Railroad Company of New Jersey, defendant, how completely the entire anthracite coal supply of the country, as well as its distribution, has come under the control of seven railroad companies in combination with a large number of subsidiary coal companies, and how completely interstate commerce in that commodity is monopolized by these seven interstate carriers. The answers of the other defendants make the same allegations or admissions, but in more general form.

That a region 484 square miles in extent should be so completely occupied and preempted by seven railroads and their branches that none of the world's capitalists other than the present defendants and those identified with them care to invest in that region of incalculable richness, either in railroad construction or mineral development—a condition upon which much stress is laid both in the answers and in the opinion of the Circuit Court—may account largely for the pressure of public opinion which led Congress to pass the commodities clause. And if it be alleged that the enforcement of the commodities clause will cause a loss to these defendants, a fair answer is that the continuance of present conditions involves a far greater loss to the general public; for how is it possible for the people of this country to engage in production or sale of raw materials or of

finished product in competition with those who, having obtained possession of all the machinery of transportation to market, have thus acquired a monopoly of production and distribution?

In *United States* v. *Freight Association* (166 U. S., 290, 333, 334), this court says:

> The business which the railroads do is of a public nature, closely affecting almost all classes in the community—the farmer, the artisan, the manufacturer, and the trader. It is of such a public nature that it may well be doubted, to say the least, whether *any contract* which imposes *any restraint* upon its business would not be prejudicial to the public interests. * * * While, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads, where it well may be that *any restraint* upon a business of that character, as affecting its rates of transportation, must thereby be prejudicial to the public interests.

And if combinations prevent competition, they restrain commerce because, as was said in *Joint Traffic Association* case (171 U. S., 577), "An agreement of the nature of this one which directly and effectually stifles competition must be regarded under the statute as one in restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be in-

dulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them." Again—

> Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall *restrain trade and commerce by shutting out the operation of the general law of competition?* We think it has. (p. 569.)

Again, in the *Addyston Pipe Co.* case (175 U. S., 211, 244) this court declared that a contract, agreement, or combination which prevents or destroys competition is in restraint of trade, saying:

> We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is *to destroy competition* between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination *amounts to a restraint of trade* in the commodity, even though contracts to buy such commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade.

It will be noted that the expressions "to prevent or suppress competition" and "to restrain trade" are used interchangeably by the court.

The highways of commerce are, in a sense, the public property of the nation, and subject to all the

requisite legislation by Congress, which necessarily includes the power to keep them open and free from any obstruction interposed by the States or otherwise; to remove such obstructions where they exist, and to provide by such statutes as they may see fit to pass against the occurrence of the evil and for the punishment of the offenders. "For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national constitution—and which have always existed in the parliament in England." (*Gilman* v. *Philadelphia*, 3 Wall., 713, 724; *In re Debs*, 158 U. S., 564, 586.)

These combinations between state corporations, one or more being industrial and the other a common carrier, would be held amenable to a state law formulated in like terms as the antitrust act. (See *People* v. *Chicago Gas Trust Co.*, 130 Ill., 294; *People* v. *North Riv. Sug. Ref. Co.*, 54 Hun. (N. Y.), 377.) And if such combinations interfere with the laws of free competition in interstate commerce, and can not be effectively dealt with under the antitrust act, Congress can provide another and more effective remedy.

We submit that such a combination as is shown in the answers offers a greater menace to interstate commerce than a consolidation or combination through a common holding company of two railroads; because the latter only tends to a monopoly of transportation, while the former tends to a centralized control not only of transportation but of production as well. In the *Knight* case it was held that the antitrust act did

not apply because the business of the company was not commerce but production only. But if the American Sugar Refining Company had formed a combination with an interstate carrier, the interstate carriage and sale of its products being in contemplation of the parties, the decision must surely have been different.

It is not essential that the person or persons charged with monopolizing or combining be shown to have actually raised prices or suppressed competition or restrained or monopolized trade or commerce, in order to bring them under the condemnation of the antitrust act. It is sufficient if the necessary effect of the combination or monopoly is to give them the power to do these things. The decisive question is whether *the power exists*, not whether it has been *exercised*. If the parties concerned have, in combining or monopolizing, acquired the *power* to suppress competition, to restrain or monopolize trade or commerce, they have brought themselves within the purview of that act. (*United States* v. *Trans-Missouri Freight Assn.*, 166 U. S., 290; *Addyston Pipe Co.* v. *U. S.*, 175 U. S., 211; *Pearsall* v. *Great Northern Ry. Co.*, 161 U. S., 646; *United States* v. *Northern Securities Co.*, 193 U. S., 197.)

If Congress has power to legislate for the purpose of preventing any public evil or danger inherent in the interstate transportation by rail of commodities in which the carrier is interested as a producer or shipper, only one other question remains to be considered, namely, whether the means employed by Congress in

exercising the power thus admitted are legitimate and appropriate to that end. If they are so, it is immaterial whether they are the best and most effective means. In this instance Congress selected a qualified prohibition.

The antitrust act involves prohibitions; it condemns certain acts and provides for their punishment as crimes. The same is true of all statutes regulative of interstate commerce. Thus Congress may prohibit and has prohibited monopolies in the business of interstate and international transportation, by other forms of legislation.

It is difficult to see how commerce, or, in fact, anything, can be regulated except through prohibitory methods. Regulations which are not prohibitory in form are prohibitory in effect. If a rule be made for doing a thing, that involves a prohibition against doing it otherwise than according to the rule.

With respect to the *method* of regulation there is no difference between interstate and foreign commerce. If Congress possesses power to prohibit as a method of regulating the one, it has like power in regulating the other. And no better statement of the law under this head could be found than the language of the United States District Court (Massachusetts) in *United States* v. *The William* (2 Hall., L. J., 255, Fed. Cas. 17700), as follows:

> Stress has been laid in the argument on the word "regulate" as implying in itself a *limitation*. Power to *regulate*, it is said, can not

> be understood to give a power to *annihilate*. To this it may be replied that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce.
>
> It will be admitted that partial *prohibitions* are authorized by the expression; and how shall the *degree or extent* of the *prohibition* be adjusted but by the *discretion of the National Government*, to whom the subject appears to be committed?

In the *Lottery Case*, *supra*, there was a total prohibition of the traffic; there is by this statute only a qualified prohibition; the transportation of the commodity is not entirely forbidden, as in that case, but only forbidden under particular circumstances and conditions.

While the States can not interfere with the free flow of commerce among them, the National Government can.

Since a State can not grant to a corporation a privilege to engage in commerce in another State, therefore it can do no act to prevent a withdrawal of that privilege from a corporation by Congress. The mere creature of a State, a railroad corporation, has no power or privilege herein superior to its creator.

This court in the *Lottery Case* says:

> The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be

> enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress. (188 U. S., pp. 363–364.)

The conclusion thus reached by the court was of general applicability, and the court apparently took care to make clear that it was so intended.

The whole issue before the court may be reduced, and it ought to be strictly confined, to this question: Is partial and qualified prohibition an appropriate method of regulation?

Chief Justice Marshall said (*Gibbons* v. *Ogden*, 9 Wheat., 1, 197) that the power to regulate interstate and foreign commerce "Is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States."

In *Gilman* v. *Philadelphia* (3 Wall., 713) and in the *Debs* case (158 U. S., 564) the power is expressly declared to be similar to that exercised by the English Parliament.

Our position is that the interstate commerce power *is* unlimited *unless limited in the Constitution*. Doubtless not merely the interstate commerce clause but the whole Constitution must be considered in this connection.

When the Constitution confers a power or enjoins a duty, it also confers, by implication, all powers that are necessary for the exercise of the one or for the performance of the other (*Sturgis* v. *Crowninshield*, 4 Wheat., 122; *McCulloch* v. *Maryland*, 4 Wheat., 315, 321); and the power conferred by the clause of the Constitution to make all laws necessary and proper to carry into execution the powers granted confers on Congress a choice of means and does not confine it to what is indispensably necessary. (*United States* v. *Fisher*, 2 Cr., 358, 396; *McCulloch* v. *Maryland*, 4 Wheat., 315, 321; *Juilliard* v. *Greenman*, 110 U. S., 440, 441; *In re Jackson*, 14 Blatch., 250.) In *United States* v. *Fisher* (*supra*) Chief Justice Marshall, delivering the opinion, said:

> In the case at bar, the preference claimed by the United States is not prohibited; but it has been truly said, that under a constitution conferring specific powers, the power contended for must be granted, or it can not be exercised. It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers

> vested by the Constitution in the Government of the United States or in any department or officer thereof. In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said, with respect to each, that it was not necessary, because the end might be obtained by other means. *Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.*

In *McCulloch* v. *Maryland* (*supra*) the same chief justice more fully developed the same view, saying:

> We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

And in *Juilliard* v. *Greenman* (*supra*), this court said:

> By the settled construction and the only reasonable interpretation of this clause, the words "necessary and proper" are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished and which in the judgment of Congress will most advantageously effect it.

These expositions are pertinent in view of the position taken by the circuit court that the commodities clause is unconstitutional because *unnecessarily harsh.*

The opinion says:

> Surely they could be restrained, or otherwise made amenable to the legal penalties in such behalf, without crippling or destroying a business in which they are profitably and usefully engaged.

The court does not attempt to show how this could have been done, but that part of the opinion is, after all, simply a criticism of the policy of Congress. In *United States* v. *Forty-three Gallons of Whiskey* (93 U. S., 188,196) the court definitely held that the power of Congress over commerce among the Indian tribes, which is conferred by the same clause as the power over commerce among the States, included the power to prohibit the introduction of whiskey, not only into the Territory where the Indians are located, but into a State nearby. The statute provided for

forfeitures, and, in that case, not only whiskey but other merchandise, vehicles, and teams were forfeited.

Yet it is insisted in the opinion that, notwithstanding the extensive power of the Congress to regulate commerce, the Congress has no power to destroy commerce. We deny that the commodities clause destroys interstate commerce. When this court said, in substance, in *Texas and Pacific Ry. Co.* v. *Interstate Com. Com.* (162 U. S., 197, 211) that an intention to promote and facilitate commerce and not to hamper and destroy it is naturally to be attributed to Congress, to what commerce did the court refer? Not to so much of commerce as may be controlled by some one individual or even by some gigantic corporation or combination of such corporations, but the "commerce" contemplated by the Constitution. It referred to interstate commerce in its entirety—that belonging to the whole people.

It is submitted that the Circuit Court was also misled in holding that the power of Congress is less absolute and complete over artificial highways of interstate commerce than over navigable waters of the United States. No authority making any such distinction was, or, it is submitted, could be, cited, but the court explicitly declared that such a difference exists, in these words:

> Arguments from analogy are always to be guardedly used, as they are often misleading. The argument is seriously made that, as Congress may remove a physical obstruction to navigation, like a rock or a bridge, it may call

> anything it chooses an obstruction, not to navigation, but to commerce generally, and require its removal. It hardly needs to be pointed out that the analogy is unsound and fanciful. It would have us conclude that, because Congress can declare a rock or a bridge an obstruction to navigation and require its removal, it may also declare the otherwise lawful carriage of their owner's harmless commodities by the boats navigating the river to be an obstruction to commerce, and so forbid it. If, indeed, the latter may be done, there is no logical nexus between the two.

The case of *Monongahela Nav. Co.* v. *United States* (148 U. S., 312), is an authority to the effect that the same power of regulation of commerce exists over water and land routes, or, as otherwise expressed, over natural and artificial channels. In the *Monongahela* case, the court said (p. 342):

> The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. There may be differences in the modes and manner of using these different highways, but such differences

> do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads, and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the General Government, that at the first it might seem that there was some inherent difference in the power of the National Government over them. *But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway.* The fee of the soil in neither case is in the General Government, but in the State or private individuals. The differences between the two are in their origin—nature provides the one, man establishes the other.

To the same effect is the language of this court in *Gilman* v. *Philadelphia* (3 Wall., 713, 724), where it is said:

> The fact that in recent years interstate commerce has come to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision or abridged the power of Congress over such commerce. *On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.*

This court in the *Debs* case (158 U. S. at p. 581) asked:

> If a State, with its recognized power of sovereignty, is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

And since there is no difference as respects the power of Congress whether the obstruction be by force or by peaceful means, we can safely close our consideration of this branch of this case with a few words from the opinion in the *Rapier* case (supra): "That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all."

II.

The law does not violate the guarantees of the fifth amendment, nor any other constitutional guarantees.

If the commodities clause is prima facie a valid regulation of interstate commerce, it must be void, if at all, because it contravenes an express prohibition of the Constitution.

The prohibition forming the real ground of the decision in the Circuit Court is contained in the due process clause of the fifth amendment.

These guarantees were placed in the Constitution by amendment as safeguards against the exercise by the Government of *arbitrary* power. Whether, therefore, a law is free from objection based upon the due process clause depends upon the meaning of the word

"arbitrary." Whether or not it operates *harshly* is not the question. Any law may impose inequalities and hardships.

A thing is done arbitrarily when done without cause or reason shown. (Anderson's Dictionary of Law; 4 Blackstone Com., p. 353.)

This court has said that classification for legislative purposes must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis; that the differences which support class legislation must be such as in the nature of things furnish a reasonable basis for separate rules and regulations. (*Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S., 150, 155.) That decision was cited in *Atchison, Topeka & Santa Fe R. R.* v. *Matthews* (174 U. S., 96), where the court upheld a Kansas statute relating to the liability of railroads for damages by fire, on the ground that the legislature intended no arbitrary selection or punishment, but simply sought to subserve the general interest of the public. Referring to class legislation, and citing many authorities, Mr. Justice Brewer, delivering the opinion of the court, said (p. 106):

> It is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. * * * Indeed, the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.

In *Clark* v. *Kansas City* (178 U. S., 114), an act of Kansas excepting from its operation agricultural lands owned by individuals was under consideration, and the court, applying the principle of *Atchison, etc., R. R.* v. *Matthews* and other cases, held that the distinction was not arbitrary and infringed no provisions of the Constitution. The court referred to many cases sustaining classifications based on the difference between fire insurance and other insurance, between railroad and other corporations, etc., including the cases of *Tullis* v. *Lake Erie & Western R. R.* (175 U. S., 348), and *Orient Ins. Co.* v. *Daggs* (172 U. S., 557), where it was said that the power of the State to distinguish and classify objects of legislation had a wide range of discretion, and that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary.

It surely can not be said that this statute (the commodities clause) is on its face a deprivation of life, liberty, or property without due process of law in the sense in which the phrase is ordinarily used. It is as proper an exercise of power under the commerce clause to forbid, conditionally, shipments of a certain class or description as to forbid discrimination. Both, or neither, are regulations of rights guaranteed by the Constitution. The one is a limitation of the right to contract and the other merely restricts, or conditions, in certain respects, the right to engage in interstate commerce.

The objection here made was also made in the *Joint Traffic Association* case (171 U. S., 571), and thus answered by the court:

> Among these limitations and guarantees counsel refer to those which provide that no person shall be deprived of life, liberty, or property without due process of law, and that private property shall not be taken for public use without just compensation. The latter limitation is, we think, plainly irrelevant. As to the former, it is claimed that the citizen is deprived of his liberty without due process of law when, by a general statute, he is arbitrarily deprived of the right to make a contract of the nature herein involved. * * * The citizen may have the right to make a proper (that is, a lawful) contract, one which is also essential and necessary for carrying out his lawful purposes. The question which arises here is whether the contract is a proper or lawful one, and we have not advanced a step toward its solution by saying that the citizen is protected by the fifth or any other amendment in his right to make proper contracts to enable him to carry out his lawful purposes. We presume it will not be contended that the court (*Allgeyer* v. *Louisiana*, 165 U. S., 578) meant, in stating the right of the citizen "to pursue any livelihood or vocation," to include every means of obtaining a livelihood, whether it is lawful or otherwise. Precisely how far a legislature can go in declaring a certain means of obtaining a livelihood unlawful it is unnecessary here to speak of. It will be conceded it

> has power to make some kinds of vocations and some methods of obtaining a livelihood unlawful, and in regard to those the citizen would have no right to contract to carry them on.

In the *Northern Securities* case it was contended that, so far as Congress is concerned, citizens and state corporations may dispose of their property and invest their money in any way they choose, and that in regard to all such matters they are subjected, if to any authority, only to the lawful authority of the State in which such citizens reside or under whose laws such corporations are organized. The court answered that such abstract general questions need not be considered; that they were not before the court to be passed upon.

A comparison of the two statutes, the antitrust act and the commodities clause, and of this case, with the *Northern Securities* case, shows that contractual rights are curtailed by the antitrust act in the same way and to the same extent as by the commodities clause; and the claim of protection under state laws in this case has no more weight than in that case.

State legislation and contracts of individuals or corporations having the effect of interfering with interstate commerce are placed in the same category in the *Addyston Pipe* case (175 U. S., 211), where Mr. Justice Peckham, delivering the opinion, said (pp. 231–2):

> It is, indeed, urged that to include private contracts of this description within the

grant of this power to Congress is to take from the States their own power over the subject, and to interfere with the liberty of the individual in a manner and to an extent never contemplated by the framers of the Constitution, and not fairly justified by any language used in that instrument. If Congress has not the power to legislate upon the subject of contracts of the kind mentioned because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the State legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, State or national, which can legislate upon the subject of or prohibit such contracts. This can not be the case.

If it should be held that Congress had no power and the state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then the legislation of the different States might and probably would differ in regard to the matter, according to what each State might regard as its own particular interest. One State might condemn all kinds of contracts of the class described, while another might permit the making of all of them, while still another might permit some and prohibit

> others, and thus great confusion would ensue, and it would be difficult in many cases to know just what law was applicable to any particular contract regarding and regulating interstate commerce. At the same time contracts might be made between individuals or corporations of such extent and magnitude as to seriously affect commerce among the States. These consequences would seemingly necessarily follow if it were decided that the state legislature had control over the subject to the extent mentioned. If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them? The private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character.

"When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we can not declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument." (*People* v. *Fisher*, 24 Wend., 215, 220.) To the same effect are *State* v. *Staten*, 6 Coldw. (Tenn.), 238; *Walker* v. *Cincinnati*, 21 Ohio St., 14; *State* v. *Smith*, 44 Ohio St., 348; *People* v. *Rucker*, 5 Col., 455; *Whallon* v. *Ingham, Circuit Judge*, 51 Mich., 503; *Wooten*

v. *State* (*Fla.*), 5 Sou. Rep., 39. A very able exposition of the principle is found in *Cochran* v. *Van Surlay* (20 Wend., 365, 381, 383). To the same effect see *People* v. *Gallagher*, 4 Mich., 244; *Benson* v. *Mayor, etc.*, 24 Barb., 248; *Grant* v. *Courter*, 24 Barb., 232; *Wynhamer* v. *People*, 13 N. R., 378, per *Comstock*, J.; 13 N. Y., 453, per *Shelden*, J.; 13 N. Y., 477, per *Johnson*, J.

The clause does not violate the provision that no person shall be deprived of property without due process of law.

When it is claimed that a legislative act is inhibited by the due process clause, as applied to property, there must be an interest amounting to a vested right of property. If a right claimed is not of that character, then it is merely an inchoate right—a privilege.

Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. (8 Cyc. L. & Proc., 894; Cooley Const. Lim., 438, 465; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S., 646, 673.)

It is said by Mr. Justice Cooley that "rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are

contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." (Principles of Const. Law, 332.)

"A vested right is property arising from contract, or from the principles of the common law, which can not be destroyed, devested, or impaired by legislation." (*Boyston* v. *Miller*, 76 Fed. Rep., 50, 53.)

Here it is claimed that private activities under state laws have created a right to continue in an established method of carrying on interstate commerce. This claim merely shifts the issue and presents the question of relative state and federal power in a different form. To claim that there is a vested right is to beg the question of federal power. No right can vest as a result of action which invades the domain of congressional power to regulate commerce, whether Congress has already acted or yet withholds action on the subject.

Mr. Cooley speaks with reference to the liability of vested rights to be divested through changes in the laws (Const. Lim., 6th ed., p. 437, 438), as follows:

> In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and

> strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, can not be regarded as vested rights in any legal sense. * * * All vested rights are held subject to the laws for the enforcement of public duties and private contracts, and for the punishment of wrongs; and if they become devested through the operation of those laws, it is only by way of enforcing the obligations of justice and good order.

The learned author proceeds to mention some things which are not vested rights, citing ample authority; and in this connection he shows that no one can ask to be protected in the advantages that would accrue to him from a continuance of existing laws, as against the government changing them in subservience of the public interest. Of this he says:

> First, it would seem that a right can not be considered a vested right, unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws: it must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand made by another.

There can not be any vested right in an existing law which precludes its change or repeal, nor in any omission to legislate which will exempt a contract from the effect of subsequent legislation upon its subject-matter by competent legislative authority. (*Fitzgerald* v. *Grand Trunk R. R. Co.*, 63 Vt., 169; 13 L. R. A., 70.)

The Circuit Court sought to distinguish the *Union Bridge* case (204 U. S., 364) from this case, and denied the analogy between obstructions in the artificial highways of commerce and those in or across a navigable stream. It is more important to keep the interstate railways open to commerce than the navigable streams; the volume of all kinds of traffic by the former is many times greater. The argument presented by the Circuit Court in favor of thorough and effective national control of navigable streams is very convincing, and is equally applicable to other highways of interstate commerce:

> The complete control of Congress under this power over the navigable waters of the United States as highways of interstate or foreign commerce for the purpose of keeping them clear and unobstructed for navigation has long been recognized. Any physical obstruction to or interference with their free navigation may undoubtedly be dealt with as such by Congress. These waters are public highways of the nation, and no one can be so permitted to encroach upon them as to deprive Congress of the right and power to abate the public nuisance thereby created. No one can acquire rights as to such navigable waters in

derogation of the public right to navigate the same.

This was the doctrine of the *Union Bridge Co. Case.* Its bridge, though permitted to be built at a time when it did not interfere with the navigation of the Allegheny River, afterwards, owing to the development of commerce, became an obstruction to such navigation, and as such was properly required to be so altered in height as to prevent its being an obstruction. The pecuniary loss resulting thereby to the owners was not in any proper sense a taking of private property for public use without compensation or a deprivation thereof without due process of law under the fifth amendment.

But the claim that the "due process" clause of the fifth amendment invalidated the legislation there considered was much stronger in the *Union Bridge* case than any that can be advanced in this case. There at the time the bridge was erected it was a perfectly legal, as well as a very useful, structure, and it was very plausibly claimed that to require expensive alterations which would (as it did in fact) bankrupt the corporation, without any provision for compensation, amounted to confiscation or spoliation on the part of the Government. But, proceeding with the comparison, the rule of the Constitution inhibiting all statutes and contracts invading to any extent the domain of interstate commerce was as much in force immediately after the Constitution was adopted as it was when the commodities clause was passed; and whereas the con-

structors of the Union Bridge proceeded within their then existing legal rights, the combinations between producers and interstate carriers of coal were, from the very beginning, trespassers in a field from which they were excluded by the Constitution as construed by the courts from a date long antedating such combinations.

The case of *Gibbons* v. *Ogden* was always a warning both to States and corporations not to trespass on the interstate field, just as the constitution of Pennsylvania (*infra*) was a warning to her own creatures not to combine mining and transportation.

In the *Addyston Pipe Co.* case, Mr. Justice Peckham, after referring to an *obiter dictum* of this court in *Railroad Co.* v. *Richmond* (19 Wall., 589), and pointing out that it had no relevancy to the foregoing question, which arose in that case as it does in this case, says (175 U. S., p. 234):

> The plain language of the grant to Congress of power to regulate commerce among the several States includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the Constitutional provision as to the liberty of the individual limits the extent of that power, as claimed by the appellants.

Something more is required to render the due process clause effective to defeat legislation than to show that a complaining party will be deprived of a mar-

ket for his property, or that the legislation deprives him of some of the uses to which, without such legislation, he might devote it. The legislation must more nearly affect the value or ownership than would an act, otherwise constitutional, closing to him particular markets. And here again the *Monongahela Bridge* case was far stronger than this case. There the act of Congress did directly and absolutely deprive the corporation, without compensation, of that which all must concede was property, namely, certain profit-producing franchises rightfully granted by a State. Here the defendants lose neither their franchises nor the title to any of their property, and if the value of that property is affected, such effect results only indirectly from the legislation assailed.

The Circuit Court calls attention to the retrospective aspect of the legislation. Surely an Act of Congress is not invalidated by the due process clause, or any other, merely because the result of its enforcement changes the *effect* of prior transactions. Such a proposition has never been presented to this court, but there are many State decisions which hold that if retrospective laws are not forbidden, *eo nomine*, by the organic law, and no other objection to them is shown beyond their retrospective character. they are constitutional (*Thornton* v. *McGrath*, .. Duvall, 249; *Aldridge* v. *Railroad Co.*, 2 Stew. & Port., 199; *State* v. *Squires*, 26 Iowa, 340; *Beach* v. *Walker*, 6 Conn., 190; *Schenley*

v. *Commonwealth*, 36 Pa. St., 57; *Shonk* v. *Brown*, 61 Pa. St., 320; *Land* v. *Nelson*, 79 Pa. St., 407).

And indeed it may be submitted with confidence that retrospective federal laws, unless *ex post facto*, are not within the due process clause or any other prohibition of the Constitution, however repugnant to the principles of sound legislation. (*Stephens* v. *Cherokee Nation*, 174 U. S., 445; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *Satterlee* v. *Mathewson*, 2 Pet., 380; *Bonaparte* v. *Camden*, *Baldw.* 205, Fed. Cas. No. 1617; *Bennett* v. *Baggs*, *Baldw.* 60, Fed. Cas. No. 1319; *Albee* v. *May*, 2 Paine, 74, Fed. Cas. No. 134.)

This statute is not in any true sense retrospective; it does not directly affect any vested past right, status, or relation. Its effect and purpose is to impose a prospective condition on future participation in interstate commerce two years after its enactment.

No valid argument can be based upon long acquiescence in the use made of their coal lands and their output by the railroads on the part of the United States; for no estoppel can be asserted against constitutional legislation. (*Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S., 677, 689; *Union Bridge Co.* v. *United States*, 204 U. S., 364.)

In *Bridge Company* v. *United States* (105 U. S., 470) Chief Justice Waite, delivering the opinion (p. 479), said: "Those who act on state authority alone necessarily assume all the risks of legitimate congressional interference."

In *Willamette Bridge Co.* v. *Hatch* (125 U. S., 1), Justice Bradley, in delivering the opinion of this court (p. 12), said:

> And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States or individuals by its authority or acquiescence have done from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose.

Not only is the Government not barred by acquiescence in what the defendants have done, whether with or without State authority, but Congress could not have bartered away or estopped itself to exercise any of its constitutional powers. (*Monongahela* v. *Nav. Co.* v. *Coons*, 6 W. & S. (Pa.), 101; *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. (Pa.), 9; *New York & Erie Railroad Co.* v. *Young*, 33 Pa. St., 175; *McKeen* v. *Delaware Canal Co.*, 49 Pa. St., 424; *Freeland* v. *Pennsylvania Railroad*, 66 Pa. St., 91; *Bailey* v. *Phil., Wilm. & Balt. Railroad*, 4 Harr (Del.), 389; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How., 80.)

We can not read into the Constitution a proviso that Congress shall not exercise its powers where money has been invested and great industries established with a hope that the powers may not be exercised. Even if it be true that many years have

intervened since the development of the anthracite resources of Pennsylvania by the defendants; that they have shown good faith, public spirit, and self-sacrifice; that incidental benefits have accrued to the material interests of the nation, and, finally, that all this was aided and encouraged by individual state governments and, in some cases, made possible by the concurrent action of separate States, these facts constitute no ground for limiting the legislative powers of Congress.

When the Constitution was framed and the first ten amendments adopted it was not meant to encourage a race of diligence between federal and state powers and to provide in the due process clause a rampart protecting the fruits of superior swiftness of action by either power. The doctrine that there can be vested or preempted rights as the result of prior state action, settled state policy, *bona fide* investments, or mere lapse of time in its final analysis involves, however, a recognition of this theory. If the defendants have power thus to forestall action by Congress in the regulation of commerce, they have power themselves to regulate commerce in a different way—in a way incompatible with national right and duty. But no device or contrivance, whether sanctioned or not by state authority, will be permitted to thwart national authority.

Nor does it fortify the position of the defendants to say that their practices and combinations are not of recent creation or of small magnitude, but have been

so long in use and have involved so much of private investment and outlay as to give them title not only to consideration but immunity. Each of the combinations shown in the answers was a monopolization of interstate commerce from the moment it was formed, whether before or since the passage of the antitrust act. That statute made no exception in favor of existing combinations and monopolies. It condemned and directed that judgment of the law be pronounced against those then in existence as well as those that might be thereafter created.

Congress afterwards saw and appreciated the danger of longer tolerating the abuses that had sprung up by taking advantage of its nonaction and did all it could to put an end to them by enacting the commodities clause. Surely the wrongs of yesterday have not become the vested rights of to-day, above the corrective power of the legislature, whose duty it is to promote and restore justice.

The clause does not violate the provision that private property shall not be taken for public use without just compensation.

The due process clause is broader than the compensation clause, though both have in view the same general purpose of protecting the citizen from spoliation.

In this case the answer of each and every defendant practically excludes the claim that the compensation clause has any applicability or relation to the issues. They virtually deny the existence of any standard of

compensation or means by which the value of the rights of which they allege they are deprived could be ascertained.

The compensation clause does not prescribe a limitation upon a power, but a condition to its exercise. The condition being observed, the power itself is unlimited. The power called "eminent domain," not mentioned in the Constitution, but inherent in all governments, is one of the powers which the Government may exercise without limit, provided the use be public and just compensation be provided for.

One of the objections made by answer reads as follows: "That the effect of said clause will constitute a taking of the defendant's property, corporate rights, and franchises without due process of law and without compensation, and that in its results this defendant will be denied the equal protection of the laws."

In *Union Bridge Co.* v. *United States* (204 U. S., 364), to which we have already referred, this court has spoken so unmistakably and in such unambiguous terms that the principles underlying that case and controlling its decision seem sufficient to finally settle these specific objections.

A bridge had been built across a navigable river by a company existing and operating under a state charter issued in 1873. The bridge was not an obstruction to navigation as at first constructed. In 1899 Congress passed an act directing the Secretary of War to investigate and, if the bridge was found to

obstruct or impede navigation, to make such orders as were found to be necessary to allow the free and safe passage of water craft under the bridge. The Secretary found the bridge to be an obstruction and impediment to navigation and an interference with interstate commerce as then carried on, and ordered changes in the structure involving large expenditures. The act also penalized noncompliance on the part of the bridge company with the Secretary's order, and the order having been disregarded, a criminal information was filed against the company. The defendant was found guilty, and an order denying a motion to set aside the verdict was reviewed on appeal to the Supreme Court. The statute made no provision for compensation to the company for its outlay in making the alterations, nor did it make any provision for an ascertainment or award of damages. Upon the objections that the enforcement of the statute constituted a deprivation of property without due process of law, and that it amounted to an appropriation to public use without compensation, the court said:

> The propositions are combated by the Government, which contends that the alterations or changes required to secure navigation against an unreasonable obstruction is not a taking of private property for public use within the meaning of the Constitution, and that the cost of such alterations or changes are to be deemed *incidental* only to the exercise of an undoubted function of the United States when

exerting, through Congress its power to regulate commerce among the States, and therefore navigation upon the waterways on and over which such commerce is conducted. It would seem clear that this issue has likewise been determined by the principles announced in the previous cases of this court.

The court then reviewed at length several cases, and said:

Do the principles announced in the above cases require us to hold, in the present case, that the making of the alterations of its bridge specified in the order of the Secretary of War will be a taking of the property of the bridge company for public use? We think not. Unless there be a taking within the meaning of the Constitution, no obligation arises upon the United States to make compensation for the cost to be incurred in making such alterations. The damage that will accrue to the bridge company, as the result of compliance with the Secretary's order, must, in such case, be deemed *incidental* to the exercise by the Government of its power to regulate commerce among the States, which includes, as we have seen, the power to secure free navigation upon the waterways of the United States against unreasonable obstructions.

The court then proceeds:

There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the Government that it can not exert its full

power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken under the cases cited, and upon principle, not only that the company, when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, can not have the effect to cast upon the Government an

> obligation not to exert its constitutional power to regulate interstate commerce except subject to the condition that compensation be made or secured to the individuals or corporation who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We can not give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made.

Mr. Cooley (Const. Lim., 6th ed., p. 473) states the general rule thus:

> It is a general rule that no one has a vested right to be protected against consequential injuries arising from a proper exercise of rights by others. This rule is peculiarly applicable to injuries resulting from the exercise of public powers. Under the police power the State sometimes destroys, for the time being, and perhaps permanently, the value to the

owner of his property, without affording him any redress. The construction of a new way or the discontinuance of an old one may very seriously affect the value of adjacent property; the removal of a county or state capital will often reduce very largely the value of all the real estate of the place from whence it was removed; but in neither case can the parties whose interest would be injuriously affected, enjoin the act or claim compensation from the public. The general laws of the State may be so changed as to transfer, from one town to another, the obligation to support certain individuals, who may become entitled to support as paupers, and the constitution will present no impediment. The granting of a charter to a new corporation may sometimes render valueless the franchise of an existing corporation; but unless the State by contract has precluded itself from such new grant, the incidental injury can constitute no obstacle. But indeed it seems idle to specify instances, inasmuch as all changes in the laws of the State are liable to inflict incidental injury upon individuals, and, if every citizen was entitled to remuneration for such injury, the most beneficial and necessary changes in the law might be found impracticable of accomplishment.

If this statute is open to the objections here made, then every statutory regulation of commerce is open to them in some degree and in the same sense. It is to be noted at the outset that this is a general law.

It does not appear on the face of it that any loss or injury will result to any person or corporation. If this provision can be collaterally attacked on these grounds, then the antitrust act and all the important provisions of the interstate commerce act may be likewise assailed, for there is not one of them whose enforcement and operation would not cause more or less loss and inconvenience to the persons and corporations regulated by them.

The commodities clause is not open to the objection that "the penalties imposed for violations thereof are of such magnitude and so unduly excessive and extortionate as to be substantially destructive of the property and franchise of the carriers affected thereby," nor does it, in respect to such carriers, constitute "a denial of the equal protection of the law."

The commodities clause becomes a penal statute only by relation to a part of section 10 of the act of 1906. Therefore the suggestion contained in the answers and intimation, contained in the opinion of the Circuit Court, that a separate penalty might attach to each carload of a commodity, applies to that section only and, in this case, is merely gratuitous and irrelevant. Such a construction of section 10, however, could not render the commodities clause invalid.

Mr. Cooley, in Constitutional Limitations (p. 402), treats the provision of the Constitution as principally applicable to the courts and mainly to common-law offenses. He treats the question somewhat more

in detail in his work on "Principles of Constitutional Law," where (p. 324) he says:

> By the eighth amendment excessive fines and cruel and unusual punishments are forbidden. What punishment is suited to a specified offense must in general be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question. A punishment may be unlawful either (1) because it is in excess of, or different from, that prescribed by law or (2) because it is not warranted by the judgment of any competent court; and, possibly, (3) because, though apparently warranted by law, it is so manifestly out of all proportion to the offense as to shock the moral sense with its barbarity, or because it is a punishment long disused for its cruelty until it has become "unusual."

In a case of punishment apparently severe, and which was characterized as "monstrous," the Supreme Court said that the statute was passed by the State of Nebraska in the exercise of its plenary power, and declined to interfere. (*Coffey* v. *Harlan County*, 204 U. S., 659, 665.)

But Mr. Cooley suggests upon authority as one of the tests in cases where the prohibition is applicable, the adequacy of the punishment to prevent a recurrence of the offense. It is obvious that no trivial fine would deter corporations of financial strength, shown in this case, from doing a business in a manner so pecuniarily advantageous as the answers allege.

Perhaps this objection was suggested by a recent decision of the Supreme Court, to which we will briefly call attention.

In that case (*Ex parte Young*, 209 U. S., 123) the State statute imposing the excessive penalty for a violation was unconstitutional on another ground, and it punished corporations, directors, corporate officers, and even ticket agents severely for each sale of a ticket for passage on trains above a rate which the Supreme Court found to be confiscatory. These confiscatory rates were fixed by a commission without a hearing; and from the action of the commission no appeal was given. The case is clearly differentiated by the court from a case like the present, as follows (pp. 147, 148):

> It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once for the purpose of testing its validity without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily, a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial

> investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation and over which the jurisdiction of the legislature is complete in any event.

Even if the penalties imposed by section 10 rendered that section invalid in its application to the commodities clause, this fact would not invalidate the latter. It would not deprive the Government of other remedies to enforce the prohibition contained in it. The case of *Reagan* v. *Farmers Loan and Trust Co.* (154 U. S., 362) presented a similar feature. There the court said (pp. 395–396):

> It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus

dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within, independently of that beyond its power.

Applying this rule, the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission with power to establish rules for the operation of railroads and to regulate rates was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision as to evidence were simply in aid of the main purpose of the statute. They may fail and still the great body of the statute have operative force and the force contemplated by the legislature in its enactment.

The clause does not give a preference to the ports of one State over those of another, contrary to Article I, section 9, clause 6 of the Constitution.

We need devote but few words to this objection. The point was conclusively settled, adversely to defendants' contention, by the decision in *Armour Packing Co.* v. *United States* (209 U. S., 56, 80, and see also *Pennsylvania* v. *Bridge Co.*, 18 How., 421, 435).

We feel justified, however, in remarking that, if the Federal Government, unrestricted by any constitutional prohibition, had deliberately gone about giving a preference of this sort, it never could have so far succeeded as have the defendants. They have concentrated the whole business of anthracite distribution in New York Harbor, according to their own allegations.

The clause does not deny full faith and credit to the public acts of a State contrary to Article IV, sec. 1 of the Constitution.

It is also objected that the commodities clause violates section 1 of article 4 of the Constitution of the United States, in that "It will deny full faith and credit to the public acts of the State of New York incorporating this defendant (Erie Railroad Company) and granting it the right to own and hold stock in corporations of the State of Pennsylvania, and to the public acts of the State of Pennsylvania granting this defendant the right to own stock in mining corporations of Pennsylvania, and to build,

lease, and operate railroads," etc. (No. 560, p. 21). It ought to be a sufficient answer to this objection simply to quote the constitutional provision invoked by said defendant. It reads:

> Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Congress, by a statute passed in 1790 and amended in 1804, prescribed the forms of verification for records, judicial and legislative. With its provisions all are supposed to be familiar. It is apparently contended by the defendants that reciprocal recognition by New York and Pennsylvania of private corporations created by each respectively, and the exercise of certain comities with respect to them, constitutes a compact which the Federal Government must respect and conform to in the regulation of interstate commerce. But no two States can exercise any power which has been conferred upon the Federal Government, or in any way obstruct or interfere with the exercise of such powers by Congressional authority.

This objection, like most of the others, raises the main question of the separation of state and federal power, and is settled by the authorities hereinbefore cited. The clause of the Constitution here relied upon did not confer any power or jurisdiction upon

the States, but merely assured the recognition of their acknowledged jurisdiction over persons and things within the respective territory of each of them. (Story Const., sec. 1313; *Bissell* v. *Briggs*, 9 Mass., 462, 467; *Shunway* v. *Stillman*, 4 Cowen, 292; *Borden* v. *Fitch*, 15 Johns, 121; Story Confl. of Laws, sec. 609; *McElmoyle* v. *Cohen*, 13 Pet., 312; *D'Arcy* v. *Ketchum*, 11 How., U. S., 165.) The two States of New York and Pennsylvania could no more diminish or increase or forestall federal regulation of interstate commerce than they could bind the nation by a treaty with a foreign government, or by a declaration of war against a friendly nation.

The clause does not deny persons any privileges or immunities of citizens of the States contrary to Article IV, section 2, subdivision 1, of the Constitution.

We are next met with the objection that the commodities clause, if enforced, "will deny to this defendant and numerous citizens of the States of Pennsylvania, New York, and other States of the United States, bondholders of, and stockholders in, this defendant, the privileges and immunities of citizens of the several States, contrary to article 4, section 2, subdivision 1, of the Constitution of the United States." (No. 560, p. 21.) This objection, like the preceding, is but another form of challenging the supremacy of the Federal Government over interstate commerce.

A corporation acquires by its charter no extra territorial powers, immunities, or privileges, even if it

were clear that this constitutional provision was intended to apply to corporations. In fact this constitutional provision has been always held a prohibition against state, and not against federal, action, though there is nothing in this statute or in the record rendering the question relevant.

The clause does not invade the reserved rights of the people or of the States contrary to the ninth and tenth amendments or any other provisions of the Constitution, nor does it deprive any person of any right of property or other right secured by section 2 of Article IV, or by the fifth, eighth, ninth, tenth, or fourteenth amendment, or by any other amendment or provision of the Constitution.

This objection is yet another form of saying that the people have never conferred upon Congress the power to enact the commodities clause, or that it is not on its face a constitutional exercise of the power to regulate interstate commerce. It is only where Congressional power is claimed upon an inherent sovereignty theory, or under the general-welfare clause, that such an objection can be pertinent, as, for example, in a case like *Kansas* v. *Colorado* (206 U. S., 46), where power was claimed for Congress to interpose in the distribution of the inland waters of a State for irrigation purposes.

No right not under protection of the prohibitions or guarantees of the Federal Constitution can be set up against an authorized regulation of interstate commerce, even though such right be given in terms by a state law. In other words, if the court finds consti-

tutional authority for the commodities clause then no state charter can furnish to the defendant any protection or defense in an action brought for its enforcement.

No relations assumed by individuals, nor rules governing such relations *inter sese*, whether made by the individuals themselves or by a State, can stand in the way, where an issue arises between them and the Government, to prevent the enforcement of a constitutional law. The right of a State to create a corporation and vest it with certain powers does not carry with it the right to project either the powers of the State or of the corporation across state lines, and thus invade the domain of interstate commerce, which it is the sole province of Congress to regulate and protect. (*W. U. Telegraph Co.* v. *Pendleton*, 122 U. S., 347, 357, 358.)

Each State has plenary local powers over its own territory and its own corporations. But a State, while exercising state sovereignty over a corporation of its creation, can not prevent or embarrass the exercise by Congress of any power intrusted to it by the Constitution. (*Railroad Co.* v. *Maryland*, 21 Wall., 456, 473; *Northern Securities Co.* v. *U. S.*, 193 U. S., 197, 347.)

On this point we quote again from the opinion in the *Northern Securities* case (193 U. S., 343, 344, 345):

> All will agree that if the antitrust act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by

such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding.

Nevertheless, the defendants, strangely enough, invoke in their behalf the tenth amendment of the Constitution, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people;" and we are confronted with the suggestion that any order or decree of the federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such

charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing parallel railroad companies, engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow such restraint to continue to the detriment of the public because, forsooth, the corporations concerned or some of them are state corporations. We can not conceive how it is possible for anyone to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

* * * * *

We reject any such view of the relations of the National Government and the States composing the Union as that for which the defendants contend. Such a view can not be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international

> commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.

The commodities clause does not operate directly upon production, or upon any industrial enterprise of any defendant in the State of Pennsylvania. Its direct effect begins and ends with that which is indisputably a part of interstate commerce: "Transporting commodities is commerce, and if from one State to or through another, it is interstate commerce." (*United States* v. *Freight Association*, 166 U. S., 325.)

Speaking with reference to the completeness and comprehensiveness of the commerce power, Mr. Justice Johnson, in *Gibbons* v. *Ogden*, said:

> The "power to regulate commerce" here meant to be granted was the power to regulate commerce which previously existed in the States. But what was that power? The States were unquestionably supreme, and each possessed the power over commerce which is acknowledged to reside in every sovereign State. * * * The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace until prohibited by positive law. The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that

> the power must be exclusive; it can reside in but one potentate; *and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.*

No less emphatic were the opinions in *Brown* v. *Maryland* (12 Wheat., 419), *Passenger Cases* (7 How., 283), *In re Debs* (158 U. S., 564), *Lottery Case* (188 U. S., 321), and all the cases under the antitrust act. Mr. Justice Bradley at circuit in *Stockton* v. *Baltimore & N. Y. R. Co.* (32 Fed. Rep., 11, 16) condensed the whole principle in one short sentence, saying: "In matters of foreign and interstate commerce there are no States."

A concession of the invalidity of the commodities clause would be not the recognition of any power reserved to any State, but the abdication by the National Government of an important duty and a surrender of its power to a single State, leaving other States without protection as against that State. Such other States could not prevent a common carrier from bringing into their territory coal mined by it in the favored State, for that would be an interference with interstate commerce. To concede to Pennsylvania the right to forestall congressional regulation in this respect would deprive other States of their right to have that commerce which belongs, not to one State, but to all, or rather to the people of all the States in common regulated as the Constitution intended it should. The commodities clause is not a blow aimed at the lawful authority or policy of a single State, but is a law affording to the

other States protection in their common constitutional rights. If Pennsylvania may in this respect adopt without national control a policy peculiar to herself, but extending into the field of interstate commerce, so may the adjoining States, and the policies of no two would be the same. Thus would be brought about those conflicting and retaliatory local laws which rendered conditions under the Articles of Confederation intolerable and the formation of a constitution a vital necessity.

The clause does not impair the obligation of contracts.

There is not a line or a word in any answer which alleges an outstanding obligation or sets forth the terms of any contract whose terms would be altered by enforcing the statute.

The obligation of a contract is simply the law which binds the parties to perform their agreement. (*Walker* v. *Whitehead*, 16 Wall., 314.) It is otherwise defined as "the means provided by law by which the contract can be enforced—by which the parties can be obliged to perform it." (*Louisiana* v. *New Orleans*, 102 U. S., 203; *Connecticut Life Insurance Company* v. *Cushman*, 108 U. S., 51.) Obviously this refers to remedies. Of course no federal remedies are taken away. But even if any state remedies for the enforcement of contractual obligations were taken away by this legislation—which is not pretended—then we would simply have arrived at the initial questions, namely, whether Congress has, by

nonaction, lost the right to regulate interstate commerce and whether or not the commodities clause is a regulation thereof. These questions are fully answered by the authorities previously cited.

Stating the same proposition differently, the obligation of a contract consists in the power and efficacy of the law which applies to and enforces performance of it, or provides an equivalent for nonperformance. The obligation does not inhere and subsist in the contract itself *proprio vigore*, but in the law applicable to the contract. (*Ogden* v. *Saunders*, 12 Wheat., 317, 318.) Now, the commodities clause neither takes away nor renders ineffective any remedy, or lessens or increases in any way the obligation of any party to a contract. Then all that the defendants mean, all that they can mean, by this objection is that in some way certain States have legislated in such a way, or that certain individuals have contracted in such a way, as to forestall the exercise by the National Government of its power to regulate interstate commerce. We need not cite authorities additional to those already cited on the permanency and persistency of federal control. We need not go so far as to say that such obligations as are set forth in the answers are invalid, notwithstanding the authority and sanction of state laws. We need only say that the defendants will not be heard to set them up to defeat a federal law, passed in the exercise of power constitutionally conferred. (*Northern Securities Co.* v. *U. S.*, 193, U. S., 197, 347; *New Haven R. R. Co.* v. *Interstate*

Commerce Commission, 200 U. S., 361; *Union Bridge Co.* v. *United States*, 204 U. S., 364; *U. S.* v. *Trans-Missouri Freight Ass'n*, 166 U. S., 290; *U. S.* v. *Joint Traffic Ass'n*, 171 U. S., 505, 569, 571.)

III.

THE CONSTRUCTION OF THE STATUTE.

It can hardly be claimed that defendants who own coal or coal lands directly through conveyances or leases have no interest direct or indirect in the commodity transported within the meaning of the law. But they do contend that they have no such interest in the coal transported by them which is mined and sold by the coal companies of which they own all or a large part or some part of the capital stock. The Delaware and Hudson, indeed, asserts that because of a sale of part of their coal at the mines it is not the owner of the same when transportation begins or at any time thereafter, and the Delaware, Lackawanna and Western admits its interest in the coal owned and mined from coal lands which it owns, but denies that its ownership of capital stock of coal companies constitutes an interest direct or indirect in the coal mined by such companies and transported over its lines of railroad. The same denial of any interest in coal lands owned and sold by subsidiary coal companies is made in the other cases.

It is argued that the interest referred to in the statute means a "legal interest," and the case of *Pullman Palace Car Co.* v. *Missouri Pacific Co.*, (115 U. S.,

588), is cited among other authorities as showing that a railroad company possesses no legal interest in any other corporation because of its ownership of the majority of the stock in such corporation.

The purpose to be attributed to Congress in enacting the statute, however, precludes the view that a legal interest only was referred to, as well as the statute itself.

The statute refers to "any" interest, direct or indirect. Its purpose, which is to be gathered from the history of the times and the conditions that were to be remedied, was to prevent discrimination on the part of railroads engaged in interstate commerce against the shippers of the country in the interest of themselves or persons or corporations under their control or in which they were interested. The idea of Congress was to free interstate transportation from the dangers arising from self-interest on the part of the carriers. Manifestly, the temptation to indulge in secret rebating in the transportation of coal in interstate commerce and other favoritism is as great where the carrier owns a majority of the stock of a coal mining company as where it is itself directly engaged in the mining of coal. In the one case its interest in the coal is direct, in the other it is indirect, but in both cases its interest is substantially the same so far as the purpose which Congress may be presumed to have had in view is concerned.

The word "interested" has many different meanings, as was pointed out by Mr. Justice Harlan in

Burton v. *United States* (202 U. S., 344). It was argued in that case that within the meaning of section 1782, Revised Statutes, the United States is not interested in any proceeding or matter pending before an executive department, unless it has a direct moneyed or pecuniary interest in the result. In holding that the business in respect of which Burton was charged to have received compensation was plainly a matter in which the United States was interested, involving as it did the use of the property and postal facilities furnished by the United States for carrying and transporting mail matter, and the enforcement of statutes and regulations for the protection of the mails against illegal use, the court said:

> The Postmaster-General represented the United States, and in the discharge of his official duties sought to enforce a law of the United States. The United States was the real party in interest on one side * * * The word "interested" has different meanings, as can be readily ascertained by examining books and the adjudged cases. (4 Words and Phrases Judicially Defined, 3692; Stroud's Judicial Dictionary, 399.) But its meaning here is to be ascertained by considering the subject matter of the statute in which the word appears. And it is, we think, a mistake to say that the United States was not interested, directly or indirectly, in protecting its property, that is, its mails and postal facilities, against improper and illegal use, and in the enforcement, through the agency of one of its

> departments, of a statute regulating such use. It would give too narrow interpretation to the statute to hold that the United States was not interested, directly or indirectly, in a proceeding in the department having such objects in view.

The court thus recognized the proper principle of construction to be adopted in a case of this kind.

It can not, therefore, be properly said that Congress meant a "legal" interest, in the Commodities Clause, when it said "any" interest, unless such a narrow construction will best subserve the purpose of the statute. That it will not, requires no argument.

It will hardly be contended that a railroad company has no interest of any kind in a corporation or the property of a corporation whose stock it holds. It is true it is not such an interest as it can mortgage or assign (*Humphreys* v. *McKissock*, 140 U. S., 304, 312); it is not a "legal" interest, but it is none the less real and substantial.

In *Pullman Car Co.* v. *Missouri Pacific Co.* (115 U. S., 587, 597), the court said:

> *In a sense, the stockholders of a corporation own its property*, but they are not the managers of its business or in the immediate control of its affairs.

In that case the court recognized the difference between a legal interest and the kind of interest which, it is contended, Congress intended to include

in the expression "any interest, direct or indirect," in the Commodities Clause, when it said (p. 596):

> The two roads are substantially owned by the same persons *and operated in the same interest*, but that of the St. Louis, Iron Mountain and Southern Company is in no legal sense controlled by the Missouri Pacific.

The cases cited in 4 Words and Phrases Judicially Defined, page 396, et seq., under the title "Interest," all recognize the principle applied by the court in the *Burton Case*, namely, that the term is to be interpreted in accordance with the subject matter of the statute and the purposes which the legislature may be presumed to have had in view.

The argument that the construction contended for by the Government would prevent a railroad company from transporting any commodity in interstate commerce, because it has a certain lien or interest in all property transported by it, for carriage or warehousing, is without merit. Such an interest is clearly not within the manifest purpose of the statute. The act is, of course, to be given a reasonable construction and applied only to such things as were presumably within the intention of Congress, having in view the evil intended to be remedied. The legislative history of the act shows that its main object was to secure freedom and equality of transportation by railroads to all shippers by preventing certain well-known abuses arising from the

ownership or control or interest of the carrier in the production of commodities.

As to the Delaware and Hudson's claim it is argued on behalf of that company that the statute should be read as if the word "or" in the expression "any article or commodity other than timber and manufactured products thereof, manufactured, mined, or produced by it or under its authority, *or* which it may own in whole or in part," should be read as if it were "and," so that it would not apply to the transportation by a railroad company of coal mined by it, but the title to which had passed from it. Otherwise, it is argued, it would be impossible for a railroad company to transport any coal mined by it, although title to it may have passed through several purchasers. This amounts merely to saying that the statute, as drawn, is impolitic, but the statute is to be given a reasonable construction to accomplish the purpose of Congress in its enactment. The interest that a railroad might have in transporting for the vendee, at less than the published tariff rate, coal mined by it and sold at the mines, is apparent. But ordinarily it would have no such interest in respect to the transportation of such coal for any subsequent purchaser from its vendee. The latter case would not be within the spirit and purpose of the act, although it might come within its letter.

IV.

THE EXCEPTION IN THE STATUTE.

It is contended that the exception of "timber and the manufactured products thereof" from the prohibition contained in the statute renders the statute unconstitutional, and the case of *Connolly* v. *Union Sewer Pipe Co.* (184 U. S., 540) is relied upon in support of this view. In that case it was held that the exception of "agricultural products or live stock while in the hands of the producer or raiser" from a statute of Illinois relating to trusts rendered the statute unconstitutional. In that case the court said (184 U. S., 560):

> We have seen that under that statute *all* except producers of agricultural commodities and raisers of live stock, who combine their capital, skill, or acts for any of the purposes named in the act, may be punished as criminals, while agriculturalists and live stock raisers, in respect of their products or live stock in hand, are exempted from the operation of the statute, and may combine and do that which if done by others would be a crime against the State. The statute so provides notwithstanding persons engaged in trade or in the sale of merchandise and commodities, within the limits of a State, and agriculturalists and raisers of live stock are all in the same general class; that is, they are all alike engaged in domestic trade, which is, of right, open to all, subject to such regulations, applicable alike to all in like conditions, as the State may legally prescribe.

In the present case, however, the exception is of a different character. There is no discrimination against one railroad and in favor of another. All railroad companies engaged in interstate commerce are entitled, under the statute, to transport timber and its manufactured products owned by them or in which they may have an interest. The exception is in respect to a certain class of commodities and not in respect to carriers. As all the railroads engaged in interstate commerce are equally entitled to the benefit of the exception, they have no ground upon which to complain of discrimination. It can not be said that either the railroads or the general public are discriminated against in any way. It is true that some railroads may have more property interest in lumber than others; but that circumstance can not render the granting of the exception to all a discrimination against some. If so, then if there were no exception at all, it could be argued with equal force that the act was discriminatory because some railroads, for instance, had greater interests in coal than others.

The reason for the exception doubtless was that Congress thought the interests of the country would be best subserved at present by allowing railroads to transport lumber and the manufactured products thereof which they owned or in which they were interested. It may later change its mind on this point. But the fact that Congress did not cover the entire field at once does not render the act discriminatory, when it applies to all concerned

alike. If so, then if in the safety appliance act Congress had excepted freight cars from the requirements as to automatic couplers, it could have been said that the act was discriminatory and unconstitutional. We might be unable to appreciate the reason for the exception, but that certainly would not invalidate such an act if it applied to all railroads alike, although some might have more freight cars which did not require automatic couplers, and less passenger cars that did, than others.

The real question is not whether there is greater necessity for preventing the transportation of coal under the circumstances referred to in the statute than timber, but whether the failure of Congress so to regulate the transportation of timber owned by railroads engaged in interstate commerce constitutes in itself a reason why the statute should be held unconstitutional. This could only be so because the exception or exemption of timber amounts to an unjust discrimination against persons embraced within the law. But as all parties concerned are equally entitled to the benefits of the exception, it can not be said to be illegal. In the *Connolly* case the statute discriminated in favor of a particular class of persons and against all others. In the present case there is no discrimination against any railroad because Congress has not thought proper to regulate the transportation of timber in the same way as that of other commodities.

V.

SUMMARY AND CONCLUSION.

These cases involve two questions, namely: I, Is the commodities clause constitutional? II, Does the commodities clause, properly construed, apply to these several defendants?

I. An act of the Congress duly passed is presumed to be constitutional, and the burden of argument rests upon those who deny its constitutionality to show that, in fact, the legislative branch of the Government has exceeded its powers. (*Hylton* v. *United States*, 3 Dall., 171, 175; *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *United States* v. *Coombs*, 12 Pet., 72, 75, 76; *Legal Tender Cases*, 12 Wall., 457, 530, 531; *Sinking Fund Cases*, 99 U. S., 700, 718; *Trade-Mark Cases*, 100 U. S., 82, 96; *U. S.* v. *Gettysburg Electric Ry. Co.*, 160 U. S., 668, 680; *Reid* v. *Colorado*, 187 U. S., 137, 153; *Nicol* v. *Ames*, 173 U. S., 509, 514, 515; *Buttfield* v. *Stranahan*, 192 U. S., 470, 492; *Interstate Cons. Street Ry. Co.* v. *Massachusetts*, 207 U. S., 79, 88.)

The constitutionality of the commodities clause is and can be assailed on one or the other, or both, of *only two* grounds, namely, A, that it is not within the grant of power to the Congress professedly exercised in its enactment; or, B, that its enactment falls within one of the prohibitions of the Constitution.

A. The commodities clause is enacted in the professed exercise of article 1, section 8, clause 3, of the Constitution, reading: "The Congress shall have

power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes." On behalf of the defendants in this case it is denied that this grant of power justifies the enactment of the commodities clause for one or the other, or both, of only two reasons, namely, (*a*) because the commodities clause is not a regulation, but a prohibition of interstate commerce, and (*b*) because it is unreasonable, harsh, inequitable, and destructive of private interests.

(*a*) The commodities clause does not prohibit the transportation in interstate commerce of any commodities, nor does it prohibit any common carrier from engaging in interstate commerce; it prohibits the transportation in interstate commerce of commodities having certain incidents by common carriers belonging to a particular class and occupying to the commodities in question certain specific relations. The commodities to which it refers may be transported in interstate commerce in any way except by railroads, and by any railroads except such as are directly or indirectly interested in them, own them wholly or in part, or have mined, manufactured, or otherwise produced them; it constitutes therefore a regulation of commerce among the several States in the form of a prohibition applicable to the transportation in such commerce of some designated commodities by some designated common carriers engaged in such commerce.

It is respectfully submitted on this point: (1) That all regulation involves partial and limited prohibition,

and this court has repeatedly upheld regulations of interstate trade which involved partial and limited prohibitions of such trade. (*In re Rahrer*, 140 U. S., 545; *Lottery Case*, 188 U. S., 321; *Reid* v. *Colorado*, 187 U. S., 137; *Northern Securities Case*, 193 U. S., 197; *U. S.* v. *Freight Assn.*, 166 U. S., 290; *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505; *St. Louis* v. *Western Union Tel. Co.*, 149 U. S., 465; *New Haven R. R. Co.* v. *I. C. C.*, 200 U. S., 361.)

2. The power to regulate commerce among the several States is given in the same words of the Constitution which confer power to regulate commerce with foreign nations and with the Indian tribes, and it has been held that, with respect to the other two forms of commerce, the power to regulate implies a power to absolutely prohibit, in the discretion of the Congress. (*U. S.* v. *Holliday*, 3 Wall., 407; *U. S.* v. *Marigold*, 9 How., 560, 566; *U. S.* v. *43 Gallons of Whiskey*, 93 U. S., 188, 196; *U. S.* v. *Le Bris*, 121 U. S., 279; *Buttfield* v. *Stranahan*, 192 U. S., 470.)

3. The same power of prohibition has been expressly held to extend to interstate commerce when exercised in the interest of the public morals or upon other sufficient grounds of public policy, and, as to the sufficiency of such grounds to justify the enactment in any particular case, the judgment of the Congress is conclusive. (*In re Rapier*, 143 U. S., 110, 134; *Lottery Case*, 188 U. S., 321, 352, 353; *U. S.* v. *Joint Traffic Assn.*, 171 U. S., 505; *Scranton* v. *Wheeler*, 179 U. S., 141, 163; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553; *Matter of Heff*, 197 U. S., 488.)

It is respectfully submitted that objection to the constitutional validity of the commodities clause on the ground of its prohibitory form is untenable.

(*b*) The question whether the commodities clause constitutes a *reasonable* exercise of the power to regulate interstate commerce is one for the Congress, and not for this or any other court. No case can be found wherein this court has declared an act of the Congress, otherwise valid, unconstitutional because the court held it *unreasonable*. The authorities which have sustained a similar objection to the validity of the acts of other legislative bodies have done so in one or the other of only two contingencies, namely, (*x*) when dealing with acts of municipal corporations, or (*y*) when the legislation related to rates of public service corporations and affected the reasonableness of profit or return upon investment.

(*x*) Municipal corporations are mere agents of the sovereign, and their powers constitute a delegation which is to be strictly construed. (*State* v. *Hyman*, 98 Maryland, 618, 619, and citations.)

(*y*) When legislation fixing the rates of public service corporations deprives those directly affected thereby of all profit or any return whatever upon investment it may be void, not because in itself unreasonable, and therefore beyond a constitutional grant of legislative power, but because confiscatory or spoliatory, and therefore void by virtue of express constitutional prohibitions. (*Covington &c. Co.* v. *Sandford*, 164 U. S., 578, 596–8; *Cotting* v.

Stockyards Co., 183 U. S., 79, 91–3; *Mayor and Aldermen of Knoxville* v. *Knoxville Water Co.*, *Willcox* v. *Consol. Gas Co. of New York*, decided Jan. 4, 1909.)

What is said above as to the objection that this enactment is unreasonable is still more clearly true with respect to the objections that it is harsh or inequitable. Granted the existence of the power, all questions of public policy connected with its exercise are for the legislative, and not the judicial, branch of the Government. (*Ex parte Kearney*, 7 Wheat. 37, 44; *Scott* v. *Sanford*, 19 How. 393, 405; *McCulloch* v. *Maryland*, 4 Wheat. 422; *Osborne* v. *Bank*, 9 Wheat. 738, 865; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56, 82; *Covington Bridge Case*, 105 U. S. 470, 482; *Leon Hing* v. *Crowley*, 113 U. S. 703; all cases cited in the brief under the antitrust act; *Union Bridge Co.* v. *U. S.*, 204 U. S. 364, 388, 389; *Gibson* v. *United States*, 166 U. S., 269, 271 et seq. and cases there cited; Cooley Prin. Const. Law, 332; Cooley Const. Lim., 6th ed., 437, 438.) It is therefore respectfully submitted that the moral or economic characteristics of the legislation involved in this case do not effect its constitutionality. It is further submitted that the commodities clause is justified by the grant of power to regulate commerce among the several States.

B. On behalf of these defendants the constitutionality of the commodities clause has been further denied because it is alleged to violate

1. The terms of article 1, section 9, clause 3 of the Constitution declaring that "no * * * *ex post*

facto law shall be passed." It is sufficient to say of this objection that, so far from being *ex post facto*, it is not even retrospective, but its operation was delayed by its terms for nearly two years after its enactment.

2. The terms of article 1, section 9, clause 6 of the Constitution declaring: "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." It is well settled that this prohibition extends only to legislation of the direct and immediate result forbidden; and there can be no question that the commodities clause has not that effect. (*Armour Packing Co.* v. *U. S.*, 209 U. S., 56.)

3. The terms of article 4, section 1, of the Constitution declaring: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." It is claimed that the charters of certain of these defendants, conferring upon them powers to engage in interstate commerce, constitute "public acts" of the States granting such charters, to which "full faith and credit" is not given by the commodities clause. That this objection is without merit would seem to be so plain on the face of the constitutional provision itself as to render any discussion, beyond its mere statement, inappropriate.

4. The terms of article 4, section 2, of the Constitution declaring: "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." The argument appears to be that some citizens of Pennsylvania are not allowed

by this act to engage in commerce within New York as freely as citizens of New York would be, or as they would be in Pennsylvania. It is a sufficient reply to point out that the commodities clause leaves citizens of New York and citizens of Pennsylvania on precisely the same footing with the like rights to engage in interstate commerce and the like conditions imposed upon the exercise of that right.

5. The terms of the fifth amendment, declaring, "No person shall be * * * deprived of life, liberty or property without due process of law." It is alleged that this prohibition is infringed.

First. Because the commodities clause makes of little or no value large investments legally made, and thus deprives the defendants and others of their property without due process of law. If this is the consequence of a legitimate exercise of the power to regulate interstate commerce, or any other constitutional power, by the Congress, then it is one of the incidental hardships involved in having a Federal Government, and which should have been foreseen by the defendants when they made the investment. (*Bridge Co.* v. *U. S.*, 105 U. S., 470, 479; *Willamette Bridge Co.* v. *Hatch*, 125 U. S., 1, 12; *Union Bridge Co.* v. *U. S.*, 204 U. S., 364; *Fitzgerald* v. *Grand Trunk Railroad Co.*, 63 Vt., 169; Article in Harv. Law Rev. for June, 1908, by William Draper Lewis, p. 615; Cooley Const. Lim., 6th Ed., 473).

Second. Because the enactment of the commodities clause has rendered contracts already made unprofita-

ble or commercially impracticable of performance, and interfered with the course of the defendant's business, thus *conventionally* depriving them and others of both their "liberty" and their "property" without due process of law. The same reply may be made to this claim as to the one last considered: Some measure of individual hardship is incidental to the enforcement of all laws. The rights asserted are, it is respectfully submitted, neither "liberty" nor "property," according to the true construction of the fifth amendment, and it is to be noted that the defendants and other parties interested were given two years wherein to adapt their business to the new legislation. (Cooley Const. Lim., 6th Ed., 473 and cases cited.)

Third. Because the clause excludes from its prohibition a certain class of commodities—that is to say, timber and its manufactured products—and thus becomes discriminatory as against the owners of other commodities. This objection appears to assume that the term "due process of law" in the fifth amendment, which is repeated in the fourteenth, is equivalent to the words "the equal protection of the laws," also found in the last-named amendment. The soundness of this position is not conceded, but, in this case, it would seem sufficient to point out the inapplicability of the prohibition to a case where only a particular kind of property is exempted from the operation of a statute, and the exemption of its owners is a mere incidental consequence.

6. To the terms of so much of the same (fifth) amendment as declares: "Nor shall private property

be taken for public use without compensation." No "property" is "taken" in this case at all. If the value of property is incidentally diminished as an indirect consequence of the legislation in question no claim for compensation can be founded upon such loss of value. (*Gibson* v. *United States*, 166 U. S., 269, 271; *Union Bridge Co.* v. *U. S.*, 204 U. S., 364, 388, 389.)

7. To the terms of the eighth amendment, which declares that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The argument is that the enforcement of the commodities clause would expose the defendants to the payment of enormous fines, because every time they violated it, they would be subject, at least, to the minimum penalty imposed by section 10 of the Act to Regulate Commerce, and as they might be construed to violate it every time they transported any of the prohibited commodities, all of them would be quickly bankrupted. It is sufficient to say in answer to this contention that all they have to do to avoid these consequences is to obey the law. In any event, however, the provision of an unconstitutional penalty in one clause would not invalidate a constitutional prohibition contained in another clause of the act and which can be enforced by other remedies. (*Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S., 362, 395, 396.)

It was urged that the enormity of the fines which might accumulate before a litigation could be determined deprived these defendants of an opportunity

to test the constitutionality of this section. Without discussing the merits of this contention, the form of the present suit is sufficient to show that it has no place here. (*Reagan* v. *Farmers L. & T. Co., supra.*)

8. To the terms of the ninth and tenth amendments. This objection is simply the restatement in a different and less appropriate form of the objection that the commodities clause is not an exercise of power conferred by article 1, section 8, clause 3, and it is respectfully submitted that what has been said on that point is sufficient to dispose of it.

Finally, on this branch of the case it is further submitted that in the enactment of the commodities clause the Congress exercised a power fully and clearly conferred by the Constitution and did not infringe any of the prohibitions therein contained, and that the commodities clause is undoubtedly constitutional.

II. The commodities clause prohibits transportation by railroads in interstate commerce of *six* classes of commodities, namely, (1) those manufactured, mined, or produced by the railroad company; (2) those manufactured, mined, or produced by some one else than the railroad company, but under its authority; (3) those owned wholly by the railroad company; (4) those owned partly by the railroad company and partly by another person or other persons; (5) those wherein the railroad company is directly interested otherwise than as owner; (6) those wherein the railroad company is indirectly interested in any manner

or form whatsoever. In construing this law we must place upon it the meaning which will best serve the purpose of the Congress in its enactment.

This purpose is shown by its tenor, its legislative history, and the circumstances of its enactment to have been to prevent unfairness or discrimination against any shippers arising from community of interest between the common carrier and some favored shippers, and to this end to prevent any combinations of *such community* of such interests.

It is a further canon of legislative construction that we shall give effect, if possible, to every part of the statute and regard none of it as surplusage or repetition.

This statute shows on its face, and is also shown by its legislative history and the circumstances of its enactment to have been passed with an apprehension on the part of the law-making power that attempts would be made, through subterfuges and artful contrivances, to evade its provisions; in its construction this fact must be borne in mind.

1. The commodities manufactured, mined, or produced by the railroad company may have been manufactured, mined, or produced by a corporation or an individual as the agent of the railroad company; *qui acit per alium facit per se.* In dealing with such a question a court of conscience or one administering the quasi-equitable remedy of mandamus will look, not at the form of the transaction, but at its substance; and if it finds that the railroad company has

created a corporate agent under its absolute control to manufacture, mine, or produce the commodities in question it will hold them manufactured, mined, or produced, for the purposes of this statute, by the railroad company. (*United States* v. *Milwaukee Refrig. Transit Co.*, 142 Fed. Rep., 247; *Northern Securities Case*, 193 U. S., 290; *Attorney-General* v. *Central R. R. Co.*, 50 N. J. Eq., 52; *People* v. *North River Sugar Ref. Co.*, 121 N. Y., 582, 615.)

2. All that is necessary to bar the commodities from transportation is that they should be manufactured, mined, or produced "by the authority" of the railroad company; such authority may be given either by a contract between the producer and the railroad or by such participation on the railroad's part, either as stockholder or otherwise, in the control of the producer's operations as would involve a consent on its part to the production. In short, if the railroad company was in a position to object to the production and did not object, the production was "by its authority" for the purposes of this statute.

3. A stock company was originally and is essentially a partnership; if all its stock is owned by one person, then, in the view of a court of conscience, and for the purposes of a remedial statute, that person *is* the corporation and "owns" what it owns. This is, of course, none the less true because the stockholder happens to be also a corporation. (*Southern Realty Investment Co.* v. *Walker*, decided by this court Jan. 5.

4. What has been just said under the last heading is equally true if the stockholder corporation holds

only a part instead of the whole of the stock; in that case it owns jointly with the other stockholders what is owned by the corporation of which they form parts, or, in other words, "owns" the property in question "in part" for the purposes of such a statute as the present.

5. If what has just been said under the third and fourth headings be deemed open to doubt because the strictly legal ownership of a corporation's property is in an imaginary being created by a fiction of law—that is to say, the corporation itself, and not in the stockholders who compose it—there can be, it is submitted, no doubt that such stockholders are, at all events, "directly interested" in the property of the said corporation. Whether a stockholder owns all or a majority or some part, however small, of the stock of a corporation, the value of his stock depends upon the value of the corporation's property, and he is directly interested in all that it owns.

6. As already stated, while the law regards, for certain purposes, a stock company as a distinct legal entity, for other purposes, such as those of this statute, it looks behind the imaginary being which its own fiction has created and deals with the stockholders as the corporation which they make up. It may be that the same persons have organized one corporation to act as a common carrier, another corporation to act as a manufacturer, miner, or producer, and yet a third corporation to hold the stock,

elect the officers, and control and direct the work of both; in such a case as this the railroad company and the mining or manufacturing company are simply two forms of the same interest, and as the prosperity and even the existence of each will be directly affected by the continued existence and prosperity of the other, each has an "indirect interest" in the instruments or products of the other's operations.

In conclusion it seems appropriate to point out that all of the defendants in these cases hold Pennsylvania charters. The constitution of Pennsylvania contains the following provision:

> No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding 50 miles in length.

The principle of public policy thus announced is precisely the same as that which led the Congress of the United States 33 years later to enact the commodities clause. It is respectfully submitted that this court

will adopt such a construction of the present statute as will aid and not hinder the common purpose of National and State legislation.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

L. ALLISON WILMER,
THOMAS C. SPELLING,
Special Counsel.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES EX REL THE Attorney-General of the United States, plaintiff in error, *v.* THE DELAWARE AND HUDSON COMPANY et al.	Nos. 559–564.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT, *v.* THE DELAWARE AND HUDSON COMPANY et al.	Nos. 565–570.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

We submit that it appears from the facts admitted that the commerce here is interstate commerce, and that the authorities cited in our principal brief establish these propositions: That the

power of Congress over interstate commerce is plenary, absolute, and exclusive;

That a State can not by a charter of incorporation or by its other laws confer such rights of property and powers of exercising the same as constitute a regulation of interstate commerce or a prohibition on Congress to regulate such commerce;

That the freedom of commerce which the union of the States and the Constitution sought to establish regards commerce as a unit and as the integral commerce of the entire people, and when an alleged and claimed liberty of commerce of any particular person or in any particular commodity is in reality an obstruction to the freedom of this general commerce, whether because it checks competition or because it works discriminations or because it injuriously affects the general interest otherwise, Congress has power to remove the obstruction and state power can not be invoked to maintain and preserve it. A license under a state law is not a federal license beyond the power of federal challenge. Whatever rights a State may grant or recognize within or without its own borders, if a State has in fact undertaken to grant rights in interstate commerce which conflict with the constitutional power of the nation, it makes no difference when the State usurped the power of Congress or whether the latter power had then been exercised. The power of Congress may lie

dormant or be in abeyance for any given time, but it is always in existence, and when exercised it is paramount and conclusive.

That the questions of policy or wisdom or reasonableness are for the legislature and not for the courts.

Examining, however, the underlying policy of this law, as it is proper to do so as to understand the law, it rests upon a recognition of evils which are notorious and upon a consideration of remedies which have been discussed for a generation and repeatedly pressed upon the attention of Congress in one form or other. The policy involved has been familiar matter of public discussion and in proposed and actual legislation on interstate commerce for years; of these facts this court will take judicial notice. Thus, in the case of *Coxe Bros.* against the *Lehigh Valley* (4 I. C. C., 535), the decision refers to the provisions of the Pennsylvania constitution forbidding the combination of mining and transportation, and another allied provision (which clearly showed the policy of the *people* of that State), and observes that the tendency of "interested management" is toward the destruction of legitimate competition; and that if railroad companies and those who direct and control them were limited to the business of transportation, it would take away from them the opportunity unlawfully to prefer themselves as shippers. "Disinterested and impartial control is

essential to prevent illegal favoritism and abuse of the privileges with which carriers are invested for the benefit of the public."

In the *Haddock case* against the *Delaware, Lackawanna & Western*, the Interstate Commerce Commission (4 I. C. C., 296) did not expressly condemn the dual relation so plainly, but it asserted the duty of carriers, under the common law and under the constitution and statutory law of Pennsylvania, not to discriminate between shippers, and explained the difficulty of detecting discrimination or unreasonable rates when the dual relation exists and a carrier is a shipper of its own coal over its own lines.

The reasons for the underlying policy clearly appear in a very recent case before the Interstate Commerce Commission, *Cedar Hill Coal & Coke Co. et al.* v. *A., T. & S. F. Ry. Co. et al.*, decided by the commission on the 6th instant, wherein it was held that—

> So long as there is identity of ownership in the agency of transportation and the thing transported, it is extremely difficult if not impossible to prevent discrimination between shippers.

The reasons for the policy adopted by Congress in the enactment of this law are forcibly stated by this court in the *New Haven Railroad* case, and the inconsistency with the public interest of the dual relation of owner and shipper of commodities, in the opinion of this court, is clearly

explained. The court says specifically that certain considerations which it reviews "demonstrate that the prohibitions of the act to regulate commerce * * * are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports."

In the debates in Congress when the commodities clause was proposed and discussed, the subject, having been presented by a resolution providing for an inquiry, the language used will be considered not necessarily as a guide to the *meaning* of the law, but as showing the *reasons* for its enactment.

On March 12, 1906, the Senate had under consideration a resolution providing for an investigation by the Interstate Commerce Commission to determine—

> Whether any common carriers by railroad, subject to the interstate-commerce act, or either of them, own or have any interest in, by means of stock ownership in other corporations or otherwise, any of the coal or oil which they, or either of them, directly or through other companies which they control or in which they have an interest, carry over their or any of their lines as common carriers, or in any manner own, control, or have any interest in coal lands or properties or oil lands or properties.

The result of that resolution was an investigation by the Interstate Commerce Commission, contained in three reports of the commission

dated January 25 and 28, 1907, and April 28, 1908, the report of January 28, 1907, dealing with oil alone, and that of April 28, 1908, with the coal situation in certain portions of the West. The report of January 25, 1907, in reference to coal, considers especially discriminations in car supply and distribution, but connects those discriminations with the carriers' ownership and control of mines, referring to the current policy of discouraging and preventing, if possible, the opening up of independent mines along the railroad lines, and concludes with this specific recommendation:

> Fourth. That carriers engaged in interstate commerce be forbidden, after reasonable time, to own or have any interest, directly or indirectly, in any operated coal properties, except such as are exclusively for their own fuel supply, and that ownership, either directly or indirectly, by officers or employees of common carriers of any coal properties or any of the stock of coal companies, along the line of road by which they are employed, be forbidden.

Returning to the proceedings in Congress, in the course of the debate on the resolution, Senator Foraker said in the Senate:

> I do not believe they [common carriers] should be allowed to engage in any other business. Their business should be solely and exclusively that of common carriers. * * * This has been for many years a grievous evil. It has been complained of

> throughout the country. I have had it called to my attention repeatedly, and the time is here now and ripe for it if we propose to do something to put the common-carrier business of the country upon a better footing to investigate this matter and investigate it thoroughly in order that we may act intelligently.
>
> (Cong. Rec., 59th Cong., 1st sess., p. 3672.)

On May 7, 1906, Senator Elkins introduced the commodities-clause amendment in its original form, and said regarding it:

> I want to confine the railroads to the legitimate business for which they are incorporated—the transportation of freight and passengers—and to forbid them engaging in any other business, especially the business of mining, producing, and selling coal or any other commodity on their lines in competition with a shipper.

Later Senator Elkins said:

> The mining and selling coal by railroad companies in competition with shippers on their lines is a great evil and abuse, and unless stopped by law, the railroads of this country can acquire all the coal lands in a particular locality or State, and can crush out under this power to mine and sell coal all independent operators and individual miners, because they can favor their own interests and deny shippers many of the advantages they enjoy. The answer to this

> may be that they cannot discriminate; but a railroad company owning the coal and the means of transportation can discriminate in a way so as not to violate the law, and in the end the independent operators must yield, surrender, and go out of business.
>
> (Id., pp. 6456, 6498.)

See also remarks by Senator Bailey, Senator Lodge, and Senator Tillman (id., p. 6460).

The original form of the clause prohibited any common carrier engaged in the production or sale of coal or any other commodity of commerce from engaging in interstate commerce. Senator Spooner thought this provision too broad, as penalizing all the traffic for the purpose of preventing some of it, and suggested that the object in view might be properly accomplished by prohibiting the interstate transportation of the particular commodity produced by a carrier in competition with people along its line (p. 6459).

Without multiplying citations which could be given from these voluminous debates, the policy of Congress is thus explained and is seen to aim at the removal of admitted evils and abuses of long standing and growing gravity. The policy was deliberately adopted and the law enacted in obedience to a widespread demand of the people. The same evils are found wherever the same conditions exist in this country and elsewhere, as, for example, in England, and the policy is accepted and approved as sound and just, in the

opinion of this court and by decisions of the English courts to which that opinion (in the *New Haven Railroad* case) refers. It is an instance, one among many, of modern laws following modern industrial evolution. We think our principal brief shows, also, that there is no invasion of the right of property or any other constitutional right of these defendants; but we propose in this brief to consider the practical aspects of the situation and inquire whether the property of the defendants will be virtually taken or their losses will be vast. We say that there will be no taking whatever of property in any proper sense, and that the apprehended losses are altogether speculative and probably imaginary. Furthermore, we wish to consider whether this traffic is really innocent under the law of Pennsylvania.

First, however, we submit a few additional authorities on the constitutional questions and a statement of the really material nature of the inquiry in this case, as shown by these authorities.

It is said by Mr. Justice Gray, speaking for this court in *Spencer* v. *Merchant* (125 U. S., 355):

> In the words of Chief Justice Chase, condensing what had been said long before by Chief Justice Marshall, "The judicial department can not prescribe to the legislative department limitations upon the exercise of its acknowledged powers."

Mr. Justice White, delivering the opinion in the *Oleomargarine cases* (195 U. S., at p. 54), says:

> No instance is afforded from the foundation of the Government where an act which was within a power conferred was declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.

And Mr. Justice White further points out (p. 59) that the power of Congress over any subject depends upon the authority conferred by the Constitution and not upon the consequences arising from the exercise of the lawful authority.

Navigation is simply one branch of commerce; and the power over navigation and the power to remove obstructions to navigation are no greater than the power over other branches of commerce where there can be no palpable physical obstacle, and over obstructions to the general, free course of commerce in those other branches. In *United States* v. *Bellingham Bay Boom Co.* (176 U. S., 211, 215) Mr. Justice Peckham said for the court:

> The power of Congress to pass laws for the regulation of the navigation of public rivers and to prevent any and all obstructions therein can not be questioned. When Congress chooses to act it is not concluded by anything that the States or that individuals by their authority or acquiescence have done, from assuming entire control of

> the matter, and abating any obstructions that may have been made and preventing any others from being made except in conformity with such regulations as it may impose.
>
> The ultimate power of Congress over the whole subject is undoubted.

The question before the court, then, narrows down to this—whether, considering the mischief, the necessity of remedying it, and the difficulties to be overcome in remedying it, the law enacted by Congress is "necessary and proper for carrying into execution" its power to regulate commerce, and "necessary" as here used means not *indispensable* or *the only possible*, but appropriate in reason to the end in view. We submit further that, in the first instance, it is for Congress to decide the question of necessity and propriety, and its decision will be accepted by this court unless there is a plain abuse of constitutional power to unconstitutional ends, involving a manifest invasion of personal liberty or private property—not a mere incidental restriction on liberty or consequent disturbance and injury to property, but a clear and plain spoliation of individual rights.

Passing now from our principal argument, this brief will deal with three propositions:

I. The property of the defendants is in no sense taken.

II. The defendants have no such rights as they claim from the States, and, whatever their state

rights may be, no right thereby to be free of the control of Congress over interstate commerce.

III. The combination of mining and transportation is not an innocent or approved business under the policy and law of Pennsylvania.

I.

The law does nothing more than place a limitation upon the use of the defendants' property. It forbids the carrier who owns and mines and sells coal to transport *that* coal in interstate commerce. The title and possession of the property remain in the owners. This is not trifling with the question. It states the exact fact and the reality. On the face of the law the defendants are free to use and enjoy their product themselves and for that purpose—their own use—to transport it anywhere. The defendants are also free to sell their coal within the State of Pennsylvania, as the Delaware and Hudson say they do respecting domestic sizes or all sizes above steam.

This is undoubtedly a searching and radical law, and was meant to be so. All such laws cause disturbance of existing conditions and require readjustments, and usually that process involves losses. That may be a necessary effect, but legally it is an incidental effect. Speaking broadly, it amounts to a consequence of existing conditions finally perceived to be an entrenched evil grown great through long usage and encroachment and acqui-

escence. Such an evil of slow and silent growth under apparent cover of law may present difficult problems just because it is an existing concrete fact, but it is none the less an evil because of its existence, and its claims to life are always subject to analysis and its right to exist to a challenge. Because such an evil could not have grown consistently with a rigid and vigilant enforcement of law to the dimensions or in the direction that it has, it cannot plead the mere fact that somehow it has grown and flourished and is now before us, a stupendous and misshapen thing, as an excuse and justification for its continuance.

The anthracite coal supply is a natural monopoly. Its area is limited and the end of the supply is already definitely foreseen. These defendants with two other associated carriers own and control 96 per cent of the existing area. Such is the figure given in the report of the anthracite commission of 1902, of which Judge Gray was chairman, the language being that a certain accredited report "states that the railroads either own or control 96.29 per cent of the anthracite measures," and this statement is substantially confirmed by the admissions or allegations of the defendants' answers herein.

Every acre of coal land in those fields, as coal in place, in fee simple, or under lease on minimum royalty has a high, steady, and standard value, varying only through the natural features of location, access, and development, or of the particular

veins and types of coal underlying the particular land. Every ton of coal mined has such a value, similarly varying with the relatively slight fluctuations in the market, and as sizes and quality vary. The demand is as steady and the value as stable as of any commodity known to trade. It could not be otherwise; anthracite coal is a prime necessity. There never will be a time when anthracite coal can not be sold for its full value, and when, by consequence, coal lands can not be sold for their full value.

It seems inconceivable that the abundant energy and capital of this country, in this situation, should not be standing ready, almost at an instant's notice, to take over and finance and operate this industry within the conditions of the law; that there should not be operators and miners and bankers willing and able to purchase these properties at the market values and furnish the funds and mine and ship and sell the coal.

It is not necessary or appropriate here to speculate on the practical methods and details of working out any needed transactions or transfers of title. There would be found, we venture to think, no insuperable difficulty in adjusting, shifting, or discharging pro tanto liens of mortgages upon such properties, provided there were what appears to be conspicuously lacking in these cases a sincere and earnest purpose to loyally accept the people's will embodied in the act of Congress as decisive of the rights and duties of those called upon to obey it.

The railroads probably *could* do this if they *would* do it.

Various precedents and analogies in actual transactions of a similar nature, past or pending, have been cited, and different practical methods have been suggested in the recent and current public discussions on the subject; but these are beside the mark now; it is sufficient for our present purpose to say that anthracite coal is always needed and must always be used, and therefore can be sold at any time for what it is worth.

The opinion of the learned court below dwells upon and stands appalled at the enormous losses which would result from the enforcement of this law. The certainty of these losses inspires the prophecy of woe which echoes through the answers and the specter which haunts the defendants. We submit that the prediction rests upon pure assumption and outcry—the outcry of those who wish to be let alone so as to enjoy the continued and anticipated profits of a dual business, not only illegal now but which has long been illegal if it was not always so.

Surely these predictions of vast losses are not to be taken as established facts so as to prevent the argument that, so far as appears from the record, the claim is simple hypothesis and assertion. As to minor incidents of the alleged probable loss, we need only say that if it be true that coal and coal lands have an established value and supply a never failing demand, then all spurs and switches, like

the collieries to which they lead, are a necessary part of that value and are instrumentalities for bringing the supply to the demand, and consequently assets of worth which can readily be disposed of.

Again, it is a frequent public complaint that the price of coal is too high, and that the price has been artificially enhanced and maintained by the manipulations of these defendants and their cooperation, by their discriminations and their absorptions and exclusions of individual and independent operators, and, finally, by their complete control of the entire trade, whether in mining and sale or in transportation. If, through a sale of their properties, the public could obtain a lower and normal price of coal per ton or of coal land per acre, such price being, however, the fair, natural value of a staple and stable article or of the tract of land containing it, then a loss of the difference between the illegally enhanced value and the just and normal rate would be a loss of something to which the defendants were never entitled at all. A loss through a failure to realize all of the hopes which their own success in acquiring and perfecting a monopoly and restraining trade had created would be in like manner no loss at all.

Disappointment in their expectation of an enormous increase in value of their properties due to their enjoyment of a monopoly in the limited and steadily diminishing supply of an article of prime necessity, an expectation which inspired these

defendants and their predecessors, promoters and managers, in the acquisition of their vast coal properties, might result in loss in fact but could not in loss in law or morals. Yet the risk of such disappointments plainly underlies the prophecies and lamentations of the answers. There was *ab initio* no guaranty that these expectations would be realized. The defendants took the chances of a great speculation against various warnings and visible signs of danger, and chose to run the risk of conflict with economic principles, constitutions, and statutes.

This whole question of losses comes to this: Can the defendants sell their coal lands and interests for the fair present value? And until they have tried in good faith so to do and really failed, we are justified in believing that they can.

II.

No State can grant a right of property consisting in a liberty to transport commodities in interstate commerce which shall be beyond the power of Congress to control. An attempt to confer such a right in interstate commerce would be an unconstitutional interference with the power of Congress and therefore beyond the power of a State. When a State grants by charter rights to be enjoyed or exercised wholly or in part beyond her borders and in another State, such rights are always subject to the authority and jurisdiction of

the other State and to the power of Congress, if interstate commerce is involved.

The defendants derive any right which they can claim in these cases from state laws enacted long after the adoption of the Constitution, and in no wise from the theoretical liberty of interstate commerce supposed to have existed before the Constitution and long before their own creation. As matter of fact, there was no such liberty then, but a mass of mutual jealousies, restrictions, and exclusions between the colonies often leading to a practical embargo, and this condition the national power over interstate commerce terminated. It has, in large measure, secured the general freedom of interstate commerce, which it was designed to safeguard, not merely by positive and affirmative action overriding state discriminations and prohibitions, but by a form of negative action imposing partial and limited restrictions in order that the general flow of trade might be healthy, steady, and unrestrained.

Beginning, then, with the state charters and subsequent laws involved in these cases, we submit that they grant and were intended to grant no such exorbitant rights and powers as are claimed by these defendants. Let us take and trace the Delaware and Hudson case as typical.

The State of New York, in 1823, did not pretend to authorize that company "to construct a canal or water navigation from the anthracite coal district n Pennsylvania to the Hudson River in New York."

(Answer No. 559, p. 10.) The act incorporating the Delaware and Hudson Canal Company (Id., p. 18) recites that it is desirable that "the city of New York and other parts of this State may receive a supply of stone coal which is found in the interior of the State of Pennsylvania," and then, after other recitals, authorizes the opening of books of subscription of capital stock "for the purpose of cutting a canal and making a complete slack-water navigation between the rivers Delaware and Hudson."

The usual formal corporate powers were granted, including the power to make by-laws and regulations for the government of the corporation and the management of its property and affairs, "provided the same be not repugnant to *the constitution and laws* of this State or *of the United States*." Section VIII of that act repeats the limitation of the terminal points and specifies the route thus:

> From such point on the river Delaware, *within the jurisdiction of this State*, through any one or more of the counties of Orange, Sullivan, and Ulster, to such point on the river Hudson as the said corporation shall judge best.

The rights, powers, duties, and liabilities are altogether restricted to the purposes of a canal wholly within the State of New York. The only foundation for the claim of larger powers is that by Section XXI of the act the corporation was

authorized to purchase the rights of a grantee of Pennsylvania to improve the navigation of a river in that State emptying into the Delaware, and to purchase coal lands, and for that purpose by later acts the capital stock of the Delaware and Hudson was increased, but the authority to construct and operate a canal was still restricted "within the jurisdiction of this State." (Id., pp. 28, 29.)

The first Pennsylvania act of 1825, on behalf of the Delaware and Hudson, authorized that company to improve the navigation of the said stream emptying into the Delaware, the river Lackawaxen, with the consent of the State's previous grantee; there was a specific prohibition of the inconsistent businesses of banking and manufacturing and a reservation of the right of repeal if navigation were not improved or if there were any misuse or abuse of the privileges granted. And the fourth section of that act expressly repudiated any exclusive jurisdiction in the State of New York "over the waters of the Delaware River." (Id., pp. 47–49.) By a later act there was a grant of the right to construct railways for the transportation of coal to the canal and a recognition of the right of the company to own coal beds (p. 50). An act of 1859 gave specific authority to purchase and hold "an additional quantity of 3,000 acres of land * * * for the purpose of carrying on their operations," and an act of 1861 gave authority to construct laterals of limited length "for the

purposes of their coal business" (pp. 54, 55). An act of 1866 authorized the holding of 5,000 additional acres of land.

Without going through the charters and legislation in detail, it is sufficient to say that generally the States gave the right to construct canals or railroads or to acquire lands *within their borders*, but *not* beyond them, or if beyond them only in so far as the State could give such power, and for the purpose of connecting at the state line; the right of intrastate merger, consolidation, or lease was given and there was cooperating legislation to carry through reorganizations. There was the express prohibition of business regarded as inconsistent with transportation, including manufacturing, and there was always a reservation of the right of repeal for misuse or abuse of the powers granted.

The Delaware, Lackawanna and Western (or its predecessors), like the Delaware and Hudson, was granted the specific right to acquire and hold coal lands by successive increases of the amount. Respecting those cases and in reference to the federal power, the question is not whether the authority founded on that right to operate mines and sell and transport the product is now beyond the power of *the State* by subsequent legislation to withdraw or impair, but whether any such veto on the State power extends to the federal power in the field of interstate transportation. There were various limitations of transportation rates,

interstate as well as intrastate; for example, the second section of the act of March 8, 1856 (Laws of Penna., 1856, p. 107), provided:

> That said company shall not, at any time hereafter, have the right to purchase anthracite coal, mined from other lands than their own, when their charges from Scranton, in Luzerne County, to Elizabethport, in New Jersey, for the use of the road and motive power in the transportation of anthracite coal shall exceed 2 cents per ton per mile.

That is now, if it was not then, an entirely safe and profitable rate for the carrier; but we suppose that any such state interference with interstate commerce, like any interference by way of grant or privilege, instead of restriction, must, if challenged, fall before the federal power.

The charter of the Pennsylvania Railroad (Laws of Penna., 1846, p. 312) contains the following provision:

> *Provided*, That nothing herein contained shall be so construed as in any way giving to said corporation any banking privileges whatever, or any other liberties, privileges, or franchises, but such as may be necessary or convenient to the procuring, owning, making, maintaining, regulating and using said railroad, the locomotives, machinery, cars and other appendages thereof, and the conveyance of passengers, the transportation of the mail, and of goods, merchandise, commodities and things thereon: *And pro-*

> *vided further*, That said company shall not purchase or hold any real estate, except such as may be necessary or convenient for the making and constructing of said railroad, or for the furnishing of materials therefor, and for the accommodation of depots, offices, warehouses, machine shops, toll houses, engine and water stations, and other appropriate appurtenances, and for the persons and things employed or used in or about the same.

The same limitation appears in the general railroad act of 1849 (Laws of 1849, pp. 79, 80), and is specifically made applicable to any railroad company incorporated thereafter by special act; and, we submit, under well-settled doctrines of law in Pennsylvania as elsewhere, by accepting the benefits of later legislation, any company previously incorporated would thereby and thereafter become subject to that general limitation.

Enough has been said to show that the States, and Pennsylvania in particular, did not undertake to grant rights beyond their borders except subject to the power of other sovereignties, state and national, and merely authorized their creatures to enjoy rights elsewhere which they might validly obtain; that there were the usual cautious restrictions and reservations in the corporate grants and the growing tendency, often if not always manifested, to restrict carriers to the business of transportation. And the joint effect of early charter grants and later acquisitions of

property and rights, as by merger under special or general laws, was to modify materially by the restrictions of intermediate general laws the rights claimed to have been originally granted. We are speaking now of the general force and meaning of the laws as gathered from their face and not of the course of state adjudication upon them, which has by no means been so thorough and complete as to satisfactorily test the meaning and intent.

For the purposes of this inquiry it is not to be assumed that Pennsylvania has granted to these defendants the rights, liberties, and immunities which are claimed. If the case were otherwise, then we submit that although this court, as a general rule, accepts as conclusive the opinion of the highest court of a State on the construction of a state law, that is not necessarily so when a private right arising under the Constitution or laws of the United States disputes the meaning or application of the state law, and *a fortiori* it is not so when a public right and a great general governmental power are involved.

Other aspects of the state laws and of the rights claimed under them and especially the scope and effect of the Pennsylvania general statutes of 1868 and 1869, on which the defendants greatly rely, will be considered in the next and final subdivision of this brief.

We submit on the second proposition of this brief that the States have not undertaken to grant rights of property in interstate commerce beyond

the power of any limitation, recall, or control, and if the States had undertaken to do so, *that* was beyond *their* power.

III.

In the front of this branch of the case is the provision of the constitution of Pennsylvania, directing that—

> No incorporated company doing the business of a common carrier shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carrier, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal, not exceeding 50 miles in length. (Article XVII, sec. 5.)

Other allied provisions under that article, "Railroads and canals," manifesting the same policy are section 3, forbidding undue discriminations in the transportation of freight or passengers, and section 7, any discrimination in charges or facilities for transportation between transportation companies and individuals or in favor of either, by abatement, drawback, or otherwise; section 4, forbidding the consolidation or purchase of the stock,

property, or franchises of any other railroad or canal corporation owning or controlling a parallel or competing line. Section 10 provides:

> No railroad, canal, or other transportation company in existence at the time of the adoption of this article shall have the benefit of any future legislation by general or special laws except on condition of complete acceptance of all the provisions of this article.
>
> (See 1 Pepper & Lewis Digest of Pennsylvania Laws, pp. 91–93.)

It thus seems clear that any carrier and any of these carriers who may have taken the benefit of any legislation since the adoption of the constitution of 1873 is bound by all the provisions of that article. Section 2 of Article XVI is to a similar effect, viz:

> The general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall there after hold its charter subject to the provisions of this constitution.

Section 3 of that article provides:

> And the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State.

Section 10 provides:

> The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution or any that may hereafter be created whenever in their opinion it may be injurious to the citizens of this Commonwealth, in such manner, however, that no injustice shall be done to the corporators.
>
> (Id., pp. 88, 91.)

Section 12 of Article XVII (the article above cited on railroads and canals) provides:

> The General Assembly shall enforce by appropriate legislation the provisions of this article.

The constitutional convention convened in November, 1872. It adjourned December 27, 1873, having before it at its final meeting the result of the election just previously held showing the adoption of the constitution by the people by a large majority. The constitution went into effect January 1, 1874. The debates of the convention are very voluminous (Debates Constitutional Convention; Harrisburg, State Printer, 1873, nine volumes), and contain the earnest appeals and cogent logic of eminent men who advocated the reforms which are expressed and crystallized in large part in the above provisions of the constitution.

Distinguished men of that convention, representing the people and reflecting its urgent de-

mands, powerfully urged the embodiment into the fundamental law of the policy of adequate control of corporations, of divorcing from transportation of business inconsistent with it, and of ending favoritism and discriminations in railroad service. Of course there were dissentient voices, but the majority in numbers and weight and influence favored and adopted the amendments and reforms urged, and there can be no doubt that the result expressed the views and will of the people, because the instrument was approved and adopted by a very large majority in the popular vote.

One of the members of that convention was Jeremiah S. Black. Judge Black's words and opinions as citizen, jurist, and statesman justly carry great weight. Among other remarks before the convention, he spoke as follows on preventing corporations doing the business of a common carrier from mining and manufacturing. (Debates, etc., vol. 9, General Index, p. 29; vol. 6, p. 602):

> There can not be—I do not believe there is—any difference of opinion in this convention about the main principle of the subject under consideration. Nobody here, nobody anywhere that I know of, is or has been for a quarter of a century past opposed to railroads. We might as well make opposition to agriculture or commerce or some branch of the mechanic arts. * * *
>
> But it is equally clear that a corporation entrusted with the performance of a public duty should be strictly confined by law to

the one end and object of its creation. When its powers are perverted to the purpose of unlawful gain, it becomes dangerous. In all the courts wherever the English language is spoken on this and on the other side of the Atlantic it has always been regarded as one of the most important of judicial duties to hold corporations and hold them hard within the limits of the authority expressly bestowed on them by the supreme legislature.

Assuming (what I am afraid is not quite as true as I wish it to be) that the courts will perform this duty well and faithfully, the tendency to accumulate powers which are not necessary or proper in the hands of corporations can not be checked by judicial authority alone so long as there is no restriction on the legislature in creating and extending them.

Knowing, as I think I do, the public sentiment on this subject, and feeling certain that it is well warranted by reason, I would be amazed beyond expression if this convention would separate without making some provision forbidding the legislature to make these unreasonable grants of power to railroad corporations in the future. Let the original charter of the Pennsylvania Railroad Company be the model for all future ones. It was cautiously and well drawn. It not only withheld all unnecessary powers, but it expressly forbade the exercise of those not granted. It is a great public misfortune that the act of incorpora-

tion was afterwards so unreasonably expanded.

But you must couple your restrictions upon the legislature with a prohibition upon the company to use such powers when they are granted.

Mr. Black appeared on this subject, the subject of railroad monopoly, before the Judiciary Committee of the senate of Pennsylvania in 1883. He appeared without a retainer for any interest and as a volunteer. He asked "for that impartial and just protection which the State as *parens patriae* owes to us not less than to them," the railroads. He said that it was not proposed by him and those who agreed with him that any corporation shall lose one atom of its property, and that a lawful contract between a railroad company and the State is inviolable and must not be touched by hostile hands, however bad the bargain may have been for the people, and that those who have such contracts are entitled each to his pound of flesh.

But he argued with clear logic and upon established and fundamental legal principles, and the decisions of the courts of Pennsylvania, that there was a limitation founded in the public nature of railroad property and of the service to be rendered to the public through the property, on the proprietary right or title of the railroads themselves; that a railroad built by the authority of the State for the general purposes of commerce is a public highway and in no sense private property;

that a corporation authorized to run it is a servant of the State as much as an officer legally appointed to do any public duty, is strictly confined by the laws, and is liable to be removed for transgressing them. He states the railroad position at that time thus:

> But on the other hand the corporations deny that they owe any responsibility to the State, more than individuals engaged in private business. They assert that the management of the railroads being a mere speculation of their own these thoroughfares of trade and travel must be run for their interest without regard to public right. If they take advantage of their power to oppress the labor and overtax the land of the State; if they crush the industry of one man or place to build up the prosperity of another; if they plunder the rich by extortion or deepen the distress of the poor by discriminating against them, they justify this by showing that all this was in the way of business. * * * "Sirs, ye know that by this craft we have our wealth."

He spoke of the evil of discriminations, and said that the sacred principle of equality is constantly and steadily violated, trampled underfoot, and treated with heartless contempt. He referred to such methods of driving business competition out of the field, and estimated the injury inflicted by one of these arrangements between the railroads and the oil trust as involving great losses direct and consequential, naming a vast amount on the

authority of an eminent railway manager of that time, the late Mr. Franklin Gowen, of the Reading Company. In many ways he illuminated and illustrated the subject and pressed his lessons with keen logic and eloquent language. Upon the anthracite phases of the situation and the combination of mining and manufacturing, he said:

> A full inquiry, if it shall ever be instituted, will probably show that nearly all the railroad corporations—the smaller ones following the example of the greater—have violated their charters by engaging "in mining and manufacturing articles for transportation over their own roads" and thus acquired a monopoly of the production as well as the carrying. It is in this way that the Reading Company has got the coal market of Philadelphia under its foot. Why should not that corporation and the others be made to respect the majesty of justice by an enforcement of the Constitution (section 5, Article XVII), which, if it leaves them what they have already got in violation of the law, will at least prevent and punish such outrages in the future? * * * We must remember that in a public grant, whether of land, money, or franchises, nothing passes by construction; the grantee at the very utmost gets only what is given in express words of which the sense is too plain to be misunderstood—nothing goes by inference; no ambiguous phrase carries with it anything to swell the dimensions of the gift. * * *

Besides all that, the State can abolish a monopoly or bring it to terms of justice at any time by virtue of her right of eminent domain; all property, corporeal and incorporeal, is held upon condition that it may be divested whenever the general interest requires it. All charters and acts of incorporation are subject to such modification as may be necessary to prevent the owners from doing wrong to the public. This principle was expressed in the constitution by the amendment of 1856, but that was not its origin. It existed from time immemorial as a rule of public and universal law. It has always been one of the powers of every sovereign government, and it applies with equal force to all charters, whether dated before or after 1856.

These are arguments in favor of the power. Except in Pennsylvania it would not be necessary to state them. Everywhere else the most zealous advocates of corporate monopoly concede the authority in question, while they deprecate its exercise. But here the shallow notion still lingers that an act of incorporation is an irrevocable license to defraud and plunder whomsoever the managers please to select as their prey.

(Essays and Speeches of J. S. Black; N. Y., D. Appleton & Co., 1885, pp. 172, 188.)

In the face of the provision of the constitution of Pennsylvania it can hardly be said that the union of mining and transportation is an innocent

business. It may be that legislatures have been supine and neglectful of their duty to carry out the command of the constitution to legislate, but the prohibitions and mandates of Article XVII none the less express the will of the people and constitute the law.

Does such a provision require legislation to give it force and effect? In *Central Iron Works* v. *Pennsylvania R. R. Co.* (5 Pa. District Reports, p. 247), it was held, by a very learned judge of common pleas, that while many provisions of the constitution presuppose and require legislation to carry them into effect, section 3 of Article XVII (*supra*), forbidding discrimination, does not need legislation for its enforcement. Authority is cited for the view that other provisions of the constitution are self-efficient, including sections 4 and 10 of Article XVII (*supra*), and it is held that an act of 1883 (June 4, P. L. 72), purporting to be an act "to enforce the provisions of Article XVII relative to railroads and canals," does not affect the question, because that act did not undertake to create a right or provide a remedy, but merely furnished a rule for the estimation of damages for the violation of its provisions. On a parity of reasoning section 5 of Article XVII does not require a statute to give it effect.

The two laws upon which defendants chiefly rely for the authority to purchase and hold the capital stock of mining companies are the acts of March 31, 1868 (P. L., 50), and the act of April

15, 1869 (P. L., 31). The first was an act "to authorize incorporated companies to invest and reinvest surplus funds in mortgages, stocks, and other securities," and provided:

> That it shall and may be lawful for any and all companies incorporated or organized under the laws of this Commonwealth, including those authorized thereby, to transport merchandise or other property, and also for the directors, managers, or trustees thereof, with the approval of the stockholders, to invest the surplus or other funds or earnings of such companies in mortgages on improved real estate, in ground rents, in the loans of the United States, in the purchase from holders thereof any of the shares of the capital stock of the respective company, and also in the public debt of the State of Pennsylvania or of the city of Philadelphia, or in other good stocks or securities, and to sell and transfer the same, and to reinvest the proceeds of such sales in securities or stocks of like kind, and to prescribe, by resolution of the directors or the by-laws of the company or otherwise, the mode of making such investments, purchases, and sales, with the approval of the stockholders, and the amount or amounts thereof to be purchased, and the price or prices to be paid or received therefor, and the reinvestment of the proceeds thereof, and to make such compensation as the said directors, managers, or trustees may deem proper to any director, manager, trustee, treasurer, or other agent or officer of

> such company, for the keeping, receiving, paying, investing, or reinvesting of any of the moneys belonging to the said company, or for any other services performed by him or them as agents of the company or otherwise.

This law is an illustration of the recklessness, to say the least, which characterized many statutes of American legislatures at that period, and of the indifference to or ignorance of sound principles of law, finance, and morals. It is of course a cardinal principle fully known then and generally enforced now that it violates all canons of sound business and honest legal dealing for a corporation to purchase and hold its own stock. That statute abandoned previous salutary restraints and distinctions between separate corporate powers and functions by a commingling of ownership which permitted all the obvious evils of unlimited absorption and control against which public opinion was then vainly struggling. Some peculiar motive and inspiration are obscurely suggested by the strange provision for special compensation to directors, managers, trustees, officers, or agents "for the keeping, receiving, paying, investing, or reinvesting of any of the moneys belonging to the said company or for any other services performed by him or them as agents of the company or otherwise." This opened the door wide to manifest extravagances and relaxations in public duties and private trusts.

The act of 1869 (*ut supra*) was an act "to authorize railroad and canal companies to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," and provided:

> That it shall and may be lawful for railroad and canal companies to aid corporations authorized by law to develop the coal, iron, lumber, and other material interests of this Commonwealth by the purchase of their capital stock and bonds or either of them, or by the guarantee of or agreement to purchase the principal and interest, or either, of such bonds: *Provided*, That this act shall not apply to the stock and bonds of any corporation possessing mining or manufacturing privileges in the county of Schuylkill.

The comments regarding the act of 1868 are pertinent to this act. Such statutes, if retained by a State to-day, place it in opposition to enlightened public opinion throughout the country. One may wonder why the anthracite county of Schuylkill alone was denied the "benefits" of the act. It is, however, notorious that during the decade after the civil war corporate franchises and power entered upon a course of astounding license and aggrandizement, and the course of legislation was often unmindful of the interests and awakened the displeasure of the people. It did not take long for the acts of 1868 and 1869 to produce a culmination of dissatisfaction with accumulated grievances and

to bring the reaction of the convention of 1872–73 and the new constitution.

Two cases decided by the supreme court of Pennsylvania deserve particular attention. In the first (*Pennsylvania R. R. Co.* v. *Duncan*, 111 Pa., 352) it was declared that—

> The defendant's charter must be regarded in the light of a contract and as in all particulars inviolable unless, in the charter itself or in some general or special law to which it was taken subject, there is a power reserved to the general assembly to alter or amend, and as, in that case, the legislature might intervene to modify the charter of a corporation, so might the constitutional convention.

The case related to section 8 of Article XVI of the constitution, which required municipal and other corporations and individuals invested with the privilege of taking property for public use to make compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements, etc. One necessary effect of the decision, although not stated, was that legislation was not necessary to enforce such a constitutional provision. It was assumed "without fear of contradiction" that section 10 of Article XVII, which contains an implication that corporations chartered before the new constitution are exempt from the burdens of future legislation as well as deprived of benefits

therefrom, unless in some way they accept the provisions of the new constitution, "was not intended to apply to those corporations which could not claim exemption from what we may call constitutional legislation; in other words, such as from the nature of their charters must necessarily come within the provisions of this new organic law. It would be folly to call upon such to accept that concerning which they had no choice."

Accordingly, it was held that the defendant's charter (granted by an act of 1846), having been amended and enlarged in 1857, a general act of 1855 providing that "every charter of incorporation granted or to be granted shall be deemed and taken to be subject to the power of the legislature, unless expressly waived therein, to alter, revoke, or annul the same whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators, and as fully as if the reservation of said power had been therein expressed," must be taken as part of the charter; that as a consequence of later legislation accepted, the company became subject to constitutional amendments and the legislative power, and the high authority of Chief Justice Gibson is cited for the view that in this way a corporation may surrender the inviolability of its contract to the discretion of the legislature.

The point actually decided was that by the act of 1855 and a constitutional amendment of 1857

to the same effect, which must be taken to be as much a part of the defendant's organic law as though written therein, both the constitutional convention and the legislature had the power to subject the company's exercise of the right of eminent domain to the provision that it might make just compensation not only for the property which it might choose to *take*, in the strict sense of that word (which was the rule of the charter and the previous rule generally), but also for such as it may *injure or destroy*.

The effect of that decision is that wherever a law subsequent to a charter imposes a new or a larger liability, as the act of 1855 reserved a broad and general power of amendment and repeal of charters, and the benefit of still later legislation is accepted, then either a subsequent act of the legislature or a subsequent constitutional amendment may subject the charter rights and franchises to a new rule of property or a new liability or consequence. It is impossible to resist the conclusion from that case that so far as these defendants or any of them have accepted Pennsylvania legislation at any time since the act of May 3, 1855, they have become subject to the new constitution and to section 5 of Article XVII among other provisions. The constitution *pro tanto* has repealed or modified the charters.

The opinion of the supreme court of Pennsylvania in that case was delivered by Mr. Justice Gordon, who also delivered the opinion in

Hays v. *Commonwealth* (82 Pa., 523), and manifestly that learned judge did not regard the two opinions as inconsistent.

In *Pennsylvania R. R.* v. *Duncan*, Paxson and Green, JJ., dissented:

> We dissent. We are unable to see how the State can avoid its solemn contract by amending its constitution.

In *Williamsport Passenger Ry. Co.* v. *Williamsport* (120 Pa., 1) the opinion of the court was delivered by Justice Paxson, and it was held that "charters of private corporations are left exactly as the new constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the State by accepting the benefit of some future legislation." It is said that the new constitution did not *ipso facto* repeal charters, and the court rely upon *Hays* v. *Commonwealth* (*ante*). It is suggested that the constitutional amendment of 1857 (as to repeal, etc. of charters; *ante*) did not give an arbitrary power to repeal, but only for cause when the charter is injurious to the citizens of the Commonwealth, and so "that no injustice shall be done to the corporators."

In this somewhat doubtful situation as to the effect of the new constitution the law of Pennsylvania stands to the present time.

The dissenting opinion of Judge Buffington comments on the question of the law of Pennsylvania, and says in substance that, on the assump-

tion that the provision of the constitution of that State is not self-operative, it certainly strips every purchase in Pennsylvania since 1874 of mining properties by common carriers of the status of innocent purchases, and the answers do not allege that the purchases were prior to the constitution, or show whether the defendants had elected to accept its provisions.

It is said that the dominant public purpose of railroad common carriers enforced by the commodities clause requires them to divorce their public duty as carriers from their private interest in carrying their own products and forbids them to become competitors of their own customers; and so far as this dominant purpose is concerned, their lawful ownership of private property is an incident to enable them to fulfill and not to thwart this public duty.

The defendants, or some of them, are rather reticent as to the dates when they acquired their coal stocks—the shares of the capital stock of coal companies. The Delaware and Hudson does not say when they acquired the stocks of the Northern Coal and Iron Company, the Jackson Coal Company, and the Hudson Coal Company; nor the Erie when they acquired their holdings of the Pennsylvania Coal Company, the Hillside Coal and Iron Company, or the Temple Iron Company. The Central Railroad Company of New Jersey says that it owned for several years preceding 1874 a majority of the capital stock of the two prede-

cessors of the Lehigh and Wilkes-Barre Coal Company.

As to the stock of the Temple Iron Company, it was the owner of a minority for a period "long prior to the first day of May, 1908." The Delaware, Lackawanna and Western stands on the latter averment as to their subsidiary coal companies and their stock in the Temple Iron Company. The Pennsylvania acquired 10,000 shares, out of a total issue of 15,000 shares at that time, of the stock of the Susquehanna Coal Company, on December 31, 1873, the day before the new constitution took effect, and its additional holdings from time to time down to January 5, 1886, without stating how much was acquired at any one time or giving any particular dates.

It is not stated when the Pennsylvania acquired their holding of the entire capital stock of the Summit Branch Mining Company. It is stated that the defendant became the owner in 1871 of a large amount of the capital stock of the Summit Branch Railroad Company (which holds coal lands under its charter), and made additional purchases down to the year 1899. It is not stated when the defendant became the owner of the shares of the Mineral Ra. ad and Mining Company, also authorized to acquire, own, and operate coal lands in Pennsylvania. The Lehigh Valley says that it acquired its interests in the predecessors of the Lehigh Valley Coal Company prior to 1872; that since that year it has owned a majority and con-

trol of the capital stock of the New York and Middle Coal Field Railroad and Coal Company. It does not state when it acquired the entire capital stock of Coxe Brothers & Company or its minority interest in the Highland Coal Company. It states that it has owned a majority and control of the stock of the Locust Mountain Coal and Iron Company since 1869. It does not state when it acquired its minority interest in the Packer Coal Company or in the Temple Iron Company.

As to Pennsylvania law the question is not when the charter rights were granted or what they were, but when these coal stocks were acquired. Was the acquisition before or after the constitution of 1873 went into effect? That question is not important or material as to the federal power over interstate commerce, which embraces and includes all the carriers whenever and however they acquired their coal properties. Respecting the federal power it is not of the slightest consequence that the acquisitions were before May 1, 1908, or before or after the adoption of the constitution of 1873. All carriers are alike subject to and bound by this law, whether they had an early special right under their charters to own coal lands and mine and sell coal, or whether they acquired by merger under special or general laws other railroads possessing such rights, or whether they acquired coal stocks under the acts of 1868 and 1869, and whether or not any of such rights are now beyond the power of Pennsylvania to repeal or modify.

But as to that power of that State in general, and certainly as to the acquisition of coal stocks and properties since January 1, 1874, it is altogether erroneous to say, considering the constitution, statutes, and decisions of Pennsylvania, that the dual business of mining and transportation of anthracite coal is and always has been an ordinary and innocent right of property in the State of Pennsylvania, never doubted or questioned by the courts or people of that Commonwealth, but fully recognized and protected by both. We submit that the fact is quite otherwise.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

L. ALLISON WILMER,
THOMAS C. SPELLING,
Special-Counsel.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES EX REL. THE Attorney-General of the United States, plaintiff in error,
v.
THE DELAWARE AND HUDSON COMpany et al.

Nos. 559–564.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT,
v.
THE DELAWARE AND HUDSON COMpany et al.

Nos. 565–570.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

The counsel for the United States respectfully submit that, in the opinion of this court in *New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission*, and the decisions of the Interstate Commerce Commission therein quoted, no distinction is drawn between an interest in the coal produced through direct ownership of the producing

coal lands and an interest in the said coal arising from ownership of stock in a corporation owning and working the said coal lands. On page 401 of 200 U. S., this court, quoting from the subsequent decision of the Commission in *Grain Rates of Chicago Great Western Ry. Co.*, says of its two previous decisions:

> Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and, indeed, it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be, in effect, the confiscation of its property, and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to enquire whether the rate charged the complainant was a reasonable one.

It was with reference to the rule thus stated that this court added:

> Now, without at all intimating as an original question we would concur in the view expressed in the case last cited that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting as presented in the *Haddock* and *Coxe cases*, would have been confiscatory, and without reviewing the rulings made by the Interstate

> Commerce Commission in those cases and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and as restricted to the precise conditions which were passed on in the cases referred to must be applied to all strictly identical cases in the future, at least until Congress has legislated on the subject.

It will be observed that the defendants in the two cases before the commission to which reference is made, namely, *Haddock* v. *D. L. & W. R. R. Co.* and *Coxe Bros.* v. *L. V. R. R. Co.*, were each alleged, in the passage quoted, to be "the owner of extensive coal fields." Whether such ownership of lands was direct or indirect through the ownership of stock in the company controlling and working the coal fields seems to have been regarded by the commission and by this court as immaterial for the purposes of the interstate commerce act; and, in point of fact, as appears by their answers in these cases, one of the railroads mentioned was an owner of coal fields and the other an owner of stock in coal companies.

It appears very clearly from the pleadings and the opinions in the *Haddock* and *Coxe* cases that the Delaware, Lackawanna and Western, on the one hand, was considered only as an "owner of anthracite coal mines," and the Lehigh Valley, on the other hand, only as owning and holding the capital stock of the *Lehigh Valley Coal Company* (4 I. C. C., 297, 298, 302, 303, 311; id., 537, 539, 552, 568).

The Commission treated the question of the character of the carriers' interest as without influence on its rights or liabilities, provided the fact of the interest was clear and it was for the purposes of the act the virtual owner of the producing property. When, therefore, Congress dealt with the situation thus revealed, after this court had suggested in the passage above quoted, that action on its part was needful, it must be presumed to have dealt with the said situation as had been done by the Commission and by this court; that is to say, it must be presumed to have drawn no distinction between owners of coal lands and owners of stock in companies which own the coal lands. The Commission having dealt with an owner of stock in a coal company, which coal company owned extensive coal fields, as no less the "owner" of the coal fields for the purposes of the act than one who owned them directly and having made apparently no distinction between the coal properties "owned" in one form or in the other, it is submitted that the intent to be attributed to Congress would be to deal in like manner with the same situation and to impose the like restrictions and the like liabilities on "owners" in either form.

In fact, there is not in the entire opinion rendered in the *New Haven Railroad* case any reference whatever to a distinction in rights or liabilities under the interstate-commerce laws between a carrier owning lands and a carrier owning stocks. The carrier affected by that decision was neither; it had only

bought coal in the name of another person and transported such coal over its own line of railroad. Undoubtedly its case differed materially from the cases of the two defendants referred to by the Interstate Commerce Commission and of the several defendants in these suits; but nowhere in the *New Haven* case is any distinction drawn between interest from direct ownership and interest from stock ownership, and we respectfully submit that, while Congress may perhaps be reasonably supposed to have legislated with a view to the distinctions drawn in this decision between the case before the court and one involving either an owner of coal properties or an owner of coal stock, there was nothing in the decision itself to call to the attention of the legislative branch of the Government a distinction in rights or responsibilities between these two classes of owners, and, as might be expected, we find in the debates and in the action of Congress nothing to indicate that the decision was understood as drawing any such distinction.

A great many amendments affecting both substance and form were offered during the course of the debate in the Senate, which, for the most part, failed. Some of them, however, were reflected in the measure as finally amended and passed, as, for instance, Senator Spooner's suggestion to which our supplemental brief refers. This appeared definitely as an amendment proposed by Senator McLaurin on May 7, 1906. (Cong. Rec., 59th Cong., 1st sess., p. 6459.)

But t is not necessary to dwell on other proposed changes which either disappeared or were adopted. The only amendment specifically embracing stock ownership was that proposed by Senator Tillman on May 8, as follows:

> From and after the 1st day of January, 1908, it shall be unlawful for any carrier owning or operating any railroad used in interstate commerce to engage in interstate commerce when it can be shown that such railroad, directly or indirectly, by stock ownership or otherwise, has or holds any control, part ownership, or interest in the business of mining or manufacturing or trading in any commodity transported over such railroad as interstate commerce; nor shall any such common carrier, after the date aforesaid, directly or indirectly, engage in any other business than that of a common carrier, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business as a common carrier.
>
> Any violation of this provision shall subject the offending common carrier to a forfeiture of $2,000 for each offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture or forfeitures shall be recovered in a civil suit in the name of the United States, brought under the direction of the Attorney-General, in the United States Circuit Court for the district wherein the carrier has its principal operating office, or in any district through which the road of the carrier may be operated. (Id., p. 6513.)

The amendment was offered in lieu of the provision agreed to as in Committee of the Whole, which appears on the preceding page of the Congressional Record, and in which the only differences from the law as finally enacted are that the District of Columbia was specifically included; that "any railroad company" and not "any common carrier" was made subject to the law; and that the exception as to timber was inserted in the final form. There was no debate on the point which we are now considering, because the discussion passed on to the timber immunity; but Senator Tillman himself states what he has in mind by saying (p. 7012):

> The provision which is now in the bill, while very broad, is also very loose; and while it is a step and a very long one in the right direction, and will undoubtedly do a great deal of good, the amendment which I have now offered may be too drastic. * * * It is very clear to any man who thinks that *if the officers of a railroad are permitted to own a mine,* or if the railroad itself is permitted through ownership or joint ownership or some other subterfuge or trickery to have an interest in a coal mine, there will inevitably be favoritism in dealing with that coal mine and transporting its product, and that it will be impossible, without some drastic provision like this, to prevent evils which every person recognizes.

Then, expressing the feeling that the provision may be too strong, by which he seems to be referring to the absolute prohibition of engaging in interstate commerce, he substitutes for the amendment, after the word "indirect" in the statute, the words "by partnership, stock ownership, or any arrangement whatsoever," and then on a demand of the yeas and nays the amendment in that ultimate concise form was rejected by a vote of 23 to 42, 24 Senators not voting (p. 7014).

As to Senator Tillman's comments, it is to be said that part of them relate to the absolute prohibition of engaging in interstate commerce and part of them to the ownership of a mine by the *officers* of a railroad company, and since that relation might have been embraced by the words "any arrangement whatsoever," and the Senate apparently was not prepared to go to that length, the rejection of the amendment without any debate should not be held to imply the meaning that the Senate did not consider the broad language already adopted sufficient to include stock ownership by a railroad or imply an assent to Senator Tillman's view that without his amendment the whole provision might as well be stricken out. After all, his view was only that of an individual member of the Senate expressed in debate, which of course can not be held as controlling the meaning of the enactment or even throwing any light on it for the purpose of a judicial inquiry.

The decision of this court in the *New Haven Railroad* case, which was rendered February 19, 1906, was undoubtedly familiar to some Senators. Passages from the opinion were quoted during the debate by Senator Teller, and the case was also referred to by Senator Bacon (pp. 6499–6500, 6566) on the general question of the evils resulting from the combination of production and transportation. But there was no reference to the opinion on the point under discussion, and it is respectfully submitted that the mere facts that the decision had been rendered and certain members of Congress had considered it do not justify any inference, much less a conclusive inference, to the effect that because the case related to a purchase of coal through an agent to fill a contract of sale (which might perhaps be regarded as giving the railroad an "indirect interest" in the coal), and because the Senate rejected an amendment specifically including stock ownership among other things, therefore an indirect interest in coal through the ownership of stock in companies producing it was not intended to be embraced within the law, notwithstanding the language used, "any interest, direct or indirect."

We respectfully submit that the scope of this law should not be restricted to the facts of the *New Haven* case, much less to the particular aspect of the case thus presented.

In the first place, we submit that the purchase of coal by the Chesapeake and Ohio through an agent to fulfill its contract with the New Haven Railroad

gave it a *direct* interest in the coal; the interposition of the agent was a mere convenience and involved a transfer of beneficial ownership, not from the vendor to the agent, but from the vendor to the Chesapeake and Ohio. If we look to matters of substance, it was the Chesapeake and Ohio which thus acquired coal for delivery to its vendee, the New Haven, under its contract of sale.

Secondly, the view suggested goes far to render the law ineffective, and it is clear that Congress meant it to be thoroughgoing and even drastic. In the view suggested a railroad can evade the prohibitions of the law by placing its commodities and lands and industrial establishments producing them in the nominal ownership of some corporation under its absolute control—a holding company, a selling company, a mining company, or a manufacturing company, which would be no less its own mere agent than was the nominal purchaser in the *Chesapeake and Ohio* case.

Thirdly, since there was no debate on the amendment rejected, and no reference whatever to the *New Haven* decision in that connection, it can not reasonably be presumed that the point now submitted was deliberately weighed and passed upon, when we consider the mass of amendments presented and the wide range of a discussion crowded into a relatively brief period; it is, we submit, more reasonable to presume that Congress thought the broad and inclusive language used covered this case, as it naturally and grammatically does, so no further specification was necessary.

Fourthly, it was notorious that control through stock ownership was a prevalent form of the evil (interest by carriers in commodities shipped) to be corrected, and indeed its most serious form, and was therefore the most conspicuous kind of "*indirect* interest" aimed at. This is manifest from the resolution for an inquiry adopted two months before the law was introduced. (Supplementary brief, p. 5.) The correction of that particular form of the evil was probably the main purpose—certainly its most important purpose practically.

There was no debate upon the commodities clause in the House when the Hepburn law was returned from the Senate with this amendment incorporated, the report of the conference committee being accepted by the House without discussion as to that clause.

We submit that the mere rejection of Senator Tillman's amendment without discussion is entirely consistent with the belief on the part of Congress that the language used, being clear, unambiguous and universal in its import, was sufficient to accomplish what it plainly said and efficient to bring in "any interest, direct or indirect," and to embrace such an interest through ownership of shares of stock without adding such words as "by stock ownership or otherwise" and without adopting Senator Tillman's amendment. Congress refrained from narrowing the scope of the statute by enumeration, and hence adopted the general terms of the law.

As to the contention that in many instances coal can only reach the markets or can only conveniently

reach the customary markets over the particular line of the company owning that coal or interested in the stock of the company producing it, that supposed difficulty and all real or supposed difficulties in the application of this law would disappear instantly if the defendants disposed of *all* their coal interests, their stock in coal companies, their lands and mines as well as their coal, so that they would no longer *mine* or *produce* it. When mining and transportation are thus absolutely divorced, then not a single one of the difficulties conjured up by opposing counsel will remain to confront us.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

L. ALLISON WILMER,
THOMAS C. SPELLING,
Special Counsel.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, EX REL. THE ATTORNEY-GENERAL of the United States, plaintiff in error, *v.* THE DELAWARE AND HUDSON COMPANY.	No. 559.
SAME *v.* ERIE RAILROAD COMPANY.	No. 560.
SAME *v.* THE CENTRAL RAILROAD COMPANY OF New Jersey.	No. 561.
SAME *v.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company.	No. 562.
SAME *v.* THE PENNSYLVANIA RAILROAD COMPANY.	No. 563.
SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.	No. 564.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

58182—08

THE UNITED STATES, APPELLANT, *v.* THE DELAWARE AND HUDSON COMPANY.	No. 565.
SAME *v.* ERIE RAILROAD COMPANY.	No. 566.
SAME *v.* THE CENTRAL RAILROAD COMPANY OF New Jersey.	No. 567.
SAME *v.* DELAWARE, LACKAWANNA AND WESTERN Railroad Company.	No. 568.
SAME *v.* THE PENNSYLVANIA RAILROAD COMPANY.	No. 569.
SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.	No. 570.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO ADVANCE.

The Attorney-General, on behalf of the United States, respectfully moves the court to advance the above-entitled causes for hearing in December, if convenient to the court.

These were petitions for mandamus on the relation of the Attorney-General and bills in equity filed by the Attorney-General on behalf of the United States

against the defendant corporations, respectively, both the petitions for mandamus and the bills in equity being founded upon the same acts in violation and threatened violation by the defendants of that provision of section 1 of the act to regulate commerce approved February 4, 1887, as amended by the act of June 29, 1906 (34 Stat., 584), which directs that—

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

The bills in equity prayed for injunctions to enjoin and prohibit the various defendants "from further transporting in interstate commerce the anthracite coal which it is the purpose of the said defendant to transport, as hereinbefore stated, in violation of the law hereinbefore quoted."

The petitions for mandamus alleged that "the anthracite coal so as aforesaid being unlawfully transported by the defendant in interstate commerce, and the anthracite coal which it is the purpose of the de-

fendant to continue to so unlawfully transport as aforesaid in violation of the law hereinbefore quoted," is an article or commodity other than timber and the manufactured products thereof (excepted from the operation of the so-called commodities clause); and an article in which the respective defendants have and will have a direct or indirect interest, and not necessary or intended for use in its business as a common carrier; and the prayer of the information and petition was for the issuance of alternative writs of mandamus commanding and directing the defendants forthwith and thereafter to comply with the law in question, and thereafter cease and refrain from transporting in interstate commerce the anthracite coal in question which it is their purpose to transport, or else to appear and show cause why the peremptory writ of mandamus should not issue, etc. The alternative writ was issued.

The charge in the bills and petitions is, in substance, that the defendants have long operated their railroads through the anthracite coal fields of Pennsylvania into other States, and throughout the period have been engaged in the interstate transportation of anthracite coal from the mines in Pennsylvania to other States, and that the coal so transported has been in large measure owned by the respective defendants either through purchase or as being the product of their own mines and coal lands, or by reason of their ownership of the stock of other companies owning or mining and producing coal, and

that the interstate transportation of coal so owned will continue, and therefore the defendants have violated and will continue to violate the so-called commodities clause of the act of 1906.

The cases were heard on the bills and petitions and answers, and the court below decided (Gray, circuit judge; Dallas, circuit judge, filing a concurring opinion; Buffington, circuit judge, filing a dissenting opinion) that the commodities clause is not a constitutional enactment, because it deprives the defendants of their liberty and property within the meaning of that clause of the fifth amendment to the Constitution which forbids that any person shall be deprived of life, liberty, or property without due process of law; that the commodities clause "not indirectly but directly" works a practical confiscation of the railroad carriers' property, that the law is unreasonable and consequently invalid, and that the restriction of the law "in its nature and effect is discriminative prohibition."

The nature of these cases as raising a great question of constitutional law and of legislative power, and their importance to the public in the due administration of governmental affairs and to the vast private property interests involved call for the advancement for hearing in this court as soon as may be convenient to the court, and the Attorney-General submits this motion accordingly. We understand that opposing counsel entirely concur in the motion.

We respectfully suggest that, if convenient to the

court, a day should be assigned for hearing in December, so that the cases may be submitted to the court before the Christmas recess.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

OCTOBER, 1908.

O

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 666.

UNITED STATES OF AMERICA,

against

THE DELAWARE AND HUDSON COMPANY,

Appellee.

No. 666.

UNITED STATES OF AMERICA, EX REL. ATTORNEY GENERAL OF THE UNITED STATES,

Plaintiff in Error,

against

THE DELAWARE AND HUDSON COMPANY,

Defendant in Error.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE DELAWARE AND HUDSON COMPANY, APPELLEE AND DEFENDANT IN ERROR.

First.—The Commodity Clause, properly construed, does not apply to The Delaware and Hudson Company, it being primarily a Coal Mining Company.

Second.—The Commodity Clause is unconstitutional if it be construed to apply to The Delaware and Hudson Company.

WILLIAM S. OPDYKE,
JAMES M. BECK,
WALKER D. HINES,
Counsel for Appellee and Defendant in Error.

C. G. Burroughs, 30 to 36 Spring Street, New York.

INDEX.

PAGE

Statement 1

Facts shown by answer and, of course, admitted for the purpose of this hearing..... 3

FIRST POINT.

The Delaware and Hudson Company, being organized primarily to produce and handle anthracite coal, and possessing its railroad powers merely as an incident to such primary purpose, is not embraced in the prohibition of the Commodity Clause 7

SECOND POINT.

The Commodity Clause is unconstitutional if it be construed to apply to The Delaware and Hudson Company..... 38

I. The power of Congress over foreign commerce is not the test of its power over commerce among the States..... 38

II. The power to regulate commerce among the States is limited by the Fifth Amendment 40

PAGE

III. The Courts are authorized and required to enforce the Fifth Amendment 43

1. It is the right and duty of the Court to decide whether a statute of Congress exceeds authorized regulation and arbitrarily interferes with liberty and property, and the question is frequently one of degree 43

2. Legislative regulations affecting railroads, and designed to protect the pecuniary interest of shippers, afford frequent occasions for judicial intervention, and require a careful weighing of the conflicting interests involved 50

IV. The purpose of the Commodity Clause is to remove a temptation to violate the unjust discrimination provisions of the Act to Regulate Commerce 53

V. The Act to Regulate Commerce was designed to promote the transportation of all traffic upon equal terms for all persons interested therein..... 55

PAGE

VI. With respect to the railroad company as a transportation agency, the effect of the Commodity Clause is to destroy a large part of its railroad business, and, therefore, a large part of the value of its railroad property..... 57

VII. With respect to the commodities themselves, and all persons interested therein, the effect of the Commodity Clause is to destroy the right to transportation, and, therefore, the value of useful commodities lawfully owned..... 59

1. The clause recognizes the legality of the railroad company's ownership of the commodities whose transportation is prohibited 59

2. The commodities whose transportation is prohibited are innocent, useful, and essential to the public..... 60

3. The prohibition to transport substantially impairs, and in many cases practically destroys, the value of commodities owned or produced, and

PAGE

the value of lands owned, by railroad companies 61

4. The Government contends that the prohibition is not confined to the railroad company, but follows the commodity into the hands of any purchaser from the railroad company.... 64

5. Thus the Commodity Clause arbitrarily destroys all right to transportation of a vast amount of property, and does this only as a means to the end of securing to all an equal right to have all property transported upon equal terms 64

VIII. The Commodity Clause is unconstitutional because it has no reasonable relation to a legitimate object and because it is an arbitrary interference with property and liberty 70

IX. This situation is not affected by the proposition that theoretically the railroad companies had the right to sell their mines or factories within a limited time..... 73

PAGE

1. Such proposition involves the establishment of the power of Congress to compel such alienation, which power Congress itself has indicated it does not possess; and this Court need not pass upon the question until it has the concrete judgment of Congress that the power exists and should be exercised in some specified way 73

2. The Commodity Clause cannot be treated as the equivalent of a Federal statute, compelling railroad companies to alienate property, for the acquisition and development of which such companies were formed..... 76

3. Such power of compulsory alienation of innocent property lawfully owned is not possessed by either the Federal or the State Governments..... 81

4. Viewed as a statute requiring such alienation, the Com-

PAGE

modity Clause is unreasonable and arbitrary and wholly unworkable.. 84

X. The exemptions of timber and its products and of all common carriers except railroad companies, and other exceptions, still further show the lack of substantial basis for the Commodity Clause, and its arbitrary character..... 87

XI. The legislative history of the Commodity Clause 93

XII. Discussion of cases 103

1. New Haven Railroad Company vs. Interstate Commerce Commission, 200 U. S., 361... 103

2. The Lottery Case, 188 U. S., 321 110

3. McCray vs. United States, 195 U. S., 27..... 112

4. Union Bridge Company vs. United States, 204 U. S., 364 115

5. Adair vs. United States, 208 U. S., 161.. 119

6. The cases upholding the constitutionality of the Anti-trust Act 120

Conclusion 122

Supreme Court of the United States,

OCTOBER TERM, 1908. NOS. 565 AND 559.

UNITED STATES OF AMERICA,
APPELLANT AND PLAINTIFF IN ERROR,

AGAINST

THE DELAWARE AND HUDSON COMPANY,
APPELLEE AND DEFENDANT IN ERROR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

AND ALSO

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF ON BEHALF OF THE DELAWARE AND HUDSON COMPANY, APPELLEE AND DEFENDANT IN ERROR.

Statement.

These two causes involving the same question come to this Court, both upon appeal from an

order of the Court below entered at its April Sessions, 1908, dismissing the bill of the complainant and appellant (Record, No. 565, p. 68); such appeal having been allowed upon the petition of the plaintiff (pp. 69, 71); and also upon a writ of error upon an order entered in the Court below at its April Sessions, 1908, refusing the prayer of the plaintiff in error for a writ of mandamus and entering judgment in favor of the defendant in error (Record, No. 559, p. 72), such a writ of error having been allowed upon a petition of the plaintiff assigning errors (pp. 73 to 75).

In both of the said causes in the Court below, appellee and plaintiff in error charged the appellant and defendant in error with violating that provision of an Act of Congress of the United States approved June 29, 1906, which hereinafter will be referred to as the Commodity Clause and which reads as follows:

> " From and after May first, nineteen hundred and eight, it shall be unlawful for any *railroad company* to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any

> article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier";

and sought to compel the appellee and defendant in error to comply with the said provisions of the said Act (Rec., No. 559, p. 6; Rec., No. 565, p. 4).

Facts Shown by Answer and, of Course, Admitted for the Purpose of this Hearing
(U. S. vs. Trans-Mo. Assn., 166 U. S., 290, 341).

I. *The Delaware and Hudson Company, the appellee and defendant in error, has been for upwards of eighty-five years a Coal Mining Company incorporated under a New York charter and authorized also to do business in Pennsylvania. The Company originally, and until 1899, was also a canal company, its canal having been authorized and constructed for the purpose indicated in its*

charter of enabling it to bring to New York the coal mined by it in Pennsylvania. Since 1867, first as a supplement to, and afterwards as a substitute for, its canal transportation, the Company has been authorized by statutes of New York and Pennsylvania to operate railroads from its mines in Pennsylvania to points in New York, such power being given for the express purpose of enabling the Company to transport to market in the State of New York the supplies of anthracite coal mined by it.[1] Also incidentally it has operated the said railroads in interstate commerce.[2]

II. The railroads operated by The Delaware and Hudson Company are the only railroads connected with its coal mines, and constitute the only reasonable, practical and conveniently available means of transporting such coal to market (Rec., No. 559, p. 13; Rec., No. 565, p. 9).

III. The Delaware and Hudson Company has expended large sums and incurred large liabilities in acquiring the ownership, for this purpose, under lease or otherwise, of the railroads operated by it; and can receive no ade-

---

[1] Rec., No. 559, pp. 9 to 12; Rec., No. 565, pp. 5 to 8.
[2] Rec., No. 559, p. 12; Rec., No. 565, pp. 7 to 8.

quate return therefrom unless permitted to carry thereon the coal mined by it (Rec., No. 559, p. 12; Rec., No. 565, p. 8).

IV. The Company has invested large amounts in coal properties in Pennsylvania, many parcels thereof being under leases requiring payments of minimum royalties irrespective of amounts actually mined, and also containing restrictions against assignments of such leases. If the Company cannot transport by its railroads coal mined by it from such properties, it will be deprived of the only possible enjoyment of property lawfully acquired, without compensation for such loss of property rights (Record, No. 559, pp. 12 and 13; Record, No. 565, pp. 8 and 9).

V. The Company's daily shipments of anthracite coal over its railroads from one State to another State, average twelve trains of thirty-seven cars each, and such shipments aggregate 4,300,000 tons annually (Record, No. 559, p. 15; Record, 565, p. 11).

VI. The coal lands owned by the Company are subject to a mortgage securing an issue of $5,000,000 of its bonds maturing in 1917, which mortgage is also a lien upon the Company's railroads in Pennsylvania. These liens cannot

be separated without the consent of all the holders of the said bonds (Record, No. 559, p. 16; Record, No. 565, p. 12).

VII. There are other common carriers by railroad, other than this defendant, which transport from one State or Territory to another State or Territory timber and the manufactured products thereof produced or manufactured by them or under their authority, or which they own or are interested in, other than that which is necessary or intended for the use of such railroad corporations or common carriers in the conduct of their business as common carriers (Record, No. 559, pp. 16 and 17; Record, No. 565, p. 12).

FIRST POINT.

The Delaware and Hudson Company being organized primarily to produce and handle anthracite coal, and possessing its railroad powers merely as an incident to such primary purpose, is not embraced in the prohibition of the Commodity Clause.

We again quote the Commodity Clause:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any *railroad company* to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

A peculiarity of this clause is that it applies only to "any railroad company," whereas all other prohibitions of the Act to Regulate Com-

merce invariably apply to "any common carrier subject to this Act." Section 1 of the Act defines the common carriers subject to its provisions, among them being "common carrier or carriers engaged in the transportation of passengers or property wholly by railroad." Section 20 of the Act requires certain reports "from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act." Clearly the expression "railroad company" as used in the Commodity Clause is not equivalent to the expression "carrier engaged in transportation wholly by railroad," or to the expression "owner of railroad engaged in interstate commerce." For example, an individual, or a partnership, or a municipality operating a railroad, or an express company, may be a common carrier engaged in the transportation of passengers or property wholly by railroad, and therefore subject to the Act, but is not a railroad company. An industrial corporation may be the owner of a railroad engaged in interstate commerce, but is not a railroad company. Since the Act does not define this term "railroad

company," it is necessary to consider whether the expression includes every corporation of every character which may operate or control a railroad, and if not, to determine whether the Clause applies to the appellee.

In considering this question we start with the fact that in the United States there are corporations which are railroad companies, without any corporate authority whatever beyond the usual powers of a railroad company. Leaving this starting point we encounter instances of corporations which, in addition to the usual powers of a railroad company, possess powers to engage directly or indirectly in industrial enterprises. Passing on, we get to corporations whose industrial powers are as important and characteristic as are their railroad powers. Beyond this point we get to corporations whose railroad powers are granted as an incident to their industrial powers. The appellee is a corporation of this last description, that is, it is a corporation organized to acquire land and mine therefrom anthracite coal and supply the same to consumers, and its railroad powers are incidental to that particular purpose.

Clearly the term "railroad company" as used in the Commodity Clause can not apply to every corporation which operates a railroad. Throughout the country there may be numerous industries, large and small, operating for the accomplishment of their industrial purposes more or less railroad mileage. As to such mileage these corporations may be charged with the duties of a common carrier, and as business may be handled on through bills of lading such corporations would be with respect to such matters carriers subject to the Act to Regulate Commerce. Yet such corporations could not in any just sense be regarded as railroad companies within the meaning of the Commodity Clause.

We do not feel that it is necessary or proper for us to attempt to draw the exact line where the term "railroad company" as used in the Commodity Clause ceases to apply, or to discuss whether its operation should not be confined to those corporations which possess no powers beyond the usual railroad powers, and therefore are accurately and completely described by the term "railroad company." We do submit, however, that in any event the line should

be so drawn as to place this appellee where it belongs, with industrial corporations whose railroad powers are incidental to their industrial functions, and therefore which are not properly described by the term "railroad company" as used in the Commodity Clause.

In presenting this argument we anticipate we shall be met by the suggestion from the counsel of the Government that the purpose of the Commodity Clause was to compel a complete severance of all cases of joint control of transportation and industrial activities, and, therefore, that the Clause should be so construed as to accomplish this purpose. This suggestion, however, is overthrown by the language of the Commodity Clause itself, because that language is inappropriate to accomplish, and wholly fails to accomplish, a comprehensive interference with the joinder under a single control of transportation and industrial activities. This will be made clear by a few striking examples.

While the cases now before the court are supposed to represent the controversy between the anthracite coal companies and the Government, it is noteworthy that the Government is not press-

ing any proceeding against the Philadelphia and Reading Railway Company, which is one of the most important of the anthracite railroad companies. Perhaps the reason is found in the fact that the Commodity Clause does not appear to apply to that Railway Company at all. The Commodity Clause applies only to a railroad company which owns or produces, or has an interest in, property which such railroad company transports. From the Interstate Commerce Commission's "Special Report No. 1, Intercorporate Relationships of Railways in the United States as of June 30, 1906," we find (page 24), that the Reading Company, a mere holding company, owns the capital stock of the Philadelphia and Reading Railway Company, and also the capital stock of the Philadelphia and Reading Coal and Iron Company. Thus, the Railway Company does not own or produce, and has no interest in, the coal of the Coal and Iron Company, and, hence is not reached by the Commodity Clause. The Government presses a proceeding against The Delaware and Hudson Company, which directly owns or leases both railroads and coal properties, but seems deterred by the language of the Commodity Clause from

pursuing the same course with reference to the Reading Company, which does not own directly either a railway or coal properties, but does own all the capital stock in a coal and iron company, and all the capital stock in the railway company which transports the coal.

If the Clause had been intended to accomplish the comprehensive purpose ascribed to the Clause by the Government, it is inconceivable that so obvious and well known a situation would have been excluded from the operation of the Clause. The result is that if a State for adequate reasons wishes to promote industry by combining industrial and transportation facilities under a single control, the Commodity Clause interposes a substantial interference if the State does this in a direct way by creating a single corporation and conferring upon it both transportation and industrial functions, but leaves the State free to accomplish the same thing by creating three corporations, one an industrial company, another a transportation company, and a third a holding company to hold the stock of the two first mentioned. We are not justified in giving an inaccurate application to the Commodity Clause in order to accom-

plish a purpose we may imagine Congress had, when the Clause itself shows that if Congress had any such purpose there was a woeful failure to accomplish it, which cannot be remedied by the courts. The immediate result of adopting the theory of the Government would be to apply the Commodity Clause to this appellee, while leaving entirely free from such application the equally substantial joinder of industrial and transportation activities in the case of the Reading.

Still another illustration shows that the Clause does not disclose any intelligent design to accomplish the disjoinder of transportation and industrial activities now combined by virtue of valid State legislation. The Clause prohibits the transportation of products where the railroad company owns the industry, *but does not prohibit the transportation of the products where the industry owns the railroad!*

Numerous industrial corporations own the capital stock of railroad companies which transport the products of such industrial corporations. This is made clear by the Special Report on Intercorporate Relationships just referred to (page 26 "Class III."). As an illustration,

we find on page 414 of the Special Report a list of the railroad companies controlled through stock ownership by the United States Steel Corporation. Among a large number of such railroads we note the Pittsburg, Bessemer and Lake Erie, 175 miles in length; the Elgin, Joliet and Eastern, 228 miles in length; the Chicago, Lake Shore and Eastern, 138 miles in length; the Duluth and Iron Range Railroad, 211 miles in length; and the Duluth, Missabe and Northern Railway, 238 miles in length. The report shows similar conditions to exist with respect to a large number of other industrial corporations.

Therefore, if a State finds it to the interest of the public to join under a single control industrial and transportation activities, it would not be necessary to form even three corporations, because two would suffice. The State could create the industrial corporation, and a separate railroad corporation, and authorize the former to hold the stock of the latter.

We must deal with the Clause as it stands, without ascribing to it a purpose not disclosed by the language, and which could not be accomplished even if the court should give the

Clause the inaccurate application of relating to companies which are not accurately described by the term "railroad company." It becomes necessary to inquire what sort of a company the appellee is. That it is a coal company with incidental railroad functions will be made clear by a brief recapitulation of its legislative history.

The appellee was incorporated under the name of "The President, Managers and Company of the Delaware and Hudson Canal Company" by a statute of New York passed April 23, 1823.[1]

The preamble to this statute read as follows:

> "*Whereas* it is desirable that a channel should be opened through which the city of New York and other parts of the state may receive a supply of stone coal, which is found in the interior of the State of Pennsylvania; *and whereas* there is a large body of this valuable article, belonging to Maurice Wurts, of the said State of Pennsylvania, situated near the head waters of the river Lackawaxen, which empties into the river Delaware opposite the county of Sullivan, and the legislature of that State has recently passed an act authorizing the

---

[1] Laws of 1823, Ch. 238, p. 305; Rec., No. 559, p. 18.; Rec., No. 565, p. 14.

above-named individual to improve the navigation of the said river ; *and whereas* it is represented that a water communication can be formed between the rivers Delaware and Hudson through the counties of Orange, Sullivan, and Ulster, or some one or more of them, so that a supply of this coal may be had from the source aforesaid ; and a number of the citizens of this State have petitioned the legislature to incorporate a company for the purpose of making such a communication between the said rivers ; "

The statute then provided for the organization of the corporation and the construction and operation of the canal from the Hudson to the Delaware ; empowered the corporation to acquire the rights given by the State of Pennsylvania to Wurts to improve the river Lackawaxen ; and (Section 21) further authorized the corporation to contract with Wurts

" for the purchase of any lands containing stone coal, that he or any other person may own at or near the head waters of the said river ; and after such purchase, to receive a conveyance of and hold the same in like manner as the said Maurice Wurts or such

other person now does, or can do; and it shall also be lawful for the said corporation to apply any part of their capital to the payment and satisfaction of such purchase, and also to the improvement of the said river Lackawaxen, in the same manner as the said Maurice Wurts is authorized to do by the above mentioned act; *and further*, to employ so much capital as they may deem expedient in the business of transporting to market the coal which they may have purchased as aforesaid."

The corporation's powers were enlarged in pertinent particulars as follows:

April 1, 1825, the State of Pennsylvania authorized[1] the corporation, with the consent of Wurts, to improve the Lackawaxen as provided by the Pennsylvania statute of 1823[2], giving such right to Wurts; and to acquire lands in Pennsylvania.

April 20, 1825, the State of New York authorized[3] the corporation to make any contract with

---

[1] Laws of 1825, Ch. 78, p. 141; Rec., No. 559, p. 47; Rec., No. 565, p. 43.

[2] Laws of 1823, Ch. 61, p. 74; Rec., No. 559, p. 37; Rec., No. 565, p. 33.

[3] Laws of 1825, Ch. 220, p. 332; Rec., No. 559, p. 29; Rec., No. 565, p. 25.

Wurts, or others, by which the improvement of the Lackawaxen might be secured, "and by which a sufficient supply of coal for the use and benefit of the said corporation may be obtained," and authorized[1] the corporation to employ such part of its capital

> "as may be necessary to carry into effect any such contract or agreement on the part of the said corporation, or as may be necessary for the transportation to market of the coal which, under any such contract or agreement, may be obtained."

April 5, 1826, the State of Pennsylvania authorized[2] the corporation

> "to construct and maintain such railways or other devices as may be found necessary to provide for and facilitate the transportation of coal to the canal by them to be constructed: *Provided*, That no railway hereby authorized to be made shall be extended further than from the coal beds owned by the said company," to certain designated branches of the Lackawaxen.

---

[1] Laws of 1825, Ch. 220, p. 332; Rec., No. 559, p. 29; Rec., No. 565, p. 25.

[2] Laws of 1826, Ch. 67, p. 204; Rec., No. 559, p. 50; Rec., No. 565, p. 46.

March 12, 1859, the State of Pennsylvania authorized[1] the corporation

> " to extend their railroads, with the necessary branches and fixtures, from the present terminus in the township of Blakely, Luzerne County, to any part of the adjoining township of Providence, in said county of Luzerne, and to any lands now owned or that may be hereafter purchased by them, under the provisions of this act."

April 11, 1861, the State of Pennsylvania authorized[2] the corporation

> " to construct and maintain, not exceeding two miles in length, branch or lateral roads, or track, from or to connect with their present railroad as the same is now erected and constructed, with the necessary branches and fixtures for the purposes of their coal business."

Apparently up to this time the railroads constructed by the corporation had been mere connecting links between its coal mines and the

---

[1] Laws of 1859, No. 123, p. 128; Rec., No. 559, p. 54; Rec., No. 565, p. 49.

[2] Laws of 1861, No. 275, p. 277; Rec., No. 559, p. 55; Rec., No. 565, p. 51.

canal, the canal constituting the only method in existence and the only method authorized for the transportation of the coal to the State of New York.

Thus this corporation was formed for the purpose of mining anthracite coal in Pennsylvania, and supplying that coal to consumers in the State of New York, this being a purely private commercial business. As an incident to this business the corporation was empowered to construct a canal for the transportation of the coal, and to construct "railways or devices" which would serve as connecting links between the corporation's mines and the canal. Clearly this was an instance of a corporation primarily industrial in character, with incidental transportation functions. Up to 1867 the corporation not only had no railroad, except the connecting links referred to, but had no authority to construct or operate a railroad, although at that time railroads and railroad companies were numerous throughout the eastern part of the United States.

May 9, 1867[1], the State of New York enacted

[1] Laws of 1867, Ch. 841, p. 2106; Rec., No. 559, p. 34; Rec., No. 565, p. 30.

a statute, the substantial part of which is as follows:

"SEC. 1. In addition to the powers conferred upon said canal company by an act entitled 'An act to incorporate the President, Managers, and Company of the Delaware and Hudson Canal Company,' passed April 23d, 1823, and the several acts amendatory thereof, *for the purpose of opening and of mining and bringing to market a supply of stone coal*, which is found in the interior of the State of Pennsylvania, it shall be lawful for the said canal company, *for the purpose of increasing said supply of coal*, to construct, own, and maintain railroads within this State, to contract with any railroad corporation now existing or hereafter to be created for the use of its road for the transportation of coal; to lease the railroad, or any parts thereof, of any incorporated company now or hereafter to be created, upon which said canal company may desire to transport coal, and, also, to subscribe for and take stock or bonds of and in any railroad company which they may lease, or with which they may contract, now existing or hereafter to be incorporated, subject to the same rights, restrictions, and

liabilities as other stockholders or bondholders."

Thus we find that the railroad functions conferred upon the corporation nearly forty years after its incorporation were expressly incidental to the purpose of increasing the supply of anthracite coal mined by the corporation itself and of transporting such coal. The New York statute of 1367 did not change the character of the corporation from that of a corporation primarily projected and devoted to the industrial business of mining and supplying coal, but expressly confirmed and perpetuated that character by limiting the corporation's railroad functions to those incidental to the transportation and supply of such coal.

By a New York statute of April 28, 1899,[1] the said Act of 1867 was amended so as to provide, among other things, as follows:

"Whenever it shall appear to the managers of said canal company *that it is able to fulfill the aforesaid purpose of opening*

[1] Laws of 1899, Ch. 469, p. 958; Rec., No. 559, p. 35; Rec., No. 565, p. 31.

> *and of mining and bringing to market a supply of stone coal* which is found in the interior of the State of Pennsylvania *more economically by rail* over its own or other lines than by its canal, it shall be lawful for said company, and it is hereby authorized and empowered, by vote of said managers, to lease, sell, or discontinue to use or maintain said canal, or any parts thereof, which in their judgment are no longer necessary for said purpose."

Here was another distinct confirmation and reiteration of the original and continuing purpose of the corporation, to wit, the "opening, mining and bringing to market" of a supply of anthracite coal found in Pennsylvania. This statute made detailed provisions for the abandonment of the canal, and changed the name of the corporation to "The Delaware and Hudson Company."

After the New York Act of 1867, authorizing the corporation "for the purpose of increasing" the supply of coal mined by it, to construct or lease railroads, the State of Pennsylvania authorized the corporation from time to time to construct other lines of railroad, all of which were

in fact appurtenant and incidental to the corporation's coal business.[1]

It would be difficult to imagine a more striking instance of a great corporation primarily designed to accomplish an industrial purpose of far-reaching importance to the inhabitants of the Middle and Eastern States. For the adequate accomplishment of this purpose it was necessary to confer upon the corporation certain transportation functions, and eventually these transportation functions have taken the shape of railroad functions, but still remain, as expressly shown by statute, to be incidental to the primary industrial purpose of the corporation.

Unless, therefore, the expression " railroad company " in the Commodity Clause is to be taken as meaning every corporation of an industrial character which merely as an incident to its industrial functions operates a railroad, then we submit the Clause should not apply to this appellee. It is perfectly legitimate for an industrial corporation to promote the efficiency and economy of its operations by the construction of

---

[1] Laws of 1870, No. 533, p. 554; Rec., No. 559, p. 59; Rec., No. 565, p. 55. Laws of 1871, No. 701, p. 770; Rec., No. 559, p. 60; Rec., No. 565, p. 56.

railroads when legally empowered to do so. It would be a superlative injustice to treat an industrial corporation as a railroad company because of the operation of a railroad under such circumstances, and then because the industrial corporation is so treated as a railroad company to prohibit the industrial corporation from performing the very transportation functions which alone serve as the inducement to the operation of the railroad.

It should be borne in mind that the Commodity Clause did not contemplate a situation involving solely a railroad function, but contemplated a subject matter involving the function of production, as well as the function of transportation. When a statute contemplates exclusively a railroad function, and prescribes with respect thereto that "railroad companies" shall do certain things, it may well be that that statute should be regarded as contemplating every company that performs that function. For example, if a statute requires a railroad company to equip its locomotives in a specified manner, every company that operates a public railroad is required by that statute to adopt that equipment. But here the statute was con-

templating the industrial function of production, as well as the railroad function of transportation. Therefore, there cannot be the same reason for saying that the statute meant by the use of the term "railroad company" to include a corporation whose primary function is its industrial function. To say that there shall be no transportation by a railroad company of a commodity produced by it, is not the same thing as saying that there shall be no transportation by an industrial company of a commodity produced by it. It is clearly inaccurate, especially when we consider the subject matter of the Clause, to treat the term "railroad company" as applying to a company primarily industrial, and, therefore, it is unnecessary and unjust to give any such construction.

Indeed, we must assume that the change in the Commodity Clause from the expression "common carrier subject to this Act" to the expression "railroad company" was dictated in part by this very consideration of exempting companies which operate railroads as a means of carrying on their industrial pursuits. Throughout the debate in the Senate there was strenuous objection that the Clause applying, (as it

did in its original form), to all common carriers subject to the act would include an industrial corporation which operated a railroad charged with the duties of a common carrier, because with respect to such railroad the corporation would be a "common carrier engaged in the transportation of passengers or property wholly by railroad," and hence would be included by the Commodity Clause. The subsequent abandonment by the last of the numerous Conference Committees which considered the Hepburn Act of the term "common carrier" in the Commodity Clause, and the substitution of the term "railroad company," evidently avoided this difficulty, because while such an industrial corporation would be a common carrier, it would not be a railroad company, even though it operated a railroad, and hence we are justified in the conclusion that this was one of the controlling considerations in bringing about the change.

A further illustration of the injustice of applying the Clause to corporations primarily industrial, and of the purpose of Congress to avoid such injustice, is afforded by the situation of the oil companies operating oil pipe lines.

The Commodity Clause was a part of the Hepburn Act of June 29, 1906. By the same Act

the provisions of the Act to Regulate Commerce were for the first time extended to persons engaged in the transportation of oil, or other commodities, by means of pipe lines, "who," the Act provided, "shall be considered and held to be common carriers within the meaning and purpose of this Act." It was well known that the oil pipe lines were largely owned or controlled by oil producing corporations. In its original form the Commodity Clause applied to common carriers subject to the Act. In that form the Clause would have applied to the oil companies owning pipe lines. It would have been a gross injustice if the statute had made an oil company a common carrier because it operated a pipe line, primarily, of course, for the transportation of its own oil, and then had prohibited the oil company, because it was a common carrier, from transporting its own oil through its own pipes. This injustice was avoided by substituting the expression "railroad company" for the expression "common carrier." Precisely the same injustice would be done to this appellee as would be done to an oil company if this appellee is denied the right to transport its own coal over the railroad which it was

authorized to construct and lease, for the express purpose of accomplishing that very transportation service. An intention to work such an injustice should not be attributed to Congress, and the Commodity Clause can only be made to work such an injustice in this case by giving to the expression "railroad company" an application which is thoroughly inaccurate.

In addition to other reasons why the Commodity Clause should not be given an inaccurate and unnecessary application, we have the important reason that the Commodity Clause is a highly penal statute, and, therefore, in accordance with the well settled rule on that subject, should be strictly construed.

By Section 10 of the Act to Regulate Commerce, of which the Commodity Clause is a part, the appellee, and its officers and agents, severally would be guilty of a misdemeanor for each violation of the Commodity Clause which they commit, aid, or abet, and would be subject to a fine of not to exceed five thousand dollars for each offense. The number of offenses which would result from any effort upon the part of the company to continue to perform its charter obligations, and carry out the policy established

for it, as will be shown, by the States of New York and Pennsylvania, would be so enormous that the amount of possible penalties would speedily run into the millions.

The case is, therefore, one where it is proper, under well settled rules, to ask a strict construction of the Commodity Clause.

Another grave reason for not construing the Clause to apply to this appellee is that such construction unnecessarily overturns a deliberate and long-settled policy jointly entered upon with respect to this appellee by the States of Pennsylvania and New York. The legislation of those two States with respect to this appellee shows a clear purpose to provide for the acquisition and mining of coal in Pennsylvania by a corporation formed for that purpose, and to provide further for the transportation of that coal to the State of New York by the same corporation. The Commodity Clause, if construed to apply to this Company, does not merely impair, and to a large extent destroy, the rights of the individuals who have invested as bondholders and stockholders in the Delaware and Hudson, and the rights of individuals who may have contracted with that Company, but the

Clause utterly nullifies the policy of the States of Pennsylvania and New York with reference to this corporation. Surely an act of Congress ought not unnecessarily to be so construed as to nullify such a policy deliberately adopted and carried out by two States of the Union. The original legislstion is now irrepealable by either of the two States.

As was said in *Turner vs. Turner*, 108 Fed., 785, 787 (a case involving the construction of the bankruptcy law):

> "The court ought not to impute to congress a design to defeat the policy of the state unless the language claimed to accomplish it is so clear and unmistakable that no other construction can be given to it."

It should be borne in mind that the special policy so adopted by the States of New York and Pennsylvania respecting the Delaware and Hudson was based upon the peculiar needs of a highly important, but narrowly localized, situation of supply and demand with respect to an essential commodity. That the anthracite coal situation is a unique situation is recognized by all. The peculiar powers were granted on account of public considerations of vital im-

portance. That peculiar conditions may exist, strictly local and exceptional, and yet of widespread importance to great numbers of consumers, may be illustrated by a single suggestion: The supply of anthracite coal is peculiarly limited, being confined to a restricted and comparatively small area. If the corporation which mines the coal also performs the transportation service, the corporation has, by virtue of its transportation interest, a strong motive to increase the volume and regularity of the supply transported, so as to diminish the average cost of transportation and increase the margin between such cost and the rates it receives for transportation. Therefore, such a corporation is willing to mine veins of coal so thin that the margin of profit thereon would be unattractive to independent operators. The consequence is that such transportation by mining interests results in conserving the natural resources of anthracite coal and benefiting the consumer, whereas under absolutely separate management many thin veins of coal might be passed by entirely, and, if once passed by, they would never thereafter be mined at all.

When in May, 1906, there was sprung on the floor of the Senate the amendment which

resulted in the Commodity Clause, members of Congress had fresh in their minds the decision of this court in the New Haven Railroad case, 200 U. S., 361, where it had appeared that the Chesapeake and Ohio Railroad Company, without authority therefor under its charter (a statute of Virginia), had engaged in the buying and selling of coal produced in West Virginia, where there was a statute prohibiting such transactions by railroad corporations. Thus the prominent illustration before Congress was one falling in the general class of railroad companies, strictly speaking, which engage in commercial activities without authority express or implied. Congress, dealing with the general situation, and not with the exceptions, enacted a statute which would be both inaccurate and seriously incomplete, if applied to the exceptional situation of this appellee. We submit that the court is not required by the language of the statute, or by any consideration of its objects, to make such inaccurate application, thereby involving the federal power in an unnecessary destruction of property rights, and in an unnecessary conflict with State legislation.

We again call attention to the striking

fact that if the appellee were empowered merely to conduct its coal operations and to hold the stock of a separate railway corporation, such an arrangement while not differing *in substance* from the situation as it is, would escape entirely the destructive operation of the Commodity Clause. It is inconceivable that if Congress had intended by the Commodity Clause to destroy what has been for eighty-five years an essential part of the policy of the States of New York and Pennsylvania as to the business of this appellee, the situation would have been left free to permit others to carry on the coal business with a substantially similar control over transportation by a mere change in the form of corporate organization.

Again, to apply the Commodity Clause in this unnecessary manner to the Delaware and Hudson is to work a destruction of property rights of great magnitude, which have existed for nearly a century. To exclude appellee's coal from the only practical channel of interstate transportation is confiscatory, because largely destroying the value of appellee's coal and coal lands. To exclude the interstate coal traffic from appellee's railways is confiscatory, because largely destroy-

ing the value of these railways and equipment. We confidently contend that such confiscation would be unconstitutional. However, even if such unconstitutionality were not clear, but were merely doubtful, it would be the duty of the court to avoid an unnecessary construction of the statute which would develop such constitutional doubts. In pursuance of this duty the Court said in *Harriman vs. Interstate Com. Com.* (decided December 14, 1908):

> "If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits. Knights Templar & Indemnity Co. v. Jarman, 187 U. S., 197, 205."

We submit that the Commodity Clause cannot accurately be applied to this appellee; that its application to this appellee would involve unnecessary interference with State policy, unnecessary destruction of property rights, and unnecessary constitutional difficulties; would further unnecessarily subject the appellee to the precise injustice which was realized and guarded against in respect to oil pipe lines and which we believe

was equally intended to be guarded against in the case of all characteristically industrial corporations ; and would logically result in the destruction of the present rights of numerous industrial enterprises to conduct incidental railroad corporations ; and that all this would be done while other industrial corporations are entirely free from such destructive restriction, because of the accident that their transportation facilities are conducted by separate, but subsidiary, corporations, and while it still remains lawful for other existing capital to control effectually through a different form of corporate organization both industrial and transportation agencies in a much farther reaching manner than that in which the appellee claims the right to control its industrial enterprise and its incidental railroad facilities.

SECOND POINT.

The Commodity Clause is unconstitutional if it be construed to apply to The Delaware and Hudson Company.

I.

The power of Congress over foreign commerce is not the test of its power over commerce among the States.

The Government argues that, by virtue of the power to regulate commerce with foreign nations, Congress has a complete power over, and at will may prohibit, foreign commerce, and claims that Congress has a correspondingly unlimited power over interstate commerce. This argument loses sight of the difference between the subject matters of the two powers. This difference can be illustrated by assuming the existence of a single sovereignty over all the territory in the United States possessing the powers of both the State and Federal Governments. Such a sovereignty would have all the power over foreign commerce which is possessed by

Congress, and would have all the power over domestic commerce which is possessed by Congress and by the State Legislatures; and yet would not have the same power of prohibition with respect to domestic commerce as would exist with respect to foreign commerce. The citizens of this single sovereignty would have a fundamental right to engage in usual and non-injurious commercial intercourse among themselves, but would not have the same fundamental right to engage in commercial intercourse with foreign nations. It would not follow, because the legislature of this single sovereignty could establish an embargo, or prohibit the importation of useful commodities, that, therefore, it could prohibit its citizens from trading among themselves in similar commodities. The legislative power over foreign commerce would be radically different from the legislative power over domestic commerce. There is no trustworthy analogy between the two powers.

That with respect to commerce among the States the power of Congress may be limited by fundamental restrictions which do not apply to its power over foreign commerce, was clearly

recognized in Buttfield vs. Stranahan, 192 U. S., 470, 492, and was well stated by Mr. Justice MOODY in his dissenting opinion in the Employers' Liability Cases, 207 U. S., 463, 521.

II.

The power to regulate commerce among the States is limited by the Fifth Amendment.

The Government also argues, independently of the analogy with reference to foreign commerce, that any action of Congress plainly a regulation of any phase of commerce among the States is by virtue of an express power conferred by the Constitution, and, therefore, is free from the limitations of the Fifth Amendment. Yet, an exercise of the power to regulate commerce among the States has been declared invalid, because in violation of the Fifth Amendment (*Counselman vs. Hitchcock* 142 U. S. 547). In Adair vs. United States, 208 U. S., 161, 180, the court said:

> "We need scarcely repeat what this court
> " has more than once said, that the power

" to regulate interstate commerce, great
" and paramount as that power is, cannot
" be exerted in violation of any funda-
" mental right secured by other provisions
" of the Constitution. Gibbons v. Ogden,
" 9 Wheat. 1, 196; Lottery Case, 188 U. S.
" 321, 353."

The power to regulate commerce among the States is of no higher quality than the power of each State to regulate its intrastate commerce, and its purely internal affairs of all sorts. This court repeatedly has declared State regulations of intrastate commerce, and of other internal affairs, invalid, because in violation of the Fourteenth Amendment. The Fourteenth Amendment, which is a limitation upon the power of the States, is no more authoritative than the Fifth Amendment, which is a limitation upon the power of Congress.

" While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth. It is true that by the provision in the body of the instrument Congress has power to regulate commerce,

> and that the act of Congress referred to in the cases cited (the Anti-Trust Act of 1890) was passed in pursuance of that power. But even if the Fifth Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the Fifth Amendment protects fundamental personal rights." (*Carroll vs. Greenwich Ins. Co.*, 199 U. S., 401, 410).

A State legislature cannot prescribe intrastate rates for a common carrier which are unreasonably low, because such rates would deprive the carrier of its property without due process of law, contrary to the Fourteenth Amendment. But according to the argument of the Government no corresponding limitation by virtue of the Fifth Amendment rests upon Congress, and it is free to prescribe confiscatory interstate rates for a common carrier, because the power of Congress in the premises is derived from the commerce clause of the Constitution!

III.

The courts are authorized and required to enforce the Fifth Amendment.

1. IT IS THE RIGHT AND DUTY OF THE COURT TO DECIDE WHETHER A STATUTE OF CONGRESS EXCEEDS AUTHORIZED REGULATION AND ARBITRARILY INTERFERES WITH LIBERTY OR PROPERTY, AND THE QUESTION IS FREQUENTLY ONE OF DEGREE.

The corresponding propositions with respect to the validity, under the Fourteenth Amendment, of State legislation are clearly settled.

The legislative determination as to what is a proper exercise of its police powers is subject to the supervision of the courts (*Lawton vs. Steele*, 152 U. S., 133, 137); it is a judicial question whether a legislative enactment undertaking to regulate a useful business enterprise is an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property (*Dobbins vs. Los Angeles*, 195 U. S., 223, 236); in every such case the question necessarily arises whether the enactment is a fair,

reasonable, appropriate exercise of the police power, or is an unreasonable, unnecessary, arbitrary interference with individual rights, and not only must the end be appropriate and legitimate, but the legislation must have a reasonable, direct relation to that end (*Lochner vs. New York*, 198 U. S., 45, 56, 57. See, also, *Mugler vs. Kansas*, 123 U. S., 623, 661; *Chicago, etc., R. Co. vs. Drainage Commissioners*, 200 U. S., 561, 593: *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362.)

The question before the court in such cases is frequently a question of degree.

> "A statute, or a regulation provided for therein, is frequently valid, or the reverse according, as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action" (*Wisconsin, etc., R. Co. vs. Jacobson*, 179 U. S., 287, 301).
>
> "And the validity of a police regulation, whether established directly by the State, or by some public body acting under its sanction, must depend upon the circumstances

of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose" (*Chicago, etc., R. Co. vs. Drainage Commissioners*, 200 U. S., 561, 592).

"Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain" (*Martin vs. District of Columbia*, 205 U. S., 135, 139).

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached" (*Hudson County Water Co. vs. McCarter*, 209 U. S., 349).

The foregoing principles have been established with respect to State legislation, as affected by the Fourteenth Amendment. The Fifth Amendment, however, imposes as high an

order of restraint upon Congress as the Fourteenth Amendment imposes upon the States. Within their sphere the States are as sovereign as is the Federal Government within its sphere. Congress is no more superior to the Federal Constitution than are State Legislatures superior to that instrument. Therefore, it must result that the same principles control the courts in determining whether Congressional legislation violates the due process clause of the Fifth Amendment as control in determining whether State legislation violates the due process clause of the Fourteenth Amendment. See quotation from *Carroll vs. Greenwich Ins. Co.*, 199 U. S., 401, 410, *supra*, pages 41 and 42.

In *Twining vs. State*, 211 U. S., 78, 101, the court declared with respect to the due process provisions of the Fifth Amendment and of the Fourteenth Amendment that if any different meaning of the words could be conceived " none has yet appeared in judicial decision."

The doctrine that Congress has a wide choice of means to accomplish legitimate objects of Federal legislation is sometimes mistakenly cited as an argument against the power of the courts to hold legislation invalid because depriv-

ing persons of liberty or property without due process of law. The two propositions are entirely distinct. The frequently employed expressions to the effect that Congress has a wide discretion as to means originated in cases (*e. g.*, M'Culloch vs. The State of Maryland *et al.*, 4 Wheaton's Rep., 316, 421, 423), where the Fifth Amendment was not involved and where the court was considering whether specific legislation was embraced in the enumerated powers of Congress and its authority to pass all laws "necessary and proper" to carry those powers into execution. Since Congress has no legislative power except what is delegated to it by the Constitution, an affirmative warrant must be found in the Constitution for all legislation. Since the Constitution in delegating legislative power to Congress describes the power by an enumeration of the objects of Federal legislation rather than by an enumeration of the means by which these objects may be accomplished, the courts in considering whether specific legislation was within the enumerated powers have declared that if the end be legitimate it rests largely with Congress to select appropriate means. But such expressions do not mean that Congress may in

accomplishing even an authorized object employ means which, contrary to the Fifth Amendment, deprive persons of liberty or property without due process of law.

Certainly Congress, which has no powers except those that are enumerated in the Constitution, has no wider choice of means than a State legislature which has all conceivable legislative power both as to ends and means, except so far as prohibited by the State Constitution or by the Federal Constitution. Yet this wide choice of means enjoyed by State legislatures has never prevented the courts from declaring invalid legislation violating the due process clause of the Fourteenth Amendment.

While Congress has a wide power of choice of means, it has no power to choose means which violate the Fifth Amendment. As was said by this court in Union Bridge Company vs. United States, 204 U. S., 364, 397 :

> " If the means employed have no real substantial relation to public objects which the Government may legally accomplish ; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms, and interfere for the

protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

There is no basis for the suggestion that the police power of the States is subject to a measure of judicial control different from the measure of judicial control applicable to the commerce power of Congress. It is merely confusing to attempt to draw distinctions between the police power and the power over commerce, because the two terms embrace much in common. While the term "police power" is more frequently used with reference to State powers, it is equally applicable to Federal powers, so far as Federal powers exist. The police power embraces regulations designed to promote the public convenience, or the general prosperity, as well as regulations designed to promote the public health, morals, or safety (*Chicago, etc., R. Co. vs. Drainage Commissioners*, 200 U. S., 561, 593). The distinguishing characteristics of the police power are that "it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion" (*Freund Police Power*, Section 3). By virtue of

the enumerated powers of Congress the Federal Government exercises the police power, much of it by virtue of the Commerce Clause (*Freund Police Power*, Sections 65, 66). The State may exert the police power with respect to intrastate commerce, and Congress may exert the police power with respect to commerce among the States. Clearly, a Congressional regulation under the commerce clause of the Federal Constitution is subject to the same measure of judicial control as could be asserted by the courts with respect to a corresponding State regulation concerning intrastate commerce.

2. LEGISLATIVE REGULATIONS AFFECTING RAILROADS, AND DESIGNED TO PROTECT THE PECUNIARY INTEREST OF SHIPPERS, AFFORD FREQUENT OCCASIONS FOR JUDICIAL INTERVENTION, AND REQUIRE A CAREFUL WEIGHING OF THE CONFLICTING INTERESTS INVOLVED.

To promote the public welfare by preventing railroad companies from oppressing the shipping public, Legislatures may prescribe the maximum rates which may be charged by railroad companies for transportation. Although such an enactment is a manifestly appropriate exercise of the legislative power with respect

to commerce, it is well established that the courts will examine the facts, weigh the rights of the shipping public on the one hand, and the rights of the railway companies on the other hand, and in that way determine whether the legislation is valid, or amounts to a deprivation of property without due process of law (*Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S., 362; *Smyth vs. Ames*, 169 U. S., 466; *C. M. & St. P. Ry. Co. vs. Tompkins*, 176 U. S., 167).

In *Lake Shore & Michigan Southern Ry. Co. vs. Smith*, 173 U. S., 684, the court declared that the statute involved (providing for the sale of family mileage books at reduced rates), was unconstitutional, because it amounted to a serious interference with the railway companies' affairs on the one hand, and, on the other hand, did not materially promote the public convenience in any proper sense.

The character of the judicial power with respect to the question whether legislation affecting the duties of railway companies to the public constitutes a deprivation of property without due process of law, has been stated recently by this court as follows:

"As the public power to regulate railways and the private right to ownership of such property co-exist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment" (*Atl. Coast Line Co., vs. North Carolina Commission*, 206 U. S., 1, 20).

There is a manifest distinction between all such legislation which is designed to protect, or promote, the pecuniary interest of shippers and, on the other hand, legislation, either State or Federal, to protect the public health, safety or morals; for legislation directed against things which are detrimental to the public health, safety, or morals, will prevail despite a very large degree of impairment of the rights of property or liberty, as is illustrated by the cases

of *Mugler vs. Kansas*, 123 U. S., 623; *Holden vs. Hardy*, 169 U. S., 366; *Lottery Case*, 188 U. S., 321.

IV.

The purpose of the Commodity Clause is to remove a temptation to violate the unjust discrimination provisions of the Act to Regulate Commerce.

The Commodity Clause has no relation to the prevention of monopolies, or restraints upon trade, unless indirectly as a consequence of the prevention of unjust discrimination. The Clause does not deal with any combination of, or agreement between, interstate carriers. Nor does it deal with any combination of, or agreement between, producers of commodities. The legality of, opportunity for, and inducement to, combinations or agreements between interstate carriers, and combinations or agreements between producers of commodities, remain the same under the Commodity Clause as before its passage. A combination between an interstate carrier and a producer of a commodity cannot in itself produce a monopoly, or operate as a restraint upon trade,

because there is no competition between the carrier, as such, and the producer, as such.

The evident and avowed purpose of the Commodity Clause is to aid the prohibitions of the Act to Regulate Commerce against unjust discriminations or undue preferences in rates and facilities. The Clause does not directly deal with such prohibitions, but proceeds exclusively on the theory that if railroad companies are not permitted to transport commodities (other than timber and its products), except for their own use as common carriers, one temptation to discriminate against other shippers of commodities (other than timber and its products), will be removed. There is no pretense that unjust discrimination, or undue preference, against other shippers *necessarily* results from the fact of the transportation by a railroad company of commodities in which it is interested.

Emphasis must be laid upon the fact that the thing which the Commodity Clause prohibits is not itself unjust discrimination, or an improper action in any aspect. Any act of unjust discrimination is a violation of the carrier's duty to treat all alike under similar circumstances, but the mere act of a railroad company in trans-

porting a commodity which it owns is in itself natural and reasonable, and cannot be regarded as a violation of any duty, legal or moral, which may exist independently of the Commodity Clause.

We must test, therefore, the reasonableness of the prohibition of the Commodity Clause by its relation to the purposes of the Act to Regulate Commerce, and by the effects of such prohibition.

V.

The Act to Regulate Commerce was designed to promote the transportation of all traffic upon equal terms for all persons interested therein.

The Act to Regulate Commerce was not designed to destroy traffic of railroad companies, or to deprive any owners of property of the right to have the same transported. On the contrary, the underlying idea of the Act is that the railroads shall enjoy all traffic afforded by the commerce of the country, and that every person interested in any such traffic shall have an equal right to have the same transported.

Referring to the scope and purpose of the Act, this court has said:

> "So, too, it could not be readily supposed that Congress intended when regulating such commerce to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation" (*Texas and Pacific Railway vs. Interstate Commerce Commission*, 162 U. S., 197, 211).

Such being the purpose of the Act, we shall now consider whether a fair and reasonable means to the accomplishment of that purpose is afforded by a statute which, in order to avoid the possibility of one out of many temptations to discriminate unjustly in the transportation of traffic, prohibits absolutely the transportation of the traffic in whose favor it is assumed there might be unjust discrimination. It will be convenient to pursue this inquiry by viewing the effect of the Commodity Clause, first, upon the railroad company

as a transportation agency, and, second, upon the commodities covered by the Clause, and upon all persons interested in such commodities.

VI.

With respect to the Railroad Company as a transportation agency, the effect of the Commodity Clause is to destroy a large part of its railroad business, and, therefore, a large part of the value of its railroad property.

Taking coal as an illustration, the theory of the Commodity Clause is that if a railroad company transports coal in which it has an interest, there will be danger of discriminating against persons interested in other coal. Therefore, to avoid this danger, the Clause prohibits absolutely the transportation, on any terms, of the coal which, it is feared, might be unjustly favored. We submit that such a measure is arbitrary, and has no reasonable relation to the thing sought to be accomplished. There always have been certain forms

of traffic in favor of which railroad companies were under an especial temptation to discriminate unjustly. For example, traffic originating at a highly competitive point was much more likely to be carried at secret reduced rates than traffic originating at a non-competitive point. Surely, this condition could not justify a prohibition that the railroad company should not carry at all the traffic originating at the highly competitive point. So, too, a railroad company is subject to an especial temptation to discriminate unjustly in favor of a large shipper controlling the bulk of the traffic in his particular line, but this condition could not justify prohibiting the railroad company from transporting property at all for such a shipper.

Any such prohibition would be regarded as arbitrary and unconstitutional, viewed from the standpoint of the railroad company, because the prohibition would be an irrational and disproportionate interference with the right of the railroad company to transport the traffic which offers for transportation.

It appears that the daily business of this appellee in the transportation of coal from one State to another, which the Govern-

ment claims is prohibited by the Commodity Clause, averages about twelve trains of thirty-seven coal cars each, and aggregates about 4,300,000 gross tons of anthracite coal per year. To deprive this appellee of this amount of business would amount to wanton confiscation of its property as a transporter of freight. To a very large extent the appellee's railroads and rolling stock were created and are maintained for the purpose of carrying this traffic, and its destruction would mean the destruction of a large part of the value of such railroad property.

VII.

With respect to the commodities themselves, and all persons interested therein, the effect of the Commodity Clause is to destroy the right to transportation, and, therefore, the value of useful commodities lawfully owned.

1. THE CLAUSE RECOGNIZES THE LEGALITY OF THE RAILROAD COMPANY'S OWNERSHIP OF THE COMMODITIES WHOSE TRANSPORTATION IS PROHIBITED.

The Clause does not prohibit a railroad company from owning or producing any commodity. Therefore, such ownership or production is not made illegal, even if Congress had the power to make such ownership or production illegal.

If Congress has not the power to prohibit a railroad company to own commodities, or to produce the same, then it is clear that the ownership and production thereof in pursuance of State authority are legalized by the laws of the various States, and are as legal and unassailable as any right enjoyed by any corporation or any individual.

If Congress has the power to prohibit such ownership or production, the right to such ownership and production remains equally legal and unassailable, because Congress has not undertaken to prohibit it. The language of the Commodity Clause acquiesces in such ownership and production.

2. THE COMMODITIES WHOSE TRANSPORTATION IS PROHIBITED ARE INNOCENT, USEFUL, AND ESSENTIAL TO THE PUBLIC.

The commodities whose transportation is prohibited are not analogous to lottery tickets,

or to intoxicating liquors, or to other articles, whose transportation or sale may be injurious to society. The Commodity Clause embraces every thing which can be transported by rail, excepting only timber and its products.

3. THE PROHIBITION TO TRANSPORT SUBSTANTIALLY IMPAIRS, AND IN MANY CASES PRACTICALLY DESTROYS, THE VALUE OF COMMODITIES OWNED OR PRODUCED, AND THE VALUE OF LANDS OWNED, BY RAILROAD COMPANIES.

The right to have commodities transported is an essential element in the value of the commodities. Except for the personal use of the owner or producer, a commodity is practically valueless, unless it may be transported to the place where a prospective purchaser would wish to use it.

Generally speaking, the only commercially feasible method of transportation is transportation by rail. A denial of the right to transportation by il is a fatal blow at the value of the commodity. The overshadowing importance of rail transportation, and the public necessity for insuring rail transportation of all property on equal terms, led to the Act to Regulate Com-

merce, which in its original form dealt only with rail transportation, and rail and water transportation under through arrangements.

If the right to rail transportation is an essential element in the commercial value of commodities in general, it is clear that the right to interstate rail transportation is an important part of that element, and that part is as fully protected against destruction as is the whole.

The Government's contention is that the foregoing considerations as to the importance of the right to transportation by rail are not relevant here, because the prohibition is not against all rail transportation, but merely against such transportation by the particular railroad company which is interested in the commodity. But, generally speaking, the limited prohibition is as destructive as a general prohibition against all rail transportation would be. The theory of the Act to Regulate Commerce is that most railroad stations, and most railroad traffic, are necessarily dependent upon a single railroad which with respect to such localities and such traffic has a monopoly; that such traffic cannot move at all except by such railroad; and, hence, that it is necessary in the public interest to insure the transporta-

tion by each railroad thus necessarily monopolizing a portion of the traffic, of all such traffic for all persons upon equal terms. The record shows that the railroads operated by the appellee are the only railroads connected with its coal mines, and constitute the only reasonable, practical and conveniently available means of transporting such coal to market. (Record, No. 559, page 13; Record, No. 565, page 9).

Independently of what is shown in the records in these cases, the courts will judicially notice the universally understood condition that a very large part of all the commodities which are important industrially and commercially are accessible only to a single railroad, and enjoy no other practical means of transportation. Therefore, in most cases, to prohibit a railroad company which owns or produces commodities from transporting the same by its own line is equivalent to prohibiting such transportation absolutely.

This destruction of an essential element in the value of a commodity like coal equally destroys the value of the land which produces that commodity. The value of appellee's coal lands in Pennsylvania is largely destroyed if the coal may not be transported to other States.

4. THE GOVERNMENT CONTENDS THAT THE PROHIBITION IS NOT CONFINED TO THE RAILROAD COMPANY, BUT FOLLOWS THE COMMODITY INTO THE HANDS OF ANY PURCHASER FROM THE RAILROAD COMPANY.

The Government contends that the Commodity Clause does not confine its prohibition to the railroad company, but is an absolute prohibition upon any purchaser from the railroad company. According to this theory, a railroad company in prosecution of its strictly lawful industrial business may have produced a commodity, and may have sold the same to an individual in the same State, and neither party to the transaction may have had any purpose at the time of sale of sending the commodity to another State, yet the prohibition continues and imposes a permanent disability with respect to that commodity, making it unlawful for it to be transported at any time to another State by the railroad company producing the commodity.

5. THUS THE COMMODITY CLAUSE ARBITRARILY DESTROYS ALL RIGHT TO TRANSPORTATION OF A VAST AMOUNT OF PROPERTY, AND DOES THIS ONLY AS A MEANS TO THE END OF SECUR-

ING TO ALL AN EQUAL RIGHT TO HAVE ALL PROPERTY TRANSPORTED UPON EQUAL TERMS.

We are confronted with this remarkable situation: Congress has deemed it essential in the interest of all producers and of all consumers to pass the Act to Regulate Commerce for the purpose of insuring the transportation of all articles of traffic for all persons upon equal terms, and now in pretended aid of that statute Congress absolutely prohibits any transportation whatever of any commodities whatever (except timber and its products), on any terms whatever, in all cases where those commodities are lawfully owned or have been lawfully produced by a railroad company, no matter how important such transportation may be to the lawful owners or lawful producers of such commodities, or to the members of the general public who desire to use or deal in those commodities. Thus every article of traffic (except timber and its products), which is characterized by the fact of being lawfully owned, or having been lawfully produced, by a railroad company, is denied all the protection which the Act to Regulate Commerce was designed to give to all articles of traffic.

The arbitrary character of the Commodity Clause may be further illustrated by the following supposed case:

Assume that Congress should enact a statute to the following effect:

> "Whereas, a monopoly in manufacture gives the manufacturer a control over railroad traffic which subjects interstate carriers to a strong temptation to discriminate unjustly;
>
> "Be it enacted, that if any manufacturer of any commodity shall produce more than fifty per cent. of the total output of such commodity in the United States, no such commodity so produced by such manufacturer shall be transported from the State of its production to any other State."

It is submitted that such a statute would be strictly analogous to the Commodity Clause. The supposed case does not make the manufacture unlawful, but prohibits interstate transportation of the thing thus lawfully manufactured. The same situation is presented by the Commodity Clause. The justification for a statute like the one supposed would be as strong as is any justification for the Commodity

Clause. Evidently if the Commodity Clause can be upheld, then through such control of interstate transportation Congress has the power to control every phase of commercial affairs, whether property rights are destroyed or not, and whether the rights of States are invaded or not.

Another aspect of this matter deserves attention.

Every railroad company in the course of its railroad business partially wears out enormous quantities of material, such as rails, bridges, locomotives and cars, and parts thereof, tools, etc. Such material when so worn as to be no longer useful to the railroad company still has an important market value as second-hand or "scrap" material. The railroad company to dispose of this material must transport it to market. Much of this material, having been manufactured by the railroad company itself, would fall in the class of commodities produced by the railroad company, and the rest of such material would fall in the class of commodities in which the railroad company has an interest. Thus the Commodity Clause, if valid, prohibits the transportation of all such material by the railroad

company. The resulting inability of every railroad company to transport to market the vast amounts of second-hand or "scrap" material which annually accumulate would be a very serious difficulty, without any public advantage whatever. Thus we have another illustration of the arbitrary character of the Commodity Clause in its interference with legitimate railroad operations.

Railroad companies have always found it convenient and economical to manufacture in their own shops many articles needed in the construction and operation of their railroads. As a mere incident to this business it is feasible from time to time to do outside work in those shops, so as to be of some advantage to the railroad companies and of vast advantage to the persons for whom the work is done. Railroad shops being scattered along the lines of railroad throughout the country, often in places remote from industrial centres, afford convenient and sometimes the only opportunities for repairs and minor construction work essential to local interests, both public and private. Frequently saw mills, coal mines, rock quarries, and other forms of industry, and also such institutions as

municipal water works, are largely dependent upon some nearby railroad shop, which may be the only accessible shop with facilities to do needed repair work. The Commodity Clause, if valid, destroys all such incidental activities on the part of railroad companies, if a state line must be crossed, except where the output of the shops can be taken to destination by some form of transportation other than rail. No reason can exist for such an interference with the salutary arrangements made by railroad companies to meet emergencies of this character.

Again, a railroad company frequently finds it convenient and economical, and at times absolutely necessary, to produce supplies necessary in its operation. For example, it may operate coal mines or oil wells to obtain fuel. Frequently such operations produce a surplus or grade of material which cannot be conveniently or economically employed by the railroad company, but which can be disposed of profitably, to the mutual benefit of the company and of the consumer. Yet the Commodity Clause destroys all right to engage in these legitimate and beneficial incidental operations, thereby increasing the cost of railroad

operations, and denying to every consumer the right to enjoy the by-products or surplus products of the enterprise. Such arbitrary consequences cannot be ignored when the court is seeking to determine whether the legislation in question constitutes legitimate regulation or arbitrary interference with property rights.

VIII.

The Commodity Clause is unconstitutional because it has no reasonable relation to a legitimate object and because it is an arbitrary interference with property and liberty.

As to the transporter of property it is unreasonable, unnecessary and arbitrary for the legislature to say in effect: "For fear you may unjustly discriminate in favor of certain articles of commerce (innocent in themselves and a vitally important part of your traffic) I forbid you to transport such articles at all."

As to the owner of the articles it is unreasonable, unnecessary and arbitrary for the legislature to

say in effect: "For fear that there may be unjust discrimination in your favor in the transportation of such articles, I absolutely deprive you of all right to such transportation."

As to dealers in, and consumers of, the articles it is unreasonable, unnecessary and arbitrary for the legislature to say in effect: "For fear there may be unjust discrimination with respect to the transportation of such articles, I deprive you of the right to transport them or to have them transported to you."

The utter lack of any reasonable relation of such means of regulation to a legitimate end, is doubly apparent when we consider that the supposed end of this regulation is to promote the enforcement of the Act to Regulate Commerce, which contemplated the transportation by railroad companies of all property which any person had an interest in having so transported, and which was designed to secure to every person, owner, producer, dealer or consumer, the right to have all property transported upon equal terms. To such an end no direct, substantial or reasonable relation is sustained by a prohibition whose effect is to prevent absolutely the transportation of a vast volume of innocent

articles of commerce whose transportation is essential to the interests of the owner and producer, and equally so to dealers and consumers, and, indeed, to the general public welfare.

In addition to the means being wholly without relation to, and inconsistent with the end, it is clear that the means adopted necessarily constitute an absolute destruction of property interests of far-reaching magnitude, including the right of the railroad company to use its railroad property for the transportation purposes for which it was created, the right of the owner of the commodities to enjoy the substantial benefit of such ownership, and the right of all dealers and consumers to obtain and enjoy such commodities.

Thus, from every standpoint, it becomes incumbent upon the court to declare that the Commodity Clause is a substantial violation of constitutional rights and is, therefore, void.

IX.

This situation is not affected by the proposition that theoretically the railroad companies had the right to sell their mines or factories within a limited time.

1. SUCH PROPOSITION INVOLVES THE ESTABLISHMENT OF THE POWER OF CONGRESS TO COMPEL SUCH ALIENATION, WHICH POWER CONGRESS ITSELF HAS INDICATED IT DOES NOT POSSESS; AND THIS COURT NEED NOT PASS UPON THE QUESTION UNTIL IT HAS THE CONCRETE JUDGMENT OF CONGRESS THAT THE POWER EXISTS, AND SHOULD BE EXERCISED IN SOME SPECIFIED WAY.

Nor is the situation affected by the suggestion that the evils wrought by the clause can be avoided by sales of the railroad companies' industrial properties. Certainly such an argument can have no validity unless it be established that Congress has the power to compel railroad companies to divest themselves absolutely of their industrial properties within the time specified in the Commodity Clause. This court need not attempt to decide this constitu-

tional question until it has the benefit of the judgment of Congress, that Congress has the power to compel such divestiture. At the present time the situation is that Congress has refused to compel railroad companies to divest themselves of their industrial properties, because of the doubt Congress had as to its power so to legislate.

In passing upon questions of legislative power, the courts are influenced to uphold the legislative action upon the theory that both houses of the legislature and also the executive department have expressed a deliberate judgment that the action taken is within the legislative power. Here, however, is a reasonably clear expression of legislative judgment that it is not within the Federal legislative power to interfere with the ownership of property or the manufacture of commodities. It is because Congress was of this opinion, that it abandoned the original plan of compelling the divesture of ownership, and instead prohibited the act of transportation, being actuated to this latter course by the mistaken belief that Congress has the power, at will, to give or withhold the right to engage in interstate commerce. That Congress was in

error in this assumption is shown by the opinion of the court in the Employers' Liability Cases, 207 U. S., 463, 502, where the court emphatically condemned this conception which "treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress."

These considerations emphasize the inverted character of this legislation. Up to the enactment of the Commodity Clause every legislative and every judicial condemnation of combining transportation and industrial functions has proceeded upon the idea that a common carrier should not engage in industrial activities, but should confine itself to the business of a common carrier. The Commodity Clause, however, while acquiescing in the industrial activities of the common carrier prohibits it, to a very important extent, from continuing its functions as a common carrier!

If Congress, once disabused of the idea that it has a dispensing power to give or withhold at pleasure the right to engage in interstate commerce, comes to consider the question of compel-

ling common carriers to confine themselves to the function of carrying all property whose transportation is desired, and to abandon industrial activities, the grave questions involved can be dealt with in a logical manner. It is not believed that Congress and the Executive, upon consideration of that precise point will reach the conclusion that the power exists to compel any such divestiture of existing property rights. But if that conclusion is reached and acted upon, the court will have for the first time the direct judgment of Congress and the Executive that the legislative power of the Federal Government has the power to compel railroad companies to divest themselves of their industrial properties, and will be able for the first time to deal with concrete legislation directed to that specific end.

2. THE COMMODITY CLAUSE CANNOT BE TREATED AS THE EQUIVALENT OF A FEDERAL STATUTE COMPELLING RAILROAD COMPANIES TO ALIENATE PROPERTY, FOR THE ACQUISITION AND DEVELOPMENT OF WHICH SUCH COMPANIES WERE FORMED.

Nor can the Commodity Clause be treated as

the equivalent of a statute compelling railroad companies to alienate property. Such alienation, for example, of coal property is an entirely different thing from the abandonment of the interstate transportation of coal. Among other purposes for which appellee was incorporated, and to the carrying out of which its stockholders looked when they became members of the corporation, were (1) the acquisition and development of coal properties, and (2) the interstate transportation from such properties of coal mined by it. Now, a prohibition of purpose No. 2 is not a prohibition of purpose No. 1. The fact that prohibition of purpose No. 2 may be so preposterous that the corporation is not required to obey literally and retire from the corporate function of interstate transportation of such coal, does not require the corporation to retire from the other corporate function of owning and developing coal lands and would not authorize such last mentioned retirement.

Where a corporation has a charter right to own coal lands and mine and sell coal, and a charter right to operate a railroad, the enforcement of the Commodity Clause might involve (*a*) a retirement from all coal business resulting

in the interstate transportation of coal, thereby confining the corporation's activities in the coal business to supplying the demand for coal within the State where its mines are located; or (*b*) an abandonment of the corporation's fundamental purpose of operating coal properties; or (*c*) an abandonment of the corporation's fundamental purpose of operating a railroad. The first mentioned of these courses is the only one which the Clause requires; in the case of the anthracite companies would practically deny to all consumers outside of Pennsylvania their right to obtain anthracite coal by rail; and is so preposterous in its nature and effects upon the public, as well as upon the bondholders and stockholders of the corporations involved, that its adoption could not have been seriously contemplated by Congress. The Clause affords no authority for the adoption of either of the other two courses mentioned, and certainly no greater authority for the abandonment of the corporation's coal operations than for the abandonment of its railroad operations. In some instances the abandonment of railroad operations might be a less radical step, and a less injurious step, than the abandonment

of coal operations. In many instances the choice between these two courses would be seriously debatable, and either course adopted in the absence of express and valid statutory authority would be open to attack by stockholders and others having a legal interest in the corporation carrying out the fundamental purposes for which it was organized.

If the legal rights of the stockholders and others to hold the corporation to the carrying out of the fundamental functions for which it was formed can be modified by legislation, certainly the corporation thereby derives power to make only the very modification which such legislation directly and positively requires. The corporate charters do not vest in the directors, or in a majority of the stockholders, or (as against other interested persons) in all the stockholders acting unanimously, discretion to abandon any fundamental corporate purpose, and it would only be by virtue of an unlimited discretion to that effect that the corporation, through any form of corporate action, could substitute the abandonment of one corporate function, whether that function be the operation of coal mines or the operation of a railroad, for the

specific thing required by statute, to wit : the abandonment of the interstate transportation of coal mined upon such properties. If the statute should require specifically the alienation of coal properties, and, therefore, the abandonment of that corporate function, the legal complications, and opportunities for, and inducements to, litigation, on the part of dissenting stockholders of different classes, or on the part of bondholders, or others interested, would be enormous, but nothing to compare with the complications and litigation which would likely result from the corporation attempting to abandon a corporate function whose abandonment is not specifically required by statute.

Certainly in a matter involving such novelty and difficulty, and private and public interests of such transcendent importance, the court must deal with the statute exactly as it is, and cannot substitute for an absurd and impracticable requirement which Congress has enacted some other requirement which Congress has not enacted.

3. SUCH POWER OF COMPULSORY ALIENATION OF INNOCENT PROPERTY LAWFULLY OWNED IS NOT POSSESSED BY EITHER THE FEDERAL OR THE STATE GOVERNMENTS.

We submit that no power exists either in Congress or in a State to compel the alienation of innocent property lawfully owned, unless such alienation be for a public purpose and adequate provision be made for just compensation.

If an individual owns a tract of land, neither the State nor the Federal Government can prohibit him from selling that tract of land, or compel him to sell it. Either step would be wholly inconsistent with the right of property, which necessarily involves control over the power of alienation. "While an alien may be prohibited from acquiring land, yet if the title is lawfully vested in him under a former law allowing purchase, he cannot subsequently be required to sell within five or six years, since this would unduly limit his right of alienation" (*Freund Police Power*, Section 516).

The situation would not be affected by the fact that the land was lawfully held by an aggregation of individuals acting together under articles of partnership.

Nor would the situation be affected by the fact that the land was held by an aggregation of individuals acting together under articles of incorporation. Such articles of incorporation would constitute a contract between the individual members of the corporation. The right of an individual to property held by him individually is of no higher dignity than the property right of a member of a corporation in the property of the corporation as determined by the charter and by-laws of the corporation, subject only to such power of alteration or repeal as may exist in the sovereignty which created the corporation.

In this, as in many other constitutional problems, the question of degree may play an important part. Some restraint upon, or dictation in regard to, the power of alienation with respect to property injurious to the community, or with respect to property of relatively small importance to the owners, might be permitted; whereas a compulsory alienation of property innocent in itself, which constitutes a vital part of the business of the owners, would not be sanctioned.

> " At any rate, difference of degree is one of the distinctions by which the right of the

> legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain." Rideout vs. Knox, 148 Mass., 368, 372.

In the present case, for over three-quarters of a century the coal property of the appellee has been held under a charter and enabling acts (which neither the State of New York nor the State of Pennsylvania can repeal) constituting a contract between the stockholders for the very purpose of the ownership and operation of such property. The compulsory alienation of the property would destroy a most vital part of the entire scheme of business with respect to which, and upon the faith of which, the stockholders have entered into contract relations with each other, and, in addition, by reason of the forced sale resulting, would largely confiscate the value of the property affected. The compulsory alienation of the appellee's railroad interests would not involve any more serious disruption of the corporation. We submit that any

such compulsory alienation would constitute a direct and destructive interference with an essential right of property, contrary to the Fifth Amendment.

4. VIEWED AS A STATUTE REQUIRING SUCH ALIENATION, THE COMMODITY CLAUSE IS UNREASONABLE AND ARBITRARY, AND IS WHOLLY UNWORKABLE.

If a legislative body has the power to compel such an alienation, and such a breaking up of contract relations, adequate machinery should be provided to render feasible what is attempted. Every corporation exists by virtue of a charter which constitutes a contract between the stockholders. The corporation has no right to abandon a principal and vital part of the business for the conduct of which the stockholders contracted with each other, unless the assent of the stockholders be secured in some way validly provided by a sovereignty having jurisdiction to make such provision. Congress has not attempted to provide any machinery in this respect, and, of course, no such machinery is provided by the States by virtue of which the various railroad companies exist. Therefore, there arises the opportunity for pro-

tracted litigation which would likely extend far beyond the period within which the Commodity Clause contemplated that all necessary arrangements should be completed.

Again the rights of mortgage bondholders are not provided for by the clause. If Congress has the power to compel such alienation, certainly it ought to provide some authoritative way of disposing of the controversies with mortgage bondholders within the limit of time which is established by the clause. It is utterly unreasonable for Congress to require the railroad companies to do a certain thing in a certain time when the contract conditions and the conditions of human nature are such as to make it perfectly apparent that the thing could not possibly be done in that time.

Again, the clause involves the affected companies in protracted controversies with persons leasing properties to the railroad companies, and, perhaps, with persons to whom the railroad companies have leased properties. No machinery whatever is provided for accomplishing the settlement of such disputes, or for postponing the compulsory divestiture of interests until such disputes could be disposed of.

Utterly ignoring all the practical requirements of the situation, the clause requires compliance in an absurdly short time, and enormous penalties are provided in the effort to make the railroad companies do what is wholly impracticable. If the power to compel alienation exists it must be exercised in a practicable way. Congress has no power to require the impossible. Surely the means employed are so unreasonable and arbitrary as to be unconstitutional, even if the end be constitutional.

Assuming that all controversies could be disposed of, the railroad companies would then be confronted with a forced sale of their properties, which would amount to confiscation.

The result is that this statute, viewed as a statute requiring the alienation of the industrial properties of the railroad companies, is not only a direct interference with an essential property right, and therefore, confiscatory in its character, but is utterly unworkable as a practical proposition. It is impossible to believe that if Congress should ever undertake directly to compel such alienation, it would do so without attempting to provide adequate machinery for the difficulties referred to. If this court should uphold the

Commodity Clause upon the assumption that it is equivalent to a statute compelling the alienation of the industrial properties of the railroad companies, the court would be in the attitude of itself enacting a grossly deficient and unworkable scheme of legislation which Congress itself has not undertaken to enact, and which the legislative department has indicated with reasonable clearness it believes it has no power to enact.

X.

The exemptions of timber and its products and of all common carriers except railroad companies, and other exceptions, still further show the lack of substantial basis for the Commodity Clause and its arbitrary character.

The Commodity Clause applies to the transportation of every article or commodity which may be transported by rail "other than timber and the manufactured products thereof." Unjust discrimination in the transportation of timber

and its products is equally as unlawful under the Act to Regulate Commerce as unjust discrimination in the transportation of any other article. No article is more dependent upon rail transportation than timber. No person would be a more completely helpless sufferer from unjust discrimination than the owner of timber. Nowhere would the motive of self-interest afford a stronger temptation to discriminate unjustly than in a case where the same corporation deals in timber and operates a railroad. Moreover, it is notorious that the operation by the same interests of timber properties and railroads has caused for many years widespread complaints that unjust discrimination, in favor of large timber interests at the expense of small, is peculiarly fostered and facilitated by the ability of trunk line railroad companies to give so-called "tap line divisions" out of the through rate to the railroads operated by such timber interests. Despite all these considerations, we find that Congress out of all the commodities in the United States which are the subject of rail transportation chooses only timber to be free from the confiscatory operation of the statute. If unjust discrimin-

ation in the transportation of timber products can be ontrolled adequately through the ordinary processes of enforcing the law, must we not conclude that there is lack of substantial basis for this destructive legislation with respect to every article of transportation other than timber?

No valid argument can be rested upon the suggestion that there are peculiar evils in the anthracite coal situation, or in the coal situation generally, which afford an adequate differentiation from the situation as to timber. In the first place no such peculiarity exists, and doubtless investigation will show that there has been fully as much trouble with unjust discrimination in the transportation of timber as in the transportation of coal. But another and a conclusive answer to any such argument is that the Commodity Clause is not directed against the coal situation as such, and judicial construction cannot restrict that clause to the coal situation. The Clause applies to every article of commerce, except timber and its products. The Clause not only destroys the right of the railroad companies to enjoy coal traffic, and the right of shippers and consumers to have coal transported, but equally destroys similar rights with

respect to every commodity except timber, although as to many commodities affected no evils whatever have developed. The theory of the clause is not that the coal situation, but that the entire traffic situation throughout the United States with respect to the transportation of every commodity other than timber, shall be subjected to a destructive treatment, from which timber is entirely exempted.

The Act to regulate Commerce throughout practically all its provisions deals with all common carriers which are subject to the Act. Sections 2 and 3 of the Act prohibit unjust discrimination or undue preference by "any common carrier." When the so-called "Hepburn Act" of June 29, 1906, was under consideration, there was a demand that oil pipe lines should be declared to be common carriers and subjected to the Act, the reason assigned being that small independent oil producers were, in the matter of transportation of oil and the rates therefor, at the mercy of the pipe lines, and were subjected to unjust discrimination for the benefit of the large oil producers. Accordingly, by the Hepburn Act, the provisions of the Act to Regulate Commerce were ex-

tended to the persons engaged in the transportation of oil by such pipe lines, "who," the Act declared, "shall be considered and held to be common carriers within the meaning and purpose of this Act." Thus, to prevent unjust discrimination, the operators of pipe lines were made common carriers, subject to the Act and to the prohibitions therein against unjust discrimination. Yet we find the Commodity Clause restricted to railroad companies with the result of excluding from its operation the operators of the pipe lines! If the unjust discrimination prohibitions can be adequately enforced against the pipe lines without applying to such transportation the destructive prohibition of the Commodity Clause, are we not again forced to the conclusion that there is lack of adequate basis for the absolute prohibition of transportation by rail which the Commodity Clause is claimed to impose?

No principle of classification can justify the exemption from the Commodity Clause of all pipe line transportation and of rail transportation of timber and its products. Unjust discrimination with respect to all such transportation is just as illegal, and just as violative of public

policy, as the transportation which is prohibited by the Clause. No means of preventing unjust discrimination with respect to pipe line transportation and rail transportation of timber exist which do not equally exist with respect to the transportation covered by the Commodity Clause, if that Clause covers cases like that of the appellee. The probability of, and facility for, unjust discrimination with respect to pipe line transportation and rail transportation of timber are at least as great as with respect to any other transportation. If the Clause applies to the appellee and similar cases, while exempting pipe line transportation and rail transportation of timber, the only explanation is that, in the hurried consideration of the Commodity Clause upon the floor of the Houses of Congress and in the Conference Committees during the late days of the Session, which was the only consideration Congress ever gave to this matter, those aware of the destructive operation of the Clause with respect to pipe line transportation and with respect to the rail transportation of timber, were able to impress upon Congress the preposterous hardships which would result from the Clause; whereas, the equally great, and perhaps farther

reaching, destructiveness of the Clause with respect to other forms of legitimate industry was not adequately presented for Congressional consideration. The result is a purely arbitrary discrimination by Congress in favor of pipe line transportation and of rail transportation of timber, which cannot be justified by any principle of classification, and which in itself is sufficient to condemn the Commodity Clause as arbitrary, and therefore unconstitutional.

XI.

The legislative history of the Commodity Clause.

The Act to Regulate Commerce prohibiting unjust discrimination in interstate rail transportation was passed in 1887.

In 1890 and 1891 the Interstate Commerce Commission considered the application of the unjust discrimination provisions to railroad companies owning and transporting anthracite coal in the cases of *Haddock vs. D., L. & W. R.*

Co., 3 Int. Com. Rep., 302, 4 I. C. C., 296; *Coxe vs. Lehigh Valley R. Co.*, 3 Int. Com. Rep., 460, 4 I. C. C., 535, and reached the conclusion that it would not be practicable to segregate the operations of the coal and the railroad departments of those companies so as to determine whether there was unjust discrimination in the matter of rates as against independent shippers of coal. The Commission held, however, that it had the power to prevent the imposition of excessive rates upon independent shippers. There has never been any doubt but that the provisions of the Act prohibiting undue preference in the matter of service and facilities could be enforced just as readily with respect to the transportation of anthracite coal over the so-called "Anthracite Coal Roads" as with respect to any other transportation over any railroad. Apparently no serious unfavorable consequences resulted from this view of the law, because during all the subsequent years, no serious complaint against the anthracite coal carriers has been sustained by the Commission.

In the year 1902, W. R. Hearst filed a complaint asserting that the rates charged for the transportation of anthracite coal were excessive,

and much testimony was taken by the Commission upon the alleged complaint (See *I. C. Com. vs. Baird*, 194 U. S., p. 25). Presumably the Commission did not believe that this complaint was well founded, for a decision has never been rendered.

In February, 1906, this Court decided in the case of *New Haven R. R. vs. Interstate Commerce Commission*, 200 U. S., 361, that there could be under the Act to Regulate Commerce, as it then existed, whatever segregation of accounts might be necessary in order to enforce the unjust discrimination provisions of the Act against a railroad company dealing in coal which it transported. The Court indicated that perhaps on account of the long standing construction of the Commission with respect to the anthracite coal roads, such segregation of their coal affairs from their transportation affairs might not be permissible, at least until further legislation in that behalf was secured.

For several years prior to 1906 there had been extensive agitation in favor of amending the Act to Regulate Commerce so as to make more effective the provisions against excessive rates and unjust discriminations. Recommendations

were made in a number of the President's messages to Congress and various bills dealing with the subject were considered by the Senate Committee on Interstate Commerce and by the House Committee on Interstate and Foreign Commerce at several successive sessions of Congress. None of the Presidential recommendations or of the bills considered by the Congressional committees contemplated any interference with railroad companies engaged in industrial activities either as an incident to their railroad operations or as a commercial business.

In the Spring of 1905, the Senate Committee on Interstate Commerce began in special session a series of hearings which lasted from April 17th to May 23d. These hearings were designed to consider the various amendments which had been urged to the Act to Regulate Commerce. The hearings have been published in four volumes aggregating 3961 pages, with an additional volume of appendices of 1154 pages. During these hearings no proposition was ever considered of interfering with railroad companies engaged in industrial activities.

At the next session of Congress, beginning December, 1905, the Hepburn Bill was reported

by the House Committee on Interstate and Foreign Commerce, and was passed by the House. The Bill did not contain any provision relative to railroad companies engaging in industrial pursuits, and that subject was not considered in any of the hearings before the House Committee, and was not discussed upon the floor of the House. The Bill then went to the Senate and was considered by the Senate Committee on Interstate Commerce. That Committee reported the Bill to the Senate, and did not report any amendment relative to railroad companies engaging in industrial pursuits, nor was that subject considered at any of the hearings before the Senate Committee.

Thus, up to this time, neither the Commodity Clause, nor any other provision dealing in any way with railroad companies engaging in industrial pursuits, had ever been recommended by the Interstate Commerce Commission, or by the President, or had ever been reported by either Congressional Committee having jurisdiction, or had ever been considered at any hearings of either of those Committees.

The Commodity Clause resulted from an amendment proposed for the first time on the floor of the Senate, after the Hepburn Bill had passed

the House and had been reported by the Senate Committee, and was considered only on the floor of the two Houses and in Conference Committees, although it was more radical in character than any other amendments which had been the subject of serious investigation and consideration for several years by the Executive Department, the Interstate Commerce Commission, and the appropriate Committees of the two Houses.

The facts leading up to the precipitate enactment of the Commodity Clause are as follows:

On January 29, 1906, a communication was presented to the Senate from the Red Rock Fuel Company, a West Virginia bituminous coal corporation, complaining that the Baltimore and Ohio Railroad Company had declined to comply with an order of the Interstate Commerce Commission forbidding the Baltimore and Ohio to discriminate unjustly in the allowance of sidetrack connections against the Red Rock Fuel Company and in favor of a bituminous coal company in which the Baltimore and Ohio was interested (Cong. Rec., Vol. 40, pt. 2, pp. 1671–1672).

It did not appear that any effort had been made to enforce the order of the Interstate Commerce Commission. There was no question but what such discrimination relating to the furnishing of facilities, if unjust, could be as easily ascertained and as easily prevented where the discrimination was in favor of the railroad company's own industrial activities, as where it might be in favor of any outside person.

As a result of this complaint to the Senate, and of subsequent discussion, a joint resolution was adopted on March 7, 1906 (See Cong. Rec., Vol. 40, pt. 3, pp. 2889, 2979, and pt. 4, p. 3440), directing the Interstate Commerce Commission to investigate and report, among other things,

> "Whether any common carriers by railroad, subject to the Interstate Commerce Act, or either of them, own or have any interest in, by means of stock ownership in other corporations, or otherwise, any of the coal or oil which they, or either of them, directly or through other companies which they control, or in which they have an interest, carry over their, or any of their lines as common carriers, or in any manner own, control, or have any interest in, coal lands or properties, or oil lands or properties."

And, further, that the Commission should report

> "As to the effect of such relationship, ownership, or interest in coal or coal properties, and coal traffic, or oil, oil properties, or oil traffic, aforesaid * * * upon such person or persons as may be engaged independently of any other persons in mining coal or producing oil and shipping the same or other products, who may desire to so engage, or upon the general public, as consumers of such coal or oil."

And, further,

> "That said Commission be also required to report as to what remedy it can suggest to cure the evils above set forth, if they exist."

Without waiting for any report in response to this joint resolution, and about eight months before any such report was made, the Commodity Clause was adopted. (The Commission under the joint resolution never investigated the anthracite coal situation at all. It investigated the eastern bituminous coal situation, and on January 25, 1907, reported recommending *not any prohibition of interstate transportation*, but that interstate carriers be forbidden after reason-

able time to own, or have any interest in, operated coal properties, except such as are exclusively for their own fuel supply. Nor did this recommendation of the Commission specify that any such legislation should be made retroactive, so as to impair property rights theretofore lawfully acquired).

On May 7, 1906, while the Hepburn Bill was before the Senate for consideration, Senator Elkins offered an amendment prohibiting any common carrier, unless authorized by its charter, to engage in the production, manufacture, buying, furnishing, or selling of coal or coke, or any other commodity or commodities of commerce, in competition with any shipper or purchaser on its line or lines (See Cong. Rec., Vol. 40, pt. 7, pp. 6455, 6456). The proposition was not investigated or considered by the Senate Committee on Interstate Commerce, but was disposed of on the floor of the Senate without hearings or investigation (See Cong. Rec., Vol. 40, pt. 7, pp. 6500, 6503, 6505).

The idea of prohibiting the common carrier from engaging in the production, manufacture, buying, or selling of commodities was abandoned because of the belief that the Federal Govern-

ment had no power to deal with that subject, and instead the idea was adopted of prohibiting interstate transportation upon the idea that Congress had full power to prohibit or permit such transportation. (See Cong. Rec., Vol. 40, pt. 7, pp. 6456, 6457).

During the debate strenuous opposition developed on the part of senators who were familiar with the hardships which would result to the timber industry, and consequently timber and its products were exempted from the operation of the clause (See Cong. Rec., Vol. 40, pt. 7, p. 7015).

During the consideration of the clause in the conference committees, the clause was changed so as to apply, not to all common carriers, but only to railroad companies (See Cong. Rec., Vol. 40, pt. 10, pp. 9100, 9522, 9577, 9641).

It is doubtful whether a more far-reaching piece of legislation has ever been adopted by Congress with less opportunity for a presentation of the facts and of the legal considerations which demanded attention.

To the situation thus disclosed the following observations of the court in *Boyd vs. United States*, 116 U. S., 635, seem particularly pertinent :

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

XII

Discussion of Cases.

1. *New Haven Railroad Company vs. Interstate Commerce Commission*, 200 U. S., 361.

In this case the Circuit Court, at the suit of the Commission, enjoined the carrying out of a contract between the Chesapeake and Ohio and the New Haven, whereby the former agreed to sell to the latter, delivered in New England, a specified amount of coal at a price not adequate to pay the cost of the coal plus the published rates of the Chesapeake and Ohio and other charges to point of delivery.

The railroad companies appealed and claimed that the contract was a valid arrangement, not affected by the Act to Regulate Commerce, between a vendor and vendee for the sale and delivery of a commodity in New England. The Chesapeake and Ohio charter (a statute of Virginia) did not authorize and did not prohibit engaging in the coal business. This court did not decide or consider whether or not the contract of sale was invalid because *ultra vires*, or because contrary to a West Virginia statute prohibiting railroad companies from dealing in coal. The court undertook only to determine whether the arrangement, even though otherwise valid, constituted a violation of the Act to Regulate Commerce.

The court held that the contract of sale violated the Act to Regulate Commerce solely because the result was to accomplish the transportation of the coal at less than the tariff rate, showing that it would be a palpable evasion of the Act to allow the Chesapeake and Ohio to take refuge behind the claim that it sustained the loss as a coal dealer, and not as a carrier, and pointing out that such a construction would simply leave the Chesapeake

and Ohio untrammeled by the published rate, which, by the statute, was binding on everybody else.

In illustrating the consequences of any such unbridled opportunity for unjust discrimination, the court quoted from Attorney-General vs. Great Northern Railway Company, 29 Law Journal, (N. S. Eq.), 794, which was a decision enjoining a railway company from engaging in the coal business when not authorized to do so by its charter. The language quoted was used by the English court to express a reason for holding that the power to operate a railroad ought not to be construed to authorize the corporation to engage in the coal business, and was quoted by this court to illustrate the argument that a corporation ought not to be permitted by the device of dealing in coal to set at naught the requirement of the Act to Regulate Commerce that published rates must be adhered to.

The court indicated that if the Chesapeake and Ohio could not deal in coal without transporting such coal for less than the published rate, it would doubtless have to retire from such dealings, but did not hold that the Chesapeake and

Ohio would or could be required to retire from such dealings if it did in fact charge the full published rate.

The court did not hold or intimate that a railroad company could be prevented by Congress from dealing in coal so long as the Act to Regulate Commerce was strictly complied with; much less did the court intimate that a railroad company could be prohibited from transporting coal already lawfully owned by it, or compelled against its will to alienate coal lands lawfully owned. No such questions were involved or discussed in the case.

The court referred to the Interstate Commerce Commission's decisions in two cases, which were as follows:

Haddock vs. D. L. & W. R. Co., 3 Int. Com. Rep., 302. Haddock claimed that the railroad company unjustly discriminated in its own favor with reference to the transportation of coal to the west, and insisted that to determine such discrimination the Commission should require the company to keep an account of the cost of transporting coal. The Commission held that this was impracticable and beyond its power, and that on account of the peculiar situation of the rail-

road company, being both a producer of coal and a carrier, the question of discrimination between the carrier and complainant could not very well arise, but that the complainant was entitled to be charged reasonable rates.

Coxe Brothers & Company vs. Lehigh Valley R. Co., 3 Int. Com. Rep., 460. The Commission held that the railroad company had discriminated unjustly in favor of the coal company whose stock it owned, but that an order to desist from such unjust discrimination would not be a practical remedy, because the Commission could not determine the prices at which the coal company might buy and sell, or regulate, or cause the discontinuance of, the methods of business resulting in the unjust discrimination.

It was urged on behalf of the New Haven and Chesapeake and Ohio that the ruling of the Commission in the two cases just referred to, constituted an administrative construction, which the courts should respect, to the effect that the prohibitions of the Act against unjust discrimination should not be interpreted as applying to a carrier which is also a dealer.

The court pointed out that the construction adopted by the Commission in the Haddock and

Coxe cases was based solely upon the peculiar charter powers of the defendant corporations possessed by them prior to the passage of the Interstate Commerce Act, and accordingly held that such construction while binding as to all strictly identical cases, was not applicable to the Chesapeake and Ohio, which had no such charter powers.

In showing that the Commission itself had thus restricted the effect of its practical construction in the Haddock and Coxe cases, the court quoted from "*Grain Rates of Chicago Great Western Ry. Co.*," 7 Int. Com. Rep., 33, and in passing took occasion to say that it did not intimate "that as an original question we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce *under proper rules and regulations for the segregation of the business of producing, selling and transporting*, as presented in the Haddock and Coxe cases, would have been confiscatory." Evidently the court's view was that a railroad company could acquire no exemption from the unjust discrimination provisions of the Act by engaging in business as a dealer, and that in enforcing those provisions the Commis-

sion and the courts had the power to inquire into the circumstances surrounding the activities of the railroad company as a dealer, so as to get at the very substance of the situation and to find out whether the railroad company was departing from the published rates, and that the necessity for such inquiries might justify proper rules and regulations for the very segregation of accounts which the Commission held in the Haddock and Coxe cases it could not make.

All that this case held was that a railroad company must substantially, as well as nominally, observe the published rates on commodities in which it deals, regardless of the effect upon its business as a dealer, and that its accounts as a carrier, and as a dealer, may be dissected and segregated to whatever extent is necessary to accomplish this result. All this is entirely consistent with our position in this case, and further illustrates the precipitate character of the Commodity Clause. For sixteen years the country had proceeded on the theory that as to the anthracite coal rates it would not be feasible under the Act to Regulate Commerce to prevent unjust discrimination in rates against independent coal dealers, yet no serious complaints growing out

of that situation have ever been sustained by the Commission. The Commission had never recommended any additional legislation on the subject. Then comes a decision of this court plainly indicating that under the Act to Regulate Commerce as it stands accounts may and must be so dissected and segregated as to prevent unjust discrimination by a railroad company in favor of itself as a dealer, and intimating that additional legislation is all that is necessary to provide for such segregation with respect to the anthracite coal roads. Thereby the situation is made clearer in favor of the feasibility of enforcing the Act in such cases than ever before. Thereupon, without investigation or recommendation, Congress absolutely prohibits the interstate transportation of any commodity produced or dealt in by a railroad company!

2. *The Lottery Case.* 188 U. S., 321.

In this case the court held that a lottery ticket was a subject of traffic; that the power of Congress to regulate commerce among the States might under some circumstances properly take the form of prohibition; that traffic in lottery tickets, on account of the evils resulting there-

from, was of a character which could be prohibited; that such prohibition could not be a deprivation of liberty without due process of law, because it could not be a part of one's liberty to introduce into commerce an element "confessedly injurious to the public morals" (page 357), and because traffic in lottery tickets "is a kind of traffic which no one can be entitled to pursue as of right" (p. 358).

Replying to the contention that if Congress could exclude lottery tickets from interstate commerce, it might also arbitrarily exclude any article no matter with what motive, the court said:

> "We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument" (p. 362).

In The Lottery Case the means employed was the proper and direct means for accomplishing the desired object, and that object did not deprive

any person of liberty or property, because no right of liberty or property existed with respect to the immoral traffic under consideration. The court plainly indicated, however, that the power of Congress over domestic commerce may not be exercised so as to infringe rights secured or protected by the Fifth Amendment.

3. *McCray vs. United States*, 195 U. S., 27.

In this case the court upheld an act of Congress imposing a tax upon artificially colored oleomargarine. After holding that the judiciary could not restrain the exercise of lawful power on the assumption that a wrongful purpose caused the power to be exerted, the court held that the statute levied an excise tax, and was, therefore, within the power of Congress; that the exercise of that power could not be judicially restrained because of the results which might arise from its exercise; that the courts have no authority to declare a tax void because deemed by the courts to be too high; that nothing in the Fifth and Tenth Amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress; that there was adequate basis for a separate classification of, and a discriminatory tax upon, artificially colored oleo-

margarine; and that the manufacture of that article, involving deception of the public, was not a lawful pursuit, and, therefore, its prohibition would not violate the Fifth Amendment, and that it had been prohibited by a State, and that this court had held such prohibition did not violate the Fourteenth Amendment.

The court, as it had done often before, strongly asserted the extensive character of congressional power of taxation. In Loan Association vs. Topeka, 20 Wall., 655, 663, the court declared that the power to tax is "the strongest, the most pervading of all the powers of government," and that "Given a purpose or object for which taxation may be lawfully used and the extent of its exercise is in its very nature unlimited."

In the nature of things, where Congress has the power to levy a tax, the legislative determination of the amount of the tax and of the object of the tax is the most appropriate possible form of due process of law with respect to that subject, and, therefore, cannot violate the due process clause of the Constitution. In this respect the exercise of the power of taxation radically differs from the exercise of the power of regulating the relations between railroad companies and the

public, because the latter form of regulation cannot be conclusively determined by the legislative declaration.

The power of the courts to determine whether State legislation regulating intrastate commerce violates the due process clause of the Fourteenth Amendment, is well established. Yet it is evident that the taxing power of the States is just as free from any judicial control under the due process clause of the Fourteenth Amendment as the taxing power of Congress was declared in the McCray case to be free from judicial control under the Fifth Amendment. In French vs. Barber Asphalt Paving Company, 181 U. S., 324, 329, the court said :

> " Certainly, it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government, in a similar exercise of power, by the Fifth Amendment."

Thus the taxing power of Congress and the taxing power of the States are equally free from judicial intervention so far as the due process clauses of the Constitution are concerned. But

that condition is entirely consistent with the other well-established condition that the power of Congress over interstate commerce, and the power of the States over intrastate commerce, are subject to judicial control to prevent the employment of arbitrary means working a destruction of lawful property interests.

4. *Union Bridge Company vs. United States*, 204 U. S., 364.

This case involved an order of the Secretary of War requiring the alteration, at the expense of a bridge company, of a bridge which had been complained of for many years as an unreasonable obstruction to navigation, and which the Secretary of War, after full hearing, had declared to be such an obstruction.

The court first held that it was appropriate for Congress to commit to the Secretary of War the determination of the question whether the bridge was an unreasonable obstruction to navigation, and to prescribe the alterations necessary to remove the obstruction. In this connection the court indicated that the Secretary was entirely justified, if not compelled, by the evidence in finding that the bridge was such an obstruction.

The other point considered by the court was the Bridge Company's contention that the act providing for the alteration was unconstitutional, because it made no provision for compensation for the resulting expense, and, in other words, amounted to a taking of property for public use without just compensation. The court stated that this issue had been determined by principles previously announced, and showed, for example, that requirements *under State authority* had been upheld, by this court compelling (*a*) a gas company, at its own expense, to change its pipes in the streets so as not to interfere with a plan of drainage; (*b*) a railroad company, at its own expense, to enlarge the opening under its bridge so as to facilitate a plan of drainage; (*c*) a street railroad company, at its own expense, to lower its tunnel under a river so that the channel of the river might be deepened. The court showed that there was no taking of property by the Government, but that the Bridge Company was merely required so to use its property as not to obstruct navigation.

This case does not sustain the idea that the power of Congress to regulate commerce among the States enjoys any exemption from judicial

control that does not equally exist with respect to the power of a State over interstate commerce. The principal precedents upon which the court relied were cases of the exercise of State power over internal affairs. The situation presented was merely that of a public nuisance which was required to be removed at the expense of the person responsible therefor. The propriety of such a requirement under either State law or Federal law had been established by a long line of cases. All such decisions are consistent with the principle settled by this court as to the States, and equally applicable as to the Federal Government, that regulations of the use of lawful property not *per se* a nuisance will not be upheld when arbitrary and destructive of legitimate interests. Indeed, in the course of its opinion the court said (as before quoted):

> "If the means employed have no real substantial relation to public objects which the Government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action.

> The authority of the courts to interfere in such cases is beyond all doubt" (page 397).

A bridge which unreasonably obstructs navigation is *per se* a nuisance, and must be altered at the expense of the owner of the bridge. But anthracite coal is not *per se* a nuisance, and the transportation of anthracite coal is not *per se* a nuisance, and there is no basis for destroying the coal or its value by destroying the right of transportation, or otherwise. The same observation equally applies to all other commodities capable of transportation by rail, all of which (except timber and its products) are alike subjected to the destructive operation of the Commodity Clause.

It is only confusing to say that the Union Bridge case held that obstructions to interstate commerce may be removed without compensation, and that the engaging in industrial pursuits by railroad companies is an obstruction to interstate commerce, and therefore may be terminated without compensation, even as to existing property, by prohibiting the transportation of commodities resulting from such industrial pursuits. The large and vital question involved in the

case at bar cannot be disposed of by this loose method of applying similar general terms to things fundamentally different. If such reasoning be upheld, then Congress is free, whenever it disapproves of any business policy having a relation to interstate commerce, to eliminate that policy by withholding the right of interstate transportation of any commodity whose production or handling may be connected in any way with that policy, so that again we would reach the point where Congress, at its unrestricted will, might regulate all economic affairs by granting or withholding the right to engage in commerce among the States.

5. *Adair vs. United States*, 208 U. S., 161.

In this case the court held unconstitutional a Federal statute prohibiting a carrier engaged in interstate commerce from discharging an employee merely because of his membership in a labor organization, on the grounds that the statute operated to deprive persons of their property and liberty without due process of law, and was not a regulation of commerce among the States in any proper sense.

In considering the question whether the statute operated to deprive persons of property or

liberty without due process of law, the court relied upon Lochner vs. New York, 198 U. S., 45, and other cases dealing with the validity under the Fourteenth Amendment of State legislation. Thereby the court recognized that when considering in the light of the due process clause of the Fifth Amendment the validity of an act of Congress, the court was controlled by the same principles which controlled it when considering in the light of the due process clause of the Fourteenth Amendment the legislative action of the States.

As to the question whether the statute was an appropriate exercise of the power of Congress to regulate commerce among the States, the Government had contended that the end to be accomplished was the protection of interstate commerce against interruptions through strikes and lockouts, but the court held that the statute was not an appropriate means for the accomplishment of that purpose.

6. *The cases upholding the constitutionality of the Anti-trust Act.*

The Anti-trust Act prohibits combinations in restraint of trade. The restraint of trade is the very thing deemed by Congress to be injurious

to interstate commerce, and its prevention is the ultimate object to be accomplished. There can be no dispute that that is an object for the accomplishment of which Congress has the power to legislate. No one has a constitutional right, either of property or personal liberty, to commit acts in restraint of trade. The means employed by the Anti-trust Act is the direct prohibition of the very thing which is in itself wrongful and injurious. Here, then, we have an object valid in itself, accomplished by a means which is the most direct and appropriate which could be devised and which does not destroy liberty or property. Therefore the considerations controlling as to the validity of the Anti-trust Act are in every respect radically different from the considerations by which the validity of the Commodity Clause is to be determined. If the Anti-trust Act had prohibited the transportation of commodities, of enormous value and of vital importance both to the owners and the public, lawfully acquired prior to its passage, simply because the production of those commodities grew out of a policy as to manufacture which Congress regarded as inimical to the freedom of interstate commerce, and

if such prohibition of the right of transportation had been sustained by this court, then such a holding might be a precedent for holding the Commodity Clause to be constitutional.

CONCLUSION.

The action of the Circuit Court of the United States for the Eastern District of Pennsylvania in dismissing the Bill of the complainant and appellant herein, and in entering judgment in favor of the defendant in error herein, should be affirmed.

January 18, 1909.

WILLIAM S. OPDYKE,
JAMES M. BECK,
WALKER D. HINES,
Counsel for Appellee and Defendant in Error.

Office Supreme Court, U. S.
FILED.
JAN 18 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

THE UNITED STATES, *Appellant,*
AGAINST
ERIE RAILROAD COMPANY, *Appellee.*

No. 326

THE UNITED STATES Ex Rel. THE ATTORNEY-GENERAL, *Plaintiff in Error,*
AGAINST
ERIE RAILROAD COMPANY, *Defendant in Error.*

No. 329

BRIEF FOR ERIE RAILROAD COMPANY

GEORGE F. BROWNELL,
ADELBERT MOOT,
Of Counsel.

Analysis of Brief in Cases Nos. 560 and 566.

STATEMENT.

Pages.

These cases involve the constitutionality of the Commodities Clause of the Interstate Commerce Act, and some of the questions arising under that clause of that Act are stated..... 1, 2, 45-49, & 51-126

We contend that the learned opinions of Judges Gray and Dallas in the Circuit Court for the Eastern District of Pennsylvania, holding the Commodities Clause to be unconstitutional for reasons stated, are sound..... 51-126

FACTS.

The undisputed facts upon which the argument is rested for the Erie R. R. Co. are, that the first predecessor of that Company was organized in 1832, that this defendant, a stockholder in the Pennsylvania Coal Company, is its last successor; that the Pennsylvania Coal Company was authorized by a statute of Pennsylvania, in 1838, to transact "the usual business of companies engaged in mining, transporting to market and selling coal," with power to purchase or lease coal lands, and to "construct railroads," and that said Pennsylvania Coal Company did acquire coal lands, develop mines, and enter into authorized contract relations with defendant's predecessors for the construction of railroads and the transportation of its coal to market..... 2, 3

The Hillside Coal & Iron Company was organized under a statute of Pennsylvania in 1869, with power to "purchase and hold in fee simple, by lease or otherwise, coal, iron, mineral and lumber lands" with power to "connect said lands by railroad * * * with other railroads," and also power to use its capital in "purchasing, mining, vending, and transporting coal, iron, lumber, and

Pages.

other products of their lands * * * in the prosecution of said business;" and into this corporation many other coal corporations were afterwards merged, under the laws of Pennsylvania..... 3, 4

"Solely" to furnish an "outlet," by authority of Pennsylvania and New York, this defendant's predecessors and said coal corporations, built railroads and mine branches in connection with said coal companies, to transport their coal to interstate markets; the railroads so built being duly authorized, and aggregating, in lines, branches, yards and sidings very expensive to build in the mountainous country in which they were built, about 190 miles 4, 5

These railroads will be "substantially valueless" if the defendant can no longer haul their tonnage to the usual interstate markets over its tracks, and the mines of these companies will be deprived of their only outlet to these markets, such interstate markets being substantially their only markets for their output 5, 8

These railroad lines, branches, sidings, and yards, built "solely" for the accommodation of this coal business, have little business except such coal business, and that coal business is of such magnitude that it constitutes over 22% of the entire freight tonnage of all the railway lines of the Erie R. R. Co., and brings it over 20% of its revenue for transportation, and to deprive the defendant of such coal tonnage would greatly impair, and in many cases wholly destroy, both mines and railways 8

The bondholders of this defendant and its predecessors hold bonds aggregating upwards of $136,000,000 that rest upon these properties, which will be greatly impaired or destroyed if the authorized contract and stockholding relations of railroads and mining corporations above described

Pages.

are destroyed, as they will be if the Commodities Clause is upheld, and it is held to also apply to this defendant as a mere stockholder..... 9-12

This defendant is a minority stockholder in the Temple Iron Company, some of the coal of which also reaches interstate markets over defendant's lines, but defendant has nothing to do with mining coal, or dealing in it, and is in no way interested in coal mining except as "a stockholder" in the three coal mining corporations named.... 9

Anthracite coal is harmless and necessary fuel, and the investigation of the Anthracite Strike Commission shows there is nothing unnatural about the present status of the business, in view of the natural difficulties encountered, the capital necessary to develop and carry it on, and the authority necessarily given capital by the State of Pennsylvania, to cause the formation of corporations to develop the expensive coal mines, and, therefore, the present status of the business furnishes no reason whatever for such legislation as the Commodities Clause 13-26

The present status of timber lands and lumbering, as compared with coal properties and mining, furnishes no reason to support the exemption of timber alone from the Commodities Clause..... 27-34

The history of the Commodities Clause shows that it was enacted to prohibit mining according to the laws of that State, by corporations of Pennsylvania, by making it impossible for mining corporations of that State to sell in that State the coal mined, since the Clause, if broadly construed, as the Government claims it should be, prohibits common carriers from carrying such coal to interstate markets upon any terms and conditions whatever, *even for the lawful purchasers and consumers thereof*..... 34-47

Pages.

The Commodities Clause not only vitally affects this defendant, and other railroad companies, if it is sustained as to stockholders, but it is vital to the interests of millions of citizens who are consumers of all necessary commodities, and also the stockholders and bondholders of all great industrial corporations, since they can no longer buy or sell the very necessaries of life without the consent of Congress 47-51

LAW.

That clause is unconstitutional because it is contrary to the fundamental and "unalienable" rights of citizens reserved to them by the Federal Constitution, by which they have the right to buy food, fuel, or other harmless necessaries of life, in any State they please, from any one they choose, so long as their purchases are lawful in that State, although it is conceded the Federal Government can regulate, but not prohibit, the carriage of such necessaries to interstate markets.. 51-78

Timber is a fuel, and Congress could not make a partial and unjust law discriminating between purchasers of timber fuel and purchasers of coal, or between stockholders and bondholders in common carriers owning timber lands and those owning coal lands, without violating the "due process of law" part of the Fifth Amendment, because there is no ground for exempting timber in the Commodities Clause, if it should apply to any fuel at all 78-102

The only possible effect of the Commodities Clause upon coal is upon *the mining or production thereof*, if that Clause is literally obeyed, hence it does not regulate interstate commerce, it being a harmless and necessary commodity, but it undertakes to regulate its antecedent intra-state production, contrary to the Constitution and all such precedents 102-125

Supreme Court of the United States

UNITED STATES OF AMERICA, *Appellant,* vs. ERIE RAILROAD COMPANY, *Appellee.*	No. 566.

BRIEF FOR DEFENDANT, ERIE RAILROAD COMPANY IN THIS CASE AND NO. 560.

This suit was brought June 5, 1908. It involves the right to transport certain anthracite coal from Pennsylvania, where it is produced, to interstate markets. A mandamus proceeding was instituted at the same time and the facts pleaded, and issues of law, in that are the same. The remedy sought is the only difference in the cases, and as to the remedy we are indifferent. The Circuit Court for the Eastern District of Pennsylvania dismissed both cases, hence the appeal allowed in this case, and the writ of error granted in the mandamus case, No. 560, to enable the United States to review the adverse decisions rendered. This brief, therefore, will be our brief in both cases. The references to the record are to the Transcript of Record in No. 566.

Questions.—The vital questions involved as to the Erie Railroad Company are two in number:

(1) Does the commodity clause of the Interstate Commerce Commerce Act apply to the transportation of anthracite coal mined or produced by coal corporations of Pennsylvania in which the Erie Railroad Company is a stockholder?

(2) If so, then is the commodity clause unconstitutional?

Facts Pleaded.—The complaint shows in substance that since May 1, 1908, the Erie Railroad Company has been transporting to interstate markets anthracite coal of the Pennsylvania Coal Company and the Hillside Coal & Iron Company, coal mining and producing corporations of Pennsylvania, of which the Erie Railroad Company has long owned substantially all the capital stock. The specific charge is that this is "unlawful" and contrary to the so-called commodity clause of the "Act to Regulate Commerce," as amended June 29, 1906, because such ownership of the stock of said coal companies makes the Erie Railroad Company *the owner of the coal so mined, produced and transported, or gives it an interest therein.* It is also alleged the Erie Railroad Company owns "some part of the capital stock of the Temple Iron Company," another anthracite coal mining corporation of Pennsylvania, for which it has also transported coal to interstate markets since May 1, 1908. This ownership of "some part" of the Temple Iron Company stock it is alleged gives the Erie Railroad Company "an interest in said last mentioned coal lands and coal mines, and the anthracite coal therein, or * * * mined therefrom." The answer, in substance, admits the ownership of "nearly all" of the stock of the Pennsylvania Coal Company and Hillside Coal & Iron Company, by defendant's predecessors and defendant, since long before June 29, 1906; sets up that such ownership is

authorized and lawful under the laws of Pennsylvania and New York, under which the Erie Railroad Company was reorganized upon foreclosure in November, 1895; and alleges that said Pennsylvania Coal Company was authorized by the statute of Pennsylvania organizing it in 1838 (No. 73) to transact "the usual business of companies engaged in mining, transporting to market, and selling coal" with power to purchase and lease coal lands, and to "construct railroads with one or more tracks."

In 1853, the State of Pennsylvania further authorized said Pennsylvania Coal Company (No. 140, Laws 1853) to "connect or consolidate with, or lease, some railroad, or canal, in said States of New Jersey or New York, and acquire, hold, and exercise, the rights, privileges, and franchises, of such corporations."

The Pennsylvania Coal Company did develop mines, build railroads, and enter into contracts accordingly, with the predecessor of defendant, pursuant to authority from Pennsylvania and New York. Such predecessor the Erie Railway Company, and its successors, including this defendant, have leased and operated the railroads of the Pennsylvania Coal Company, and have carried its coal to interstate markets "to this day" (Answer, pp. 6 to 18, paragraphs 4, 5, 6, 8 and 10).

The Hillside Coal & Iron Company was organized as a corporation, under a statute of Pennsylvania in 1869 (No. 1279). When organized it was authorized to "purchase and hold in fee simple, by lease, or otherwise, coal, iron, mineral, and lumber lands in this Commonwealth, not exceeding at any one time 5,000 acres, with power to connect said lands by railroad not exceeding twenty miles in length, with other railroads, canals, or public improvements"; also to use its capital in "purchasing, mining, vending and trans-

porting coal, iron, lumber, and other products of their lands * * * and in such other objects as may be considered necessary and expedient in the prosecution of said business."

Many other coal corporations were merged into the Hillside Coal & Iron Company by agreements, under the authority of Pennsylvania, from 1869 to 1873 (No. 1030, Laws 1873, especially). Any incorporated railroad had the right to subscribe to the capital stock of one of those companies (Laws Pennsylvania, 1869, No. 532). Answer, pp. 12 and 13, paragraph 7).

A predecessor of defendant acquired substantially all of the capital stock of the Hillside Coal & Iron Company long before February 5, 1874, when the same, with other property and franchises, was mortgaged to The Farmers' Loan & Trust Company. Through the foreclosure of that mortgage in 1878, defendant's predecessor, the New York, Lake Erie & Western Railroad Company got title to the stock of the Hillside Coal & Iron Company. Through that predecessor, and such foreclosure, a new mortgage made October 5, 1878, and its foreclosure in November, 1895, this defendant finally succeeded to such title. This defendant's predecessors and this defendant have always hauled the Hillside Coal & Iron Company coal to interstate markets (Answer, pp. 9, 10, 11, 13, 14, 15, paragraphs 4, 5, 7, 8, 10).

To furnish "an outlet" for such coal to the lines of this defendant's predecessor then existing, the Jefferson Railway, of upwards of forty miles, was built, "through a mountainous and sparsely settled country," by the corporation of that name, under the Pennsylvania Railway Statute of 1849, and special acts organizing said Jefferson Railroad Company, and giving it adequate powers, April 28, 1851, March 18, 1863, and

Letters Patent February 15, 1864. Mine branches of many miles were built *"solely"* to haul the output of the Edgerton, Erie and Glenwood breakers to defendant's lines, and those branches are now used *"solely"* for that purpose (Answer, pp. 8 and 9, paragraph '). The defendant's predecessors, and defendant, have "leased and operated" said Jefferson Railroad line ever since. Its stock is substantially all owned by defendant (Answer, pp. 8, 9, 10, 11, 14, 15; paragraphs 3, 5, 10).

Railroads were constructed by the Pennsylvania Coal Company *"solely"* to transport its coal to market, under its power to "construct railroads." The one into which the others were finally merged was incorporated as the Erie & Wyoming Valley Railroad Company. That Railroad Company had its inception in a contract with the Erie Railway Company dated June 9, 1862, which was duly authorized by statute. By such contract, the Erie Railway Company was to and did lease and operate said railroad, and transport the anthracite coal of the Pennsylvania Coal Company to interstate markets, over the lines of the Erie Railway Company. The Erie & Wyoming Valley Railroad consists of seventy-five miles of main track, and has forty miles of yards and sidings, and thirty-five miles of mine branches and breaker tracks. Its stock is substantially all owned by defendant (Answer, pp. 9, 10, 11, 12, 14, 15; paragraphs 4, 6, 10). Let us here quote the answer:

> "The main line of the railroad now owned by the Erie & Wyoming Valley Railroad Company was built solely for the purpose of transporting to market the coal owned, mined or produced by the Pennsylvania Coal Company, and nearly all the branches thereof have been built solely for the purpose of reaching and transporting to market coal owned, mined or produced by the Pennsyl-

vania Coal Company or Hillside Coal & Iron Company.

"A portion of the said railroad and its branches, constituting a mileage of thirty-five miles, was constructed and is now used solely for the purpose of transporting coal from, and mine supplies to collieries of the Pennsylvania Coal Company and of Hillside Coal & Iron Company, and is so situated that no traffic from any other shipper, either of anthracite coal or otherwise, can be obtained, and if the coal of the Pennsylvania Coal Company and the Hillside Coal & Iron Company cannot be carried by it, such portion of said railroad will be substanially valueless.

"The Erie & Wyoming Valley Railroad Company has, at great cost, constructed upwards of forty miles of double track, tracks in yards and passing sidings solely for the accommodation and transportation of the anthracite coal tonnage handled by it, which will be unnecessary, useless and valueless for railroad purposes if it cannot transport the tonnage of the Pennsylvania Coal Company and Hillside Coal & Iron Company" (Answer, p. 10, paragraph 4).

This defendant itself uses about 400,000 tons per annum of the by-product, small-size anthracite coal.

"On account of the greater cleanliness of anthracite coal as compared with bituminous coal, competitive reasons, police regulations of growing centers of population and other reasons, the consumption of anthracite coal for railroad fuel purposes is increasing and will tend to further increase. Such use of anthracite coal suitable for domestic use would be wasteful and extravagant

on account of the higher price and value of such coal. The smaller sizes of anthracite coal suitable for locomotive fuel purposes, are a by-product of the production of the more valuable sizes of coal suitable for domestic purposes. The proportion of the total product of such smaller sizes in the mining of coal is, with the Pennsylvania Coal Company and the Hillside Coal & Iron Company, about 35 per cent. at the present times. The mines of said Pennsylvania Coal Company and Hillside Coal & Iron Company could not be operated solely for the production of railroad fuel coal without wasteful and ruinous extravagance" (Answer, pp. 13 and 14, paragraph 9).

The railroads of the Jefferson Railroad Company and the Erie & Wyoming Valley Railroad Company were first built half a century or more ago, under the laws of Pennsylvania, to haul anthracite coal of said coal mining companies to the predecessors of this defendant. They were very expensive to build in a mountainous country. *Such anthracite coal was and is their main traffic, and without such traffic they would be substantially valueless. Without such coal traffic from such mines, these railroads can reach and transport substantially no other traffic. Without such railroads, such coal could not reach interstate markets in numerous cases. This railroad alone reaches the great majority of the mines served by it. It also reaches many cities and towns that use the coal from such mines. Other lines of railroad could not be constructed to such mines, cities and towns, except at prohibitive cost* (Answer, pp. 8, 9, 10, 11, 12, 13; paragraphs 3, 4, 6, 7, 8).

Over 95 per cent. of the traffic over the Erie & Wyoming Valley Railroad Company is anthracite coal;

over 95 per cent. of such coal being owned, mined or produced by the Pennsylvania Coal Company and Hillside Coal & Iron Company; and practically all of it being interstate commerce. Over 80 per cent. of the tonnage transported by defendant over the Jefferson Railroad Company comes from the Pennsylvania Coal Company and Hillside Coal & Iron Company; substantially all of it being interstate tonnage. Said coal companies annually mine, produce, and sell several million tons of such coal in said markets, outside of Pennsylvania, more than 90 per cent. of such coal being consumed outside of Pennsylvania. Over 70,000,000 tons per annum of anthracite coal is now produced in Pennsylvania, but there is no sufficient market in Pennsylvania therefor, over 80 per cent. thereof being necessarily marketed in other States, and in Canada.

Over 70 per cent. of the entire revenue from transportation by defendant over the Jefferson Railroad, and over 85 per cent. of the total revenue from transportation over the Erie & Wyoming Valley Railroad, are derived from the coal of said coal companies. Over 22 per cent. of the entire freight tonnage of this defendant for the year ending June 30, 1907, was from anthracite coal; from which it earned over 20 per cent. of its revenue from transportation. This defendant and its predecessors have paid the State of Pennsylvania for the rights and franchises enjoyed from Pennsylvania, $10,000 a year to January, 1908, since 1848 under the laws of Pennsylvania for 1846 and 1848 (Answer, p. 6). The mines were developed and the railroads in this mountainous coal country were built, at large expense, and were naturally so built or developed with reference to each other that taking either from the other would greatly impair, or wholly destroy, the value of both (Answer, pp. 8, 9, 10, 11, 13, 14; paragraphs 1, 2, 3, 4, 6, 7, 8, 10).

This defendant only has "a small minority of the stock of the Temple Iron Company." The only interest this defendant has in said Pennsylvania Coal Company, or Hillside Coal & Iron Company, or the Temple Iron Company, or the property of either of them, is that of "a stockholder." Our only relation to these corporations has been as "a stockholder." As "a stockholder" thereof, defendant votes for directors, *and those directors elect officers and manage its affairs according to law. This is alleged in the complaint, and admitted and alleged in the answer.* This defendant has long since been compelled to pledge its stocks of the Pennsylvania Coal Company, the Hillsdale Coal & Iron Company, the Jefferson Railroad Company, and the Erie & Wyoming Valley Railroad Company, as collateral to negotiable bonds held by thousands of innocent citizens and holders in New York, Pennsylvania, and throughout the world. These stocks form necessary and substantial portions of the security. Those bonds, aggregating upwards of $136,000,000, were issued under trust mortgages; the last of which mortgages bears date April 1, 1903. These mortgages are annexed to the answer as Exhibits "A," "B" and "C." Many of the obligations secured by these mortgages are underlying bonds and mortgages of the New York & Erie Railroad Company. Those bonds were issued under five mortgages, the earliest dated May 14, 1845, and the last bearing date in 1858. Those bonds are unmatured and outstanding, and aggregate over $12,500,000. These mortgages contain no provisions for releasing the stocks of said coal corporation, or said coal railroad companies pledged thereunder (Answer, Exhibit "A," pp. 18 to 83; Exhibit "B," pp. 84 to 126; Exhibit "C," pp. 127 to 197; also answer, pp. 14, 15, 16; paragraphs 10, 11, 12).

This defendant denies specifically that it is violating the Commodity Statute, or "intends hereafter to violate such clause by unlawfully transporting any coal to interstate markets."

Constitutional objections to commodity clause.— If construed to *prohibit* this defendant from carrying such anthracite coal to interstate markets, this defendant alleges that *"said commodity clause is not a reasonable or lawful regulation* of interstate transportation" of anthracite coal.

The clauses of the Constitution alleged to be involved are:

(a) Art. I, Section 8, wherein—

"Congress is granted power only to regulate such interstate commerce" as "*is not harmful but beneficial,*" and has no power to "prohibit" *such* commerce.

(b) Art. IV, Section 1, which requires that

"full faith and credit" be given "to the public acts" of New York and Pennsylvania "incorporating this defendant and granting it the right to own and hold stock * * * in mining corporations of Pennsylvania."

(c) Art. IV, Section 2, Subdivision 1, which requires that the

"defendant * * * its stockholders and bondholders" have the "privileges and immunities of citizens of the several States."

(d) Amend. V, which forbids that defendants

"* * * its stockholders and bondholders * * * citizens of the United States and of the several States thereof," be deprived of "liberty and property without due process of law, and * * * just compensation."

(e) Amend. VIII, which forbids that—

> "defendant, its directors, officers, lessees, agents, and other persons acting for or employed by it" be subjected to "excessive fines."

These defenses to the Commodity Clause are also otherwise stated thus:

(f) "It will deny to defendant and its stockholders, and bondholders, and disparage, *those certain rights possessed by the people of the several States when the Constitution of the United States and the amendments thereto were adopted and which were retained by the people under the Constitution and especially by the ninth and tenth amendments thereof,* among which rights are the liberty to make innocent contracts and do innocent business upon the same terms and conditions permitted to all other persons, the right to use, sell, or enjoy property acquired by lawful contract, the right to have such contracts continue unimpaired, and the right to that justice and the equal protection of the laws which the Constitution was established to make secure to all persons; and it will exceed the limitations imposed on the powers of Congress by the nature of the Federal Government, and the fundamental principles thereof."

(g) "It will deny to this defendant and its stockholders and bondholders, who are citizens of the United States and of the State of Pennsylvania, or New York, *their certain rights in real estate, and in corporations of said States, and in business in each of said States, and in the United States, contrary to the rights reserved to them,* and granted to them by Section 2, Article IV, and by the Fifth, Eighth, Ninth, Tenth and Fourteenth amendments of the Constitution of the United States." (Answer, pp. 16 to 18, paragraph 13.)

Upon such facts, does the commodity clause apply to defendant and prohibit it from carrying the coal of

the Pennsylvania Coal Company, or the Hillside Coal & Iron Company, or The Temple Iron Company, to interstate markets? Upon such facts, if such transportation is prohibited, is the commodity clause of the statute a valid "regulation" of interstate commerce? Other facts may have an important bearing upon these questions. A long and broad view of the anthracite coal mining industry and traffic may help in determining if the statute in question is a valid regulation of interstate anthracite coal transportation.

Mining, transporting and selling anthracite coal.— Fortunately for this discussion, the main facts that throw light upon mining, transportation and selling anthracite coal as interstate commerce, have been stated for us by skillful and impartial pens, after a most thorough investigation.

The Anthracite Coal Strike Commission first met October 24, 1902. Its hearings began November 14, 1902. It took testimony until February 5, 1903, and heard arguments the week beginning February 9, 1903. It made its report under date of March 18, 1903. In that thorough investigation, wherein 558 witnesses were examined for the miners and the operators, 10,047 pages of testimony were taken, and arguments and briefs were submitted for the different parties by many able and learned lawyers, it is fair to assume that no important feature of the anthracite coal mining industry was overlooked.

To be sure, the Commission was arbitrating between employers and employees as to the claims made by the employees for higher wages, and for reforms in certain practices of the employers in the conduct of the business. The bulk of that report, therefore, bears upon the demands of the employees against the employers. In considering those demands, however, it was neces-

sary that the business as a whole be considered, and that its past and present development be compared, that a just award might be made to promote the future interests of all parties. It is necessary here, too, that this Court shall consider broadly the well-known history of the anthracite industry, its mines and railroads, that this Court may see wherein, if at all, they are inimical to the nation. It is not alleged in the government pleadings in this case that they are injurious to the nation; or that any of them had been doing anything illegal, or contrary to public policy, unless carrying coal to market is a penal offense; but it is necessary in so important a case that this Court know the facts that show if the industry imperilled by the legislation in question helps or hurts the nation, because this is the turning point of this case. Those parts of that report that bear most directly upon the history of the development of this industry down to the time the Commission made its report, should greatly aid this Court on this point.

> "**Report.**—*There is probably no other commodity entering into human consumption which possesses so much the character of a natural monopoly as the anthracite coal of Pennsylvania.* The only other known deposits of anthracite coal of economic value in the United States are in Colorado and New Mexico, but these are all comparatively insignificant, yielding less than 100,000 tons annually. Practically, therefore, the entire source of supply of this fuel is confined to an area of 496 square miles, in nine counties in the State of Pennsylvania. Of these nine counties, five, *i. e.*, Lackawanna, Luzerne, Schuylkill, Northumberland, and Carbon, produce 96 per cent. of the total output. The four less important producing counties are Susquehanna, Dauphin, Columbia and Sullivan.

"The output of anthracite coal in 1901 amounted to 60,242,560 long tons, with a value at the mines of $112,504,020. As an indication of the comparative importance of this industry it may be stated that the value of this product exceeded that of any other non-metallic product of the United States in 1901, with the exception of bituminous coal, and exceeded the value of any metallic product, with the exception of pig iron. It amounted to considerably more than 10 per cent. of the entire value of the mineral output of the United States in 1901.

"The official records of anthracite coal production date from 1820, in which year 365 tons were mined and shipped from the Lehigh region, but for more than fifty years previous to this date anthracite coal had been known to exist and had been mined to a small extent, principally for local consumption. * * *

"In 1812 the new fuel was successfully used in an iron furnace in Philadelphia, and a small quantity was shipped to New York and sold at $15 a ton. A number of mines were opened in the different regions in the next five years, and in 1818 the Lehigh Navigation Company and the Lehigh Coal Company were organized and were shortly afterwards merged into what is still known as the Lehigh Coal & Navigation Company. The first year that this Company shipped coal was in 1820, fifty-eight years after the discovery in the Wyoming Valley, and amounted in that year, as previously stated, to 365 tons. The following year the shipments rose to 1,073 tons. In 1822 the Schuylkill region was opened and the production from these two fields rapidly increased until

1829, when the Wyoming region began shipping. The development of this industry since these early years of struggle is shown in the following table:"

In the place of the elaborate tables contained in this report, from 1820 to 1901, we condense by giving simply the amounts there given every tenth year and for the last additional year:

Year.	Schuylkill Region. Quantity. Long Tons.	Per Cent.	Lehigh Region. Quantity. Long Tons.	Per Cent.	Wyoming Region. Quantity. Long Tons.	Per Cent.	Total. Quantity. Long Tons.
1820..	.....	....	365	....	.....	....	365
1830..	89,984	51.50	41,750	23.90	43,000	24.60	174,734
1840..	490,596	56.75	225,313	26.07	148,470	17.18	864,379
1850..	1,840,620	54.80	690,456	20.56	827,823	24.64	3,358,899
1860..	3,749,632	44.04	1,821,674	21.40	2,941,817	34.56	8,513,123
1870..	4,968,157	40.90	3,239,374	20.02	7,974,660	49.28	16,182,191
1880..	7,554,742	32.23	4,463,221	19.05	11,419,279	48.72	23,437,242
1890..	10,867,822	29.68	6,329,659	17.28	19,417,979	53.04	36,615,459
1900..	13,502,732	29.94	6,918,627	15.33	24,686,125	54.73	45,107,484
1901..	16,019,591	29.92	7,211,974	13.45	30,337,036	56.63	53,568,601

Now, as we have seen, the production is over 70,000,000 tons.

"As seen, the Lehigh region, which was the first opened, became second in importance in 1828, and the Wyoming region, the last to be developed, took first place in 1867, retaining its supremacy to the present time. In the eighty-two years of recorded shipments the Wyoming region has produced nearly 50 per cent., the Schuylkill region a little over 33 per cent., and the Lehigh region about 17 per cent. of the total output. The total shipments in these eighty-two years have amounted to 1,225,581,269 long tons. Adding to this the estimated local and colliery consumption of about 10 per cent. of the shipments, the total production has amounted to about 1,350,000,000 long tons.

"Although the value of anthracite coal as a fuel was demonstrated in the first quarter of the last

century, and although in 1836 the Franklin Institute, of Philadelphia, offered a prize to anyone who should first produce twenty tons of pig iron by use of anthracite, it was not successfully employed in blast-furnace practice until 1838, and the Franklin Institute prize was not awarded. About the middle of the last century anthracite began to be largely used for the manufacture of pig iron, and in 1855 exceeded the use of charcoal for that purpose. Its general utilization for this purpose, however, was somewhat short-lived. The use of coke, a product from bituminous coal, was growing rapidly and in 1875 anthracite fell behind that fuel in blast-furnace consumption. Since 1875 its decline for blast-furnace use has been quite rapid, and at the present time very little anthracite coal finds its way into pig-iron manufacture.

"This decline has had a material effect upon the anthracite industry beyond the mere fact of the loss of an important market. The coal formerly sold for blast-furnace use was lump coal. It was, therefore, a profitable product. *The cutting off of this outlet has made necessary the breaking down of lump coal to meet the requirements for domestic consumption, resulting in the production of a larger amount of fine coal, much of which, until quite recently, has been considered waste output, and which is still sold at prices far below the cost of production.* A considerable percentage of dust and culm is made, for which no market has yet been secured. The general conditions and problems affecting the present marketing of anthracite coal are treated in another portion of this report, and need not be considered in detail here. What is of some importance, however, in connection with the discussion of the past production, is a considera-

tion of what is to be expected in the future in the way of production and the probable duration of the anthracite coal supply. The original deposits of the anthracite coal field have been ascertained with a reasonable degree of accuracy.

"According to the estimates of the Pennsylvania geological survey, the amount of workable anthracite coal originally in the ground was 19,500,000,000 tons. The production to the close of 1901, as previously stated, amounted to 1,350,000,000 long tons, which would indicate that there remained still available a total of 18,150,000,000 tons. Unfortunately, however, for every ton of coal mined and marketed one and one-half tons, approximately, are either wasted or left in the ground as pillars for the protection of the workings, so that the actual yield of the beds is only about 40 per cent. of the contents. Upon this basis the exhaustion to date has amounted to 3,375,000,000 tons. Deducting this from the original deposits, the amount of anthracite remaining in the ground at the close of 1901 is found to be, approximately, 16,125,000,000. Upon the basis of 40 per cent. recovery, this would yield 6,450,000,000 long tons. The total production in 1901 was 60,242,560 long tons. If this rate of production were to continue steadily, the fields would become exhausted in just about one hundred years.

* * * * * * *

"How much this may be increased by better mining methods and the utilization of former waste material, it is impossible to say. Already a large amount of fuel is being recovered from the old culm banks, and it seems safe to predict that the coal saved will, in the near future, equal 50 per cent. of the contents of the fields worked.

However we may make our estimates of future production, it is apparent that the maximum output has been almost if not quite reached. *The production henceforth will be from lower levels and thinner seams than those previously worked. This will necessitate greater expense in mining and, consequently, higher prices for the fuel. With higher prices will necessarily follow more economy in consumption, greater restriction of the market, and the increased competition of other fuels.* All conditions seem to combine for the conservation of the supply of anthracite coal.

"It is interesting to note to what an extent the production is now controlled by the large corporations engaged in the business. Mr. Griffith, in his contribution to the Bond Record, states that the railroads either own or control 96.29 per cent. of the anthracite deposits, nearly 91 per cent. being actually owned by the transportation companies through their coal corporations in all but two cases.

"**Market conditions.**— The endeavor to control this natural monopoly has led many to miscalculate the anticipated increase in value of anthracite coal, due to said increase being more gradual than they had thought, causing in the past undue competition, unwarranted development of the mines, and financial disaster to many of the interests participating in this competition, so that the business has been subject to violent fluctuations. The rivalry between railroads, resulting in the construction of lines into the region, with the idea of securing a portion of this attractive tonnage, has also contributed to the unsettled manner of conducting the business.

"These causes have led to the opening of new mines and the production of coal beyond the market

demand. This seems to have been particularly the case during the six years from 1893 to 1899. *The result of this increased capacity to produce was detrimental to all interests engaged in the business, and was felt especially by the mine workers, who could be given employment only from* 160 *to* 175 *days during the year.* The gradual concentration of anthracite mining properties in the hands of fewer corporations, and the gradual increase in consumption of the product, have contributed to secure more uniform conditions in mining and the management of the business.

"The consumption of anthracite coal, especially of the 'domestic' sizes, is much larger during the winter months than during the remainder of the year, and while the mining operations were conducted by individual operators and small corporations, with limited capital, the mining was more active during the fall and winter months, the output being limited during the spring and summer months, on account of inability to provide storage plants at the far distant points of consumption to which coal could be transported by water while navigation was open.

"Anthracite is prepared in nine sizes, for which there are different uses. 'Lump' coal is taken as it comes out of the mine, and it is marketed for use either in iron furnaces or locomotives. The demand for this size is limited, and the remainder of the coal is broken by rolls and screened into sizes known as 'grate,' 'egg,' 'stove,' 'chestnut,' 'pea,' and 'No. 1,' 'No. 2,' and 'No. 3 buckwheat.'

" 'Grate' is used in house furnaces and some of it for steam purposes, but it is known as one of the 'domestic' sizes.

"'Egg' is used principally for domestic purposes in furnaces.

"'Stove' and 'chestnut' are used entirely for domestic purposes in stoves, furnaces, and ranges.

"'Pea' is used to a small extent for domestic purposes, but mostly for steam.

"'Buckwheat No. 1,' 'No. 2,' and 'No. 3' are the 'small sizes,' and are used entirely for steam purposes, coming directly in competition with bituminous coal.

"The sizes above 'pea' are known as 'domestic,' and bring higher prices than the so-called 'steam' sizes. In fact, were it not for the ability to obtain higher prices for these 'domestic' sizes the business could not be profitably conducted, as the 'steam' sizes are sold below the average cost of production, 'buckwheat No. 3' realizing about 30 cents per ton at the mine to the operator, 'buckwheat No. 2' about 40 cents per ton, 'buckwheat No. 1' about 85 cents per ton, and 'pea' coal about $1.30.

"The total cost of all sizes for the mining and preparing of the coal at the mine, to some of the large companies, is about $2 per ton, while a considerable portion of the product is sold and delivered in New York Harbor for less than that amount, so that the prices realized at the mine for about 40 per cent. of the product averages not over $1 per ton. This loss on the smaller sizes, if the business is to be profitable, must be recovered from the 'domestic' sizes, which are about 60 per cent. of the product, so that in speaking of the cost, which is based on the total of all sizes, one must bear in mind the above facts in comparing that cost with the prices obtained by the operators for the 'domestic' sizes.

"As shown by the figures prepared by Mr. Wm. W. Ruley, the total amount of anthracite coal transported to market during the year 1901 was 53,568,601 long tons. The geographical distribution of this tonnage was as follows:

	Long Tons.	Per Cent.
Pennsylvania, New York and New Jersey	35,234,059	65.77
New England States	8,199,940	15.31
Western States	5,963,035	11.13
Southern States	2,142,744	4.00
Pacific Coast	20,000	.04
Dominion of Canada	1,933,283	3.61
Foreign Ports	75,540	.14
Total	53,568,601	100.00

"The same authority estimates the consumption of anthracite coal along the eastern seaboard, north of and including Philadelphia, during 1901, as follows:

Philadelphia	4,225,000
New Jersey Coast	1,000,000
New York, City, Brooklyn, Long Island and Staten Island	9,000,000
Miscellaneous coast points—Connecticut	1,000,000
Miscellaneous coast points—Rhode Island	600,000
Boston	2,000,000
Miscellaneous coast points—Massachusetts	500,000
Miscellaneous coast points—New Hampshire	250,000
Miscellaneous coast points—Maine	400,000
Total	18,975,000

"This tonnage originates along the lines of, and is transported to market on, the following railroads: Philadelphia & Reading; Central Railroad of New Jersey; Lehigh Valley; Delaware, Lackawanna & Western; Delaware & Hudson Company; Erie; New York, Susquehanna & Western; New York, Ontario & Western; Pennsylvania; and Delaware, Susquehanna & Schuylkill.

"During the past ten years there has been considerable change in the demand for coal of certain sizes, as shown by the following statement of tonnage shipped in 1892 as compared with 1901:

Size.	1892. Long Tons.	1892. Per Cent.	1901. Long Tons.	1901. Per Cent.
Lump	3,907,296	9.3	2,187,553	4.1
Grate	4,692,137	11.2	4,423,584	8.3
Egg	6,078,277	14.5	6,989,330	13.1
Stove	9,681,988	23.1	10,561,957	19.7
Chestnut	7,508,580	17.9	10,250,550	19.1
Prepared sizes.	27,960,982	66.7	32,225,421	60.2
Pea	5,258,838	12.6	7,555,948	14.1
Buckwheat No. 1..	3,971,025	9.5	7,894,613	14.7
Smaller than buckwheat No. 1...	795,179	1.9	3,705,066	6.9
Small sizes..	10,025,042	24.0	19,155,627	35.7
Total	41,893,042	100.0	53,568,601	100.0

"While the total shipments of anthracite in 1901 were 53,568,601 long tons, or about 11,500,000 tons more than in 1892, only about 4,000,000 tons of this increase was in the sizes above 'pea' coal. Of the total shipments of anthracite during the year 1901, 2,567,335 tons were not fresh-mined coal, but were taken from the old waste banks and prepared for market through washeries constructed for that purpose, whereas in 1892 only 90,495 tons were shipped from washeries.

"The average f. o. b. prices per ton received for the different sizes sold at New York Harbor during the year 1901 for the Wyoming region, as reported by Mr. Ruley, were:

Grate	$3.4472
Egg	3.9778
Stove	4.3211

Chestnut	4.3230
Pea	2.5769
Buckwheat No. 1	2.1020
Buckwheat No. 2	1.4383
Buckwheat No. 3	1.1575

"*The introduction of improved methods for burning the small sizes may gradually enable the operator to get better prices for them, but the price must always be controlled or affected by the competition of bituminous coal.* In preparing the coal it is evident that it is to the interest of the operator to make as large a percentage of the 'domestic' sizes as practicable, but it is impossible to prevent a large amount of waste by breakage in preparation; some of this, however, is saved in small sizes, which must be marketed at the best price obtainable.

"The demand for the different sizes is not uniform throughout the year, but all sizes must be produced if any size is wanted; consequently storage facilities for sizes not needed immediately must be provided, causing another investment and source of expense in storing and taking up again. In order to operate the mines more steadily throughout the year and to provide for the increased consumption without opening additional mines, it became necessary for the larger companies engaged in the business to provide storage facilities for many of the sizes that are not generally used through the spring and summer months. Anthracite being used over a large section of the country, these storage plants have been gradually installed at different points. These are used for storing coal during the spring and summer months, leaving the nearby points to be supplied with fresh-mined coal during the winter. *These storage*

plants, however, do not take care of all the coal that could be mined, and the method has been adopted, and carried out fairly well during the past two years, of giving discounts to consumers who buy their coal during the spring and early summer months. This system has worked with general satisfaction, as it enables the companies to have the advantage of the consumers' bins for storage purposes.

"There has been a decided improvement in the past three years in the conditions controlling the anthracite business, among others, the general prosperity of the country has led to an increased consumption of anthracite more nearly approaching the capacity to produce, consequently removing to a great extent the strong competition on the part of the operators. The strike of 1900 limited the production of that year, causing higher prices than had been obtained for some years previous. The operators were enabled to secure about the same prices during the period between the 1900 strike and the long strike of 1902, which again reduced the shipments of coal to the extent of over 22,000,000 tons, so that the present prices which the operators are able to obtain are due to this unusual reduction of output.

"Anthracite, though regarded largely as a necessity, is not free from competition, and unreasonably high prices limit the use of it. As has been said, the price of the 'steam' sizes, which are about forty per cent. of the total production, is influenced by and controlled through the competition of bituminous coal. The 'domestic' sizes, at reasonable prices, are always certain of a fair market, but when the price becomes abnormally high, the economy prac-

ticed in its use and the competition of gas and oil ranges and stoves are directly felt and limit consumption.

"Owing to its gradual exhaustion and the consequent greater expense of mining the poorer veins, and the increased labor cost due to higher wages, the tendency of the price of anthracite coal is probably upward. The effect of higher prices will undoubtedly be to limit consumption.

"*We were impressed with many important features regarding the anthracite industry that are not generally known,* and particularly with the capital required in the development of the mines and the production of the coal, as well as with the great waste occurring and the cost of handling the output under present conditions in the preparation of the marketable sizes. Sinking shafts, fitting them with hoisting machinery, driving gangways, opening chambers, pumping plants, which must be run continuously, ventilating machinery, that the men may work with safety and a reasonable degree of comfort, grading roads, planes, and slopes, cost of mules and cars, the installation of the machinery required in hauling the product to the breaker, where the coal is finally prepared for market—necessitate a large investment of capital. *The breakers, also, equipped with the necessary machinery, are expensive. They are usually built of wood and require constant repairs. The cost of opening a colliery, with its equipment, varies from* $200,000 *to* $750,000, *which must be returned by the time the coal is exhausted or the investment results in loss, as the plants are worthless when all of the coal has been mined.*

"In the study of anthracite conditions, one can not but be struck by the thought that a commodity

so vauable and indispensable, lying within a small area, limited in quantity, should not be wastefully mined, and that the needs of future generations should be considered and their interests conserved."

The practical problem here.—What is the bearing of the facts so found upon the problem here? How serious is the practical question before this Court? A decision by this Court upholding the Commodity Claus may produce a coal famine as great as that caused by the strike that the Commission estimated to have cost $25,000,000. It may throw more than 147,000 laboring men out of employment for a long time, and cause great want among them and say 500,000 women and children dependent upon them. On the finding of the Commission that there was about 16,125,000,000 tons of unmined coal in the ground in 1903, there is now unmined about 15,800,000,000 tons. Of this amount the Commission finds that about 91 per cent. is owned by the railways, or the railway coal companies. On the basis of the last important sale of stock in coal companies, made in recent years, a sale made in 1901, this coal would be worth in the ground substantially 20c a ton; therefore this 91 per cent. would be worth upwards of $2,000,000,000 on that basis. The royalties of the Girard estate, in reality now the City of Philadelphia, under coal leases, upon the coal in some 12,000 acres, averaging much over 20c a ton, shows how valuable are the coal properties of other owners. The great appreciation in prices due to the great increase in gold production during the last ten years, has raised such prices generally from 20 to 40 per cent. since 1900. For these reasons, it is safe to conclude that $2,000,000,000 would now be a low price for the coal lands of the railroad companies and the railroad company coal companies. Suppose it much less than that,

the result is still the same. It is obvious that the remaining coal interests upon that valuation, or a lower one, would be of a value of less than $200,000,000; and, therefore, they would not have sufficient capital to buy and operate these coal properties. Moreover, an adverse decision throwing all these coal properties upon the market would make such independent capital already fully employed in the same business, so timid that it would not further invest in a business that the Strike Commission rightly found to be "more hazardous than any other class of underground work," because of the risk of "falling rock," "premature blasts," "fire," and "explosion." These risks often destroy much property as well as many lives in an instant of time. Fortunes vanish in a moment. If we add unsettled legal, market, and competitive conditions to such hazards, capital will be likely to stay out. Capital already employed appreciating the added risks, will not venture to meet them, in sufficient quantities. Capitalists having $1,000,000, or $10,000,000, or even $100,000,000 cannot buy these properties. It was impossible for business men and lawyers to solve the problem created by the Commodity Clause, between June 29, 1906, when it was passed, and May 1, 1908, when it took effect. Despite the risk of its confiscatory fines and penalties, there was nothing left for them to do, therefore, except to join issue with the Government after it took effect, to test its validity in this Court. Treating the shipment of each car load of from 600 to 800 car loads a day by the Erie Railroad Company alone as a separate offense and fining "~~at least $1,000" and not more than $20,000~~ $5,000.—, for each offense, would result in aggregate fines of from ~~$600,000 to $16,000,000~~ $3,000,000. to $4,000,000. a day. The property of the bondholders and stockholders of the Erie Railroad is already confiscated to the United States upon what we

have shipped since May 1, 1908 if the Commodity Clause is valid.

How important these considerations are is shown by the fact that many independent millionaires and coal corporations are now mining coal upon lands leased from these companies. While these companies own about 90 per cent. of the coal in the lands under leases upon royalties to be paid as the coal is mined, or by a title in fee simple, they lease from one-sixth to two-ninths of their coal lands to independent operators upon royalty, and those independents mine and produce the coal therein.

Are such leasehold and royalty relations sufficient to bar the lessors from carrying to market the coal so mined or produced? Are such lessors "indirectly interested" in such coal? If it is necessary for the railways, or the railway coal corporations, thus to draw in outside capital to develop and operate coal mines upon their own lands because it takes from $200,000 at least $750,000, or usually more, to develop a mine, and erect a proper breaker to prepare its output for market, what will happen if all coal produced by these corporations, is prohibited from going to interstate markets upon the same rates, and upon the same terms and conditions as other like coal? Perhaps no lawyer or court can answer these questions in advance, but it is easy to see that the answer of business men on the heels of an adverse decision, that will unsettle the foundations of this business laid legally over fifty years ago pursuant to the statute law of Pennsylvania, may be an answer fraught with financial disaster. And what were those legal business foundations under the laws of Pennsylvania?

Railroad coal traffic.—The production and transportation of anthracite coal has been commonly carried on by

the same corporation, by the express authority of the State of Pennsylvania. Whether that corporation was called a railroad company, or a canal company, or a coal company, was deemed a matter of no consequence, for a long term of years. For instance, in 1823 the States of New York and Pennsylvania each authorized the Delaware & Hudson Canal Company to construct a canal from the anthracite coal district in Pennsylvania to the Hudson River; to purchase anthracite coal lands in Pennsylvania; and to use its capital in producing and transporting such coal to market. Such legislation was supplemented by each State from time to time, until such Canal Company was authorized to build a railroad, and finally April 28, 1899, such canal company was authorized to sell its canal and to change its name to "The Delaware & Hudson Company." (See Ans. D. & H. in case that corporation.)

One of the Lehigh Valley Railroad Company's predecessors, the "Beaver Meadow Railroad & Coal Company," created April 7, 1830, under the Laws of Pennsylvania, was given power to construct a railroad, and mine, transport and vend coal. Another predecessor of the Lehigh Valley, the Hazleton Railroad Company, was organized March 28, 1836, by a statute of Pennsylvania, with power to construct a railroad to intersect the Beaver Meadow Railroad, and also to transact the usual business of companies engaged in mining, transporting, and selling coal. (Ans. Lehigh Valley R. Co. in case that corporation.)

The predecessor of the Delaware, Lackawanna & Western Railroad Company, "Ligett's Gap Railroad Company," was organized under the Laws of Pennsylvania, April 7, 1832, with power to construct a railroad "through the coal region," and later, and April 14, 1851, its name was changed to "The Lackawanna & Western

Railroad Company," and it was authorized to "purchase and hold a reasonable amount of coal lands; provided that the amount so held shall in no case exceed 1,000 acres."

So its predecessor, the Northwestern Coal & Iron Company, organized under the Laws of Pennsylvania April 19, 1856, with power to acquire coal lands, and to "mine, prepare for market, sell and dispose of the * * * coal," after various authorized changes and mergers, finally became the Keyser Valley Railroad Company, and was merged in the Delaware, Lackawanna & Western March 13, 1865, by Act of Assembly of Pennsylvania, which gave the Delaware, Lackawanna & Western the right to exercise all the rights and franchises so obtained by such merger. Other coal companies were merged in the Delaware, Lackawanna & Western in like manner. (Ans. D., L. & W., in that case.)

Without examining all the answers to point out similar legislation that shows that for more than half a century Pennsylvania encouraged, and expressly authorized, stockholders and bondholders to put their money into corporations expressly authorized to buy and hold coal lands, and to "mine, transport and vend coal," we again call attention to the Pennsylvania Coal Company, and the manner in which it was expressly authorized to do the same thing in 1838, and later; also to the natural manner in which this defendant's predecessor then existing was authorized in 1862 to enter into contract relations with the Pennsylvania Coal Company for operating its railroad and transporting its coal to market. So, too, through the Jefferson Railroad Company, organized April 28, 1851, this defendant's predecessor came into natural and authorized coal traffic relations with the Hillside Coal & Iron Company, and was authorized to, and did, acquire substantially all its stock; such stock

being mortgaged by such predecessor as early as February 5, 1874. (Ans. pp. 7 to 16, paragraphs 2 to 13.)

While the Erie Railroad Company is not a controlling factor in the coal situation, this case is fraught with vital consequences to it. How important this question is to the Erie Railroad Company may be seen from the fact that for the year ending June 30, 1907, its report to the Interstate Commerce Commission shows it transported 18,258,031 tons of coal to market. Of this coal, the anthracite was 8,628,049 tons; the bituminous 7,338,700 tons; the coke 2,291,282 tons. From 600 to 800 cars a day would be the average anthracite shipments. The total coal tonnage was 46.62 per cent. of its entire tonnage. Upon the anthracite coal the earnings for that year were $10,205,432.40, out of freight earnings of $38,550,092.47. Since the panic of October, 1907, the relative earnings of anthracite coal have been still greater. The bituminous part of the question is important to the Erie Railroad Company and numerous other railroad companies; in fact, the bituminous coal traffic gave rise to the Commodity Clause, and is even more important than the anthracite traffic. (Vol. 42 Cong. R., pp. 6479 to 6481.)

Nor is bituminous coal the only other commodity produced upon lands owned by railroads, or in manufactories owned by corporations in which railroads lawfully own stock, that may be affected by the decision of this Court should it take the broad view urged upon it by the learned Attorney General. The relative importance of anthracite and bituminous coal, lumber, and other commodities from the railway tonnage and interstate commerce point of view here becomes very important to this Court. We have therefore compiled from the statistics of the Interstate Commerce Commission a

statement showing the tonnage of the principal commodities carried by the railroads down to as late a date as such statistics are available to us.

TONNAGE ORIGINATING ON ROAD.

	1902 Tons.	1903 Tons.	1904 Tons.	1905 Tons.	1906 Tons.
Anthracite coal	48,722,948	40,351,603	51,652,133	63,830,823	59,698,122
Bituminous coal	154,402,501	170,203,832	174,355,979	184,979,910	206,040,224
Lumber	46,930,305	51,075,510	67,049,472	65,775,694	77,345,991
Other products of forest...	20,763,745	23,484,470	13,334,105	14,661,169	14,841,360
Grain	26,354,325	30,188,316	30,493,327	30,906,440	35,856,333
Hay	4,681,509	4,641,440	5,228,475	5,191,830	5,479,755
Cotton	2,796,850	3,175,117	3,005,897	3,962,183	3,428,880
Live stock...	8,457,337	9,803,871	10,190,124	10,611,555	11,089,456
Iron, pig and bloom	14,714,989	16,604,066	15,255,251	17,610,240	21,190,517
Iron and steel rails	4,849,255	5,124,681	3,878,772	3,781,934	5,847,927
Bar and sheet metal	10,624,712	11,721,664	9,411,655	11,400,571	15,194,805
Cement, brick and lime...	17,752,630	20,247,502	19,815,674	22,514,909	27,368,544

This table shows at once how important this case is to the bondholders and stockholders of bituminous coal, and lumber producing railroads as well as to anthracite producing railroads, or coal corporations the stock of which is mainly owned by such railroads. Other commodities affected will suggest themselves as the Court examines this table. If the Commodity Clause is upheld as broadly as it is claimed it should be then a precedent will be made that may affect all the above commodities tomorrow even if this Act does not reach them today.

It is estimated there are between 30,000 and 40,000 miles of railroads in our timber lands. Many of them

own immense tracts of timber lands. They were exempted for that reason. If that power exists the exemption can be wiped out tomorrow. Some of these timber lands were granted the railroads by the United States to get them to build. Could that government now forbid them to carry that timber to market? The railroads, or railroad coal companies, bought their coal lands in Pennsylvania under her laws because she gave them power to buy, mine, and vend coal. Can the United States destroy these titles and franchise by forbiding them to carry their coal to market?

Fuel.—Nor is the competition of bituminous coal and wood as fuel negligible in considering the case of anthracite coal. The commission finds the small or steam sizes of anthracite are some 40 per cent. of the whole output of anthracite, and come into direct competition with bituminous coal, an abundant, cheap and most people claim, superior steam coal fuel. Wood is still largely used on the farms as a fuel, and is drawn to the smaller towns all over the country and sold in competition with both bituminous and anthracite coal. As the statistics and report of the strike commission shows the bulk of the anthracite coal is sold in the large cities and towns of the New England and Middle States, the Lake cities and Canada because cheaper bituminous coal and wood circumscribe its market. We see, therefore, the intimate connection between all these competing fuels, and why it is Congress should not leave one fuel free, while prohibiting the interstate transportation of the others by railroads alone, while leaving common carriers by wagon, or water, free to carry them all under the same circumstance and conditions. Has Congress such absolute, unlimited, despotic power to discriminate without justice or reason when pretending to "regulate" interstate commerce? Can Congress say one owner may carry his food, fuel, or material for clothing to an interstate mar-

ket, but that his neighbor shall not carry a competing product to the same market?

The extent to which timber is still used for mere fuel is thus shown to be important, and is shown by late government estimates, as briefly summarized by Mr. Rossiter in his January, 1908, article in the *American Review of Reviews*, p. 71.

"PRODUCT AND DISTRIBUTION OF TIMBER IN THE UNITED STATES, 1906.

	Board Feet.	Per Cent of Total.
Lumber	37,550,736,000	38.04
Shingles	2,376,000,000	2.4
Hewed cross ties	2,325,000,000	2.4
Pulp wood	1,599,000,000	1.6
Cooperage stock	1,067,000,000	1.1
Round mine timbers	993,000,000	1.0
Laths	764,000,000	0.8
Wood distillation	657,000,000	0.7
Veneer	327,000,000	0.3
Poles	210,000,000	0.2
Fuel, domestic and misc	50,000,000,000	51.1
Total	97,868,736,000	100. "

HISTORY OF THE COMMODITY CLAUSE.

Is the Commodity Clause a regulation of interstate commerce, or is it in effect a prohibition of domestic production? What is its history?

Litigations in West Virginia between producers of bituminous coal and common carriers, and in Kansas between producers of oil and pipe line, corporations at least supposed to be controlled by the Standard Oil Company, led to an investigation under a joint resolution of Congress dated March 7, 1906—

> "instructing the Interstate Commerce Commission to make investigations into the subject of railroad discriminations in coal and oil and report on the

same *from time to time.*" (See beginning of final report of Commission to Congress, dated January 25, 1907.)

It will be noticed this investigation was begun about March 7, 1906, three months before the Hepburn amendments were passed and more than two months before the Commodity Clause first saw light in its present form. During this time, the investigation made for the Commission, and the reports of the lawyers who conducted that investigation into the *bituminous coal* business, for the Commission, resulted in various proposed commodity clauses. The anthracite coal business did not cause the investigation, and was not investigated. The lawyer employed by the Commission to conduct that investigation was a lawyer of high standing, who had been previously employed in the trial of important bituminous coal litigations. He was, and still is, counsel for many independent bituminous coal operators. In a letter to the President, to have the Commodity Clause further suspended from operation for a long time after May 1, 1908, apparently because it was not drawn as it should have been, or its effect was not that anticipated, he discloses that he originally advised the Commission that there should be some legislation of the general character of the Commodity Clause, but not in form or effect like that Clause as it now stands. 42 *Congressional R.,* May 13, 1908, 6193-4. How came it in its present form? At first, Senator Elkins, Chairman of the Interstate Commerce Committee of the Senate, reported it in a form to make it "unlawful" for—

> "*any* common carrier subject to the * * * Act, unless authorized by its charter to do so, to *engage* directly or indirectly in the production * * * or selling of coal * * * *or any other commodity*" except "for its own use."
>
> 40 *Cong. R.,* May 7, 1906, pp. 6345-6.

In introducing this amendment Senator Elkins said in part:

> "I do not want to bring on any conflict by this amendment. I want to be fair. *I do not want to interfere with any vested rights.*"
>
> 40 *Cong R.*, May 7, 1906, pp. 6455-6.

Senator Elkins later stated the object of proposing a Commodity Clause was:

> "to *divorce* transportation from *production* on the part of the railroads engaged in transporting coal they *mined and sold in competition with their shippers,* which was a great abuse. Of late the railroads in West Virginia and in other States have acquired large holdings of coal lands and become extensive miners of coal as well as shippers, and in competition with shippers on their lines. This abuse grew into a grievous wrong to independent shippers. I sought to correct this abuse by an amendment confining railroads to their legitimate business of transporting freight and passengers and *prohibiting* them from engaging in the transportation of any commodity *which they might own* except for their own use." (40 *Cong. Rec.,* June 26, 1906, p. 9250.)

So the object was a "divorce" by the Federal government of what Pennsylvania joined together? But can the Federal government divorce business by prohibiting such business any more than it could divorce man and wife by legislative fiat compelling separation?

The clause as proposed was amended at once by Senator Elkins, after a brief discussion, to prohibit any common carrier "engaged" in "production" to "engage in interstate commerce." (40 *Cong. R.*, May 7, 1906,

p. 6457.) Other proposals, or suggestions, from Senators Knox, Lodge and Bailey, caused Senator Tillman to say of the subject—"the more you consider it, the more troublesome it grows." (40 *Cong. R.*, May 7, 1906, p. 6460.)

This interesting discussion took place:

> "Mr. Foraker: What would happen if our legislation should be enacted as proposed and it should be held to be constitutional and we would *thereby prohibit railroads who are now engaged in mining and manufacturing coal from sending it out as interstate commerce and supplying the people with it?*
>
> "Mr. Teller: * * * *I cannot conceive that any court in this country entitled to be called a court would hold that we have that right.*"
>
> 40 *Cong. R.*, May 8, 1906, p. 6495.
>
> "Mr. Knox: * * * But, Mr. President, to say that Congress can cancel the policy of any State in respect to the development of its own resources *by prohibiting the agencies of its creation from commercial intercourse upon equal terms with citizens of other States is to say that which I think is impossible; and I entirely agree with the legal conclusions that have been so clearly announced upon this subject by the Senator from Colorado* (Mr. Teller)."
>
> 40 *Cong. R.*, May 8, 1906, p. 6497.

Said Senator Elkins said:

> "Under the laws of West Virginia a railroad company is prohibited from engaging in the business of mining and selling coal. This act of the Legislature was passed in 1895."

The Act of February 15, 1895, of the Legislature of West Virginia, referred to by Senator Elkins, provides:

> "It shall be unlawful for any railroad corporation to engage, directly or indirectly, in the *business of buying and selling coal* or coke, or to promise, pledge or lend its credit, money or other property or thing of value to another, either natural or corporate, engaged in such business but nothing herein shall prevent such corporation from purchasing such articles for its own consumption, *or when it is the owner of any such commodities, from selling and shipping the same;*
>
> "Provided, in doing so, such corporation shall not discriminate in rates, distribution of cars or otherwise against other shippers of like commodities on its lines; *and, provided further that when such company has the right to sell either of such commodities,* and is unable from any cause to fill any bona fide contracts it may have made to supply such commodities or either of them it may purchase them to enable it to fill such contracts."

It will be observed that by this act West Virginia undertook to regulate the "business" of "buying and selling coal" within the State of West Virginia. Still that Act does not undertake to prevent those having the right so to do to continue that business. Having that Act in mind Senator Elkins further said:

> "What I am contending for in this amendment is that the independent operator, the individual mine owner, shall be protected in his business against the rapacity and injustice of railroads owning coal lands. No independent operator, no small mine owner, can afford to engage in competition

with a railroad company that owns twenty, or thirty, or forty thousand acres of coal doing business in the same locality."

So Senator Elkins wanted Congress to free such operators from all possibility of competition *in the mining of coal.* Senator Elkins continues:

"It seems to me that the substitute offered by the Senator from North Dakota (Mr. McCumber) is clear, explicit and to the point. It says it shall be unlawful, using the very words I have in the pending amendment, for a common carrier under the provisions of this Act to do what? *To engage in the business of mining, selling and producing coal.* That is simple, and I do not see how there can be any objection to this wording. It seems to me it is clear and to the point.

"Railroads in recent years have been chartered and organized primarily for one purpose, namely, to transport freight and passengers. Nothing else. *Fifty years ago I admit that the Reading, the Lehigh Valley, the Pennsylvania, and other roads, under special acts of the legislature, had the power conferred upon them of owning coal lands and mining and selling coal, which they have exercised for all these years. I do not want to interfere with these powers,* but for the future I want it to be clearly understood that all interstate roads shall refrain from engaging in such business."

40 *Cong. R.*, May 8, 1906, pp. 6498 to 6500.

Senator McCumber said of the then Commodity Clause:

"The only thing the company is prohibited from selling is *the article owned by itself* which enters into interstate commerce."

40 *Cong. R.*, May 9, 1906, p. 6560.

Finally, after more discussion, Senator Daniel proposed as a substitute that—

> "after May, 1908, it shall be unlawful for *any common carrier* to transport" to another State, territory, or country "*any* article or commodity * * * produced by it, or under its authority, or which it may own in whole or in part, in which it may have an interest, direct or indirect, except such articles or commodities as may be necessary * * * in * * * its business as a common carrier"; and this amendment was adopted by the Committee of the Whole.
>
> 40 *Cong. R.*, May 9, 1906, p. 6569.

When this amendment came before the Senate from the Committee of the Whole, Senator Tillman offered a substitute to make it cover cases of those—

> "interested, directly or indirectly, *by stock ownership or otherwise*, in the business of buying or selling such article, or * * * producing the same."
>
> 40 *Cong. R.*, May 17, 1906, p. 7012.

As a reason for that amendment, Senator Tillman said:

> *"I have here a communication from a gentleman engaged in coal production, and he points out that this amendment would not prevent the ownership of coal properties by the ownership of stock in coal companies; that it would not prevent the control of coal companies by officials of railway companies; that it would not touch the ownership of railroads by coal companies or the common ownership of railroad companies and coal companies."*
>
> 40 *Cong. R.*, May 17, 1906, p. 1711.

That amendment was twice rejected. (40 *Cong. R.*, May 17, 1906, pp. 7012-7014.) So rejected after this

discussion which showed it was proposed to reach common carriers having interests in coal mining corporations, can we doubt it was rejected because Congress considered it either unwise, or unjust, to affect them, or beyond the constitutional power of Congress to reach stockhoding and coal production in accordance with State laws?

Still the clause applied to "any" common carrier, "any" commodity. It still covered *all* commodities, *all* common carriers. Why was it changed so as to except some common carriers, and some commodities much used for fuel? The reason for such changes we cannot answer. To follow all the debates upon the Court review, rate-making, and other important clauses, would take too much time and paper. The Commodity Clause cut a late and minor part in all the discussion. The three conference committees considered all the proposed amendments before both Senate and House, could agree upon a report that finally changed many important amendments, and, among others, changed "any" common carriers, to any "railroad company," and "any" commodity to "other than *timber* and the manufactured products thereof." What railroad or railroads had sufficient timber lands, and was engaged in producing and transporting lumber to interstate markets to such an extent as to require that timber alone be excepted we are not told by the Congressional Record; but we do know enough of such things to know timber was so quietly excepted only at the instance of influential railroads that desired it excepted. That these changes were not adequately considered or discussed at the late day they were made, we also know from the reports and debates. In a more recent debate over the proposition to suspend its operation for time enough *to enable the owners affected by it to sell their coal interests* this came out. But the clamor for

railroad blood was not yet over then, and that was not done; albeit a great increase in votes for justice was shown. In the debate that preceded the vote, some truth leaked out.

Senator Beveridge said that the Superme Court had said of foreign and interstate commerce in *Crutcher vs. Ky.*, 141 U. S., 57,—"no difference is perceivable between them," and, therefore, it has in fact the same power over each. This interesting senatorial colloquy then took place in the Senate May 22, 1908:

> "Mr. Rayner: I have had occasion to examine this question, and if there is any decision of the Supreme Court of the United States where the quesiton has ever arisen that Congress has the same power over interstate commerce that it has over foreign commerce, I have never heard of it. I should like to ask the Senator from Pennsylvania (Mr. Knox), who has thoroughly considered this question, whether I am right in that assertion.
>
> "Mr. Knox: Mr. President, I tremble to enter this arena. However, I have been asked a question and I am very glad to make reply. There has never been such a decision of the Supreme Court of the United States that I know of, and it has been my business to inquire pretty closely into this question. I do not say there is not an opinion of the Supreme Court in which there is such language, but I say there is no decision of the Supreme Court of the United States deciding that the power of Congress over interstate commerce is the same in all respects as the power of Congress over commerce with foreign countries.
>
> "I recall very distinctly that while I was filling the office of Attorney General of the United States, the Government raised that question, argued the

question, and contended for it upon the identical authorities which have been cited here by the Senator from Indiana as sustaining the proposition, namely, in the lottery cases.

* * * * * * * *

"The Government contended for that proposition in the lottery case, because it was the simple solution of the lottery case. What Congress did in respect to the lotteries was to pass a law prohibiting them from injuring the channels of interstate trade. There was the plain, naked proposition presented to the Supreme Court of the United States, 'Had Congress the power to do that thing,' and the Government contended it had the power, because it had the power to prohibit commerce between the States under the Constitution, which made its power equal to that over foreign commerce, and as there could be no doubt of the Government's power to place arbitrary limitation upon goods imported from foreign countries, the Government contended that it had a right to prohibit goods from going from one point in the United States to another.

"But the Supreme Court of the United States reversed that contention and threw all those authorities into the brush heap and decided the question solely upon the ground of the obnoxious character of the lottery business, and held, as I discovered in looking at a pamphlet that I happened to find in my desk here, that—

"Just as the Senator from Montana (Mr. Carter) has said—

"The power of Congress to regulate commerce among the States, although plenary, can not be deemed arbitrary since it is subject to such limitations or restrictions as are prescribed by the Con-

stitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."

42 *Cong. R.*, p. 6751.

Senator Heyburn said May 13, 1908:

"Mr. Heyburn: *Mr. President, I have never known of a case in which there was such haste and importunity to remove every possible obstacle from the enactment of legislation as in this case. I remember when the Commodity Clause was being interjected into this legislation. It had no business there.*"

42 *Cong. R.*, p. 6198.

Senator Foraker, who alone had the courage to oppose all this legislation as unconstitutional by a powerful argument, said:

"I do not think this Commodity Clause ever should have been enacted in the form in which it finds itself in the Act. *It was pointed out here on the floor of the Senate—but without avail—that if we passed this Commodity Clause in the form in which we enacted it, we would, when the 1st day of May, 1908, arrived, either be unable to enforce it or be compelled to interfere with vested property rights, which everybody knows would be unconstitutional; or, if the law should be held valid and be enforced, bring wholesale disaster to all concerned —consumers as well as railroads.* But that did not seem to do any good.

42 *Cong. R.*, May 13, 1908, p. 6201.

Without further quoting from these interesting discussions of able, experienced, and learned lawyers and Senators, it is very obvious the Commodity Clause is

not really considered constitutional by them; hence, perhaps, its passage, that the Courts might condemn it.

And what is the Commodity Clause as finally passed? It reads:

THE COMMODITY CLAUSE AND QUESTIONS UNDER IT.

It makes it "unlawful" after May 1, 1908—

> "for *any railroad company* to transport from any State * * * to any other State, * * * or to any foreign country, any article or commodity, *other than timber and the manufactured products thereof, manufactured, mined or produced by it,* or under its authority, *or which it may own* in whole or in part, or in which it may have an *interest* direct or indirect, except for its use."

These are some of the questions that arise in this case under this clause:

(1) If a railroad company does not own the coal land, and does not buy the coal, does it "own in whole or in part," or has it an interest in the coal mined, "direct or indirect," if it is a stockholder in the coal corporation that mines and produces the coal?

(2) If the railroad company owns all, or a majority, of the capital stock of the coal corporation, and can and does lawfuwfully elect its directors, who in turn elect the executive officers of the coal corporation, and then such directors and officers are left to run the coal corporation according to the law of Pennsylvania which created the coal corporation, can it be held that the coal is "mined or produced" under its "authority" by the railroad company instead of the coal corporation?

(3) Can Congress make it "unlawful" for "any" railroad corporations to transport their own coal to inter-

state markets upon any terms or conditions whatever, where such railroad companies were created by States, and were given the power to "mine, transport, and vend" coal by the state where the coal is all produced?

(4) Has Congress the power to "regulate" harmless interstate commerce, like fuel, in such a way that a citizen buying 1,000,000 tons, or only a car-load, of fuel in Pennsylvania, where it has been lawfully produced, cannot have it become interstate commerce at all, because he cannot have it carried to his coal yard, or his home, on the same terms and conditions as other shippers, by the only available common carrier having any railroad connection to it, because it owned the coal before its sale, or owned stock in the coal corporation that produced and sold it in Pennsylvania, where such production and sale were lawful?

(5) The State of Pennsylvania having the exclusive constitutional power to create coal mining corporations, and to give them the right to own, mine, transport and vend coal, within her domain, and having exercised that power, and created such corporations, and given them, whether railroad companies or coal corporations, the power to own coal lands, and to mine, transport and vend coal, and such corporations having accepted such franchises, and having induced stockholders and bondholders to invest hundreds of millions of dollars in coal lands, mines, breakers and railroads, so that the State of Pennsylvania could not thereafter take such franchises, and such property, from such corporations, and their stockholders and bondholders, even by constitutional amendments, without giving just compensation for such real estate, mines, breakers, and railroads, can Congress greatly impair such property and franchises, and in many cases render them wholly valueless, by making it "unlawful" for the harmless fuel produced to become interstate commerce at all upon the same rates and conditions of transportation that apply to all other shippers?

(6) Can Congress discriminate between those railroad companies that produce wood for fuel and those railroad companies that produce coal for fuel, and leave the wood produced from the surface of the ground free to move to market over the railroad of the corporation that produced it, while making it "unlawful" for the very same railroad company to carry coal produced on the same lands to the very same market, upon any terms whatever?

(7) Citizens all over the northeastern part of this country having built homes, with furnaces, and grates to use anthracite coal to warm them in winter, and having the constitutional right to go to Pennsylvania, or send their agents, or coal dealers, to Pennsylvania to buy their coal, if they do go or send to Pennsylvania to buy that coal, has Congress the power to make it "unlawful" for the only common carrier or railroad that reaches the coal to transport it to the citizen upon the same terms and conditions upon which it would carry the same coal for other shippers, if it is the fact that it was produced by a coal corporation in which the common carrier is a stockholder, or such common carrier itself produced, owned, and lawfully sold it?

We do not intend to discuss all these questions. We rely upon what Mr. Johnson will say in his brief and oral argument in the discussion of the Commodity Clause. If he cannot adequately present this or any other case, no one at the Bar of this Court can. But even Mr. Johnson cannot say all that might well be said in so important a case. The Commodity Clause will affect railroad stockholders and bondholders and all citizens interested in all commodities except timber, if the broad claims of the learned Attorney General are sustained. Even timber may be included in its fines and penalties by amendment tomorrow, if the innocent limited word "regulate" carries the broad, unlimited and absolute powers from the people of the States to the National Government that are now claimed for it for the first time in over a century. Corporations

like the United States Steel Corporation, owning numerous railroad corporations, thousands of miles of tracks, tens of thousands of cars, with engines to move them, and having corporate power itself, and also through its subsidiary corporations, to construct and use its own "transportation," may be here involved. That corporation expended for capital account during the last fiscal year alone upon "transportation properties," $13,194,074.61. (See Poor's Manual, 1908, pp. 1624, 1634, 1638-1642.)

Nearly all the great industrial corporations of the country are in the same position, because they have engines, cars, and tracks to mines, and railroad connection, in order that they may assemble, load, unload, and move raw material and manufactured products with promptness and economy. Hundreds of thousands of citizens, and hundreds of savings banks, trust companies, and estates hold billions of their stocks and bonds. How far the Commodity Clause, *or like legislation*, if it is upheld, may affect them, we do not know. Such corporations may be largely exempt, now, because their cars and railroads may be carrying ore, coal, coke, iron, steel, and like commodities "for" their own "use." And yet it may be "unlawful" for them to use "any" railroad "transportation" to carry iron, steel, steel wire, steel building structutres, steel bridge structures, and other commodities, to the buyers thereof over their own railroads and in their own cars, because they have "manufactured or produced" such "commodities." Even as to such corporations "for its use" could be wiped out tomorrow, if public clamor should demand it, and Congress has the absolute power now claimed for Congress.

All corporations that have engines, cars, or tracks, of their own, as so many have, would seem to come within section 1 of the Interstate Commerce Act of which the Commodity Clause is a part. This is so because the Act provides: "The term 'rail-

road' * * * shall include * * * all the road in use by any such corporation operating a railroad * * *; 'transportation' shall include * * * cars and other vehicles and all instrumentalities and facilities of shipment or carriage."

Parties here and not here.—As to the corporations that reach and carry anthracite coal, as shown in the report of the Anthracite Coal Commission already quoted, the legal situation in this Court is that they divide into five classes. They are:

(1) The New York, Susquehanna & Western; the Delaware, Susquehanna & Schuylkill, and the Ontario & Western *are not before this Court*, although we understand each has stock in coal mining corporations, but does not itself own coal lands or mine or sell coal.

(2) The Pennsylvania, Erie, Lehigh Valley, and Central of New Jersey, all own stock in coal corporations, and are all before this Court, but neither of them owns, mines, or sells coal.

(3) The Delaware, Lackawanna & Western, a railroad company having the chartered right to own, mine, transport and sell its coal, and exercising that right. It also owns stock in three coal corporations. It is here.

(4) The "Delaware and Hudson Company," having the chartered right, which it has exercised, to own, mine, transport, and sell coal, and for that purpose to build both canal and railroad. About 1898 it was authorized to sell its canal. It did sell its canal, and it was authorized to strike "canal" out of its corporate name. It built a railroad to serve its coal mines, but does not concede that it is a railroad company. It also owns the stock in three coal corporations. It is here.

(5) The Philadelphia & Reading Railroad Company, which does not own coal lands, or the stock of coal

corporations, and does not mine, transport or sell coal. The capital stock of this corporation, however, is owned by the Reading Company, which also owns a majority of the capital stock of the Central of New Jersey, and of the Philadelphia Coal & Iron Company, which is principally a coal mining corporation, and not at all a railroad company. These corporations are none of them parties here.

If this Court sustains the Commodity Clause as broadly as the government claims it should, all the foregoing corporations will be affected, and some will be vitally affected. *If it is held that it does not reach mere stockholding in lawful coal mining or other corporations of Pennsylvania, or other States, because Congress did not intend to reach them, and the language used does not in terms, or by necessary implication, include them, then, as will be readily seen, nearly all of the foregoing corporations will be unaffected, even if the Commodity Clause be narrowly upheld.*

Of course, we know it must be upheld if constitutional, even if it creates another panic. But we know, too, this Court may consider the foregoing facts to see if Congress could have intended such unjust, unreasonable, and disastrous effects as will be produced if the Attorney General's broad argument is sustained. Should this Court uphold the Commodity Clause narrowly, or broadly, or not at all? The foregoing facts, and the following considerations, may help this Court to answer this question.

BRIEF OF THE ARGUMENT.

I.

Fundamental Rights.

The United States cannot impair or destroy the reserved "unalienable" constitutional rights of the people, States, and corporations created by them, under the mere pretense that it is necessary to so "regulate" production as to make it "unlawful" to "transport" to interstate markets the "commodities" lawfully "produced."

To hold otherwise would be to hold that the United States Government can so "regulate" domestic production within the domains of a State as to make it difficult, if not impossible, for a State corporation to sell its lawful product within that State. *Such so-called regulation would make it impossible for all of the articles so regulated, and really affected, to ever become interstate commerce at all.* It was held in the Lottery cases that the Federal Government has this extreme power as to injurious, state-outlawed, articles, like lottery tickets; but in that case this Court refused to go further. The Court then said of legislation affecting innocent articles like the fuel here involved:

> *"It will be time enough to consider the constitutionality of such legislation when we must do so."*

The question there reserved is now up. In its most important aspect, it affects the constitutional rights of millions of citizens to go or send to Pennsylvania, or any other State, and there buy much or little wood, bituminous coal, coke, or anthracite coal, there lawfully produced by a corporation, and then to have that coal carried to the coal yard or home of the citizen by the usual and only available common carrier, either by rail or water, as he may choose, on the same terms and conditions as those prescribed for all other shippers subject to our national regulations or statutes.

As the citizens, a majority of whom, some tens of thousands, are also stockholders and bondholders of the various railroad companies, are not before this Court as parties, but are the real parties to be affected most by this Commodity Clause, if it is upheld, let us argue their cases.

We have a precedent for this request. Fortescue is authority for giving all persons or corporations that may be affected a hearing before confiscating their property:

> "The laws of God and man both give the party an opportunity to make his defense, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defense. 'Adam,' says God, 'where art thou. Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." (1 Stra., 567.)
>
> 12 Law Notes, p. 139.

Let us further consider the Lottery Cases.

The Lottery Cases have a history. In 1821, in *Cohens vs Va.*, 6 Wheat., 264, the Supreme Court had held Virginia could make it a crime to sell lottery tickets in Virginia, authorized by Congress for Washington, D. C. In 1879 it held a State could terminate a lottery charter at its will, as it created no vested right. *Stone vs. Miss.*, 101 U. S., 814-821. In 1891 it held the unlimited power of Congress over the mail authorized an act to exclude lottery matter from the mail. In *re Rapier*, 143 U. S., 110, it held that Austrian bonds with lottery features could not be advertised through the mails. (*Dunwoddy vs. U. S.*, 143 U. S., 578.) In 1893, to try to sell such Austrian bonds with lottery features was held to be a crime under the United States statutes. (*Horner vs. U. S.*, 147 U. S., 449.

In the Lottery Cases, the Court said of lottery traffic:

> *"It is a kind of traffic which no one can be entitled to pursue as of right."*

Of the power upheld and there exercised, the Court said:

> "We may, however, repeat, in this connection, what the Court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. *This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States.*"

See *Lottery Case*, 188 U. S., 321, 356, 358, 362, 363.

The short of that decision, then, is that gambling is criminal; lotteries are more criminal; neither gives rise to lawful contracts, or lawfully acquired property, and, therefore, neither can become lawful commerce. Crime cannot become interstate commerce. There is no constitutional right to commit crimes.

Furthermore, Congress did not there permit *some* corporations to produce such instruments of crime as lottery tickets, and some common carriers to transport them to market, while prohibiting other common carriers from transporting them to the same markets, at the same time, if they had, *or had ever had*, any interest, direct or indirect, in them. To do that is not to legislate, but is to exercise the unjust, despotic, unlimited power of an absolute despot; just as the end of that road might be a czar, who might, possibly, give a favorite, or class of favorites, a monopoly in lotteries.

But even Congress cannot condemn a *natural, helpful, necessary and lawful business,* and *prohibit one class of common carriers from transporting a particular thing necessary as fuel,* while permitting all other classes of common carriers to carry that and all other fuels to market.

The anthracite coal business, generally, remains lawful. The railroad company may still transport anthracite coal to market. If, however, it owns a share of stock in the Temple Iron Company—so runs the Government's argument—it cannot transport that company's coal to market. Even if it buys a share of that stock to shut that company out of the market, it is still prohibited from carrying its coal to people who have bought it. It cannot carry it to such buyers on the same terms and conditions as it must give all other corporations or persons who order the *common* carrier to carry the same kind of coal over the same line at the same time. We concede the Federal right to regulate the interstate transportation of even the necessaries of life, like harmless food, or fuel; but we deny the Federal right to prohibit it and all such transportation of the necessaries of life.

Is the Government right or are we right?

A.

The People.—The rights of the people are the vital things involved in this case. The people came to this country to get greater personal liberty, settled it, and in it they freely exercised the right to follow any innocent business. Their liberty of contract in any innocent business, including the fundamental right to acquire and dispose of property with freedom, was unquestioned. When England began to assert her sovereignty and to interfere with the enjoyment of these rights, even by taxation, the people revolted, because they insisted their rights were fundamental, indvidual, and "unalien-

able"; that is, that no government could ever get the right to interfere with, or deprive a man of these rights, because he has no power to give any government such rights, or to alienate such rights. The people went to war for these rights, and won them. The Treaty of Peace in 1783 was the result, and it put the people of the thirteen States, respectively, in the place of Great Britain. The confederation of States not being a success, "the people" made the United States Constitution, and in it granted certain powers to the President, unlimited judicial powers in national and international matters to the Judiciary, and certain enumerated powers to Congress, among which powers was the power to "regulate" "commerce." They reserved to citizens of each State "all privileges and immunities of citizens in the several States" (Art. IV, Sec. 2). By the Amendments at once adopted, the people made it clear that Congress could not interfere with their personal *freedom* in religion, speech, or print; or levy upon them "excessive fines," or "unusual punishments;" that they should be secure in their persons, houses and effects; that Congress could not take from them "life, liberty or property without due process of law," or without "just compensation." They made it very clear that:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others *retained by the people*."
>
> "The powers not delegated to Congress by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*."

Congress is nowhere given the power to prohibit, impair, or destroy, an innocent business of any of the people, under *pretense of its regulation*.

It has no such sovereign, "despotic" or unlimited power. The argument to the contrary has been conclusively answered thus:

> "Appreciating the force of this, counsel for the Government relies upon 'the doctrine of *sovereign*

and inherent power,' adding: 'I am aware that in advancing this doctrine I seem to challenge great decisions of the Court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the State or the National Government; no legislaitve powers belong to a State government *other than those which affect solely the internal affairs of that State;* consequently, all powers which are national in their scope must be found vested in the Congress of the United States. *But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed, in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers.* That this is such a government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. *This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that Act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a*

reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it—'We, the people of the United States'; not the people of one State, but the people of all the States; and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States respectively;* and all powers of a national character which are not delegated to the National Government by the Constitution *are reserved to the people of the United States.* The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States; and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, *they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.''*

Kansas vs. Colorado, 206 U. S., 46, 89, 90 and 91.

Adair vs. U. S., 208 U. S., 171, 172.

B.

The States.—The States are the outgrowth of colonies organized under corporate charters. Some of these charters were very perfect; that of Connecticut continuing as her Constitution until long after the United States Constitution was adopted, and well into the last century. When the Revolution came, most of them, however, gave way to State constitutions. That of New

York, adopted in 1777, quotes and rests upon the Declaration of Independence as a bill of fundamental rights. In the confederation it was stipulated that—

> "each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right which is not by this confederation expressly delegated to the United States in Congress assembled." (Art. II.)

The people were careful to delegate no power to Congress to interfere with their fundamental rights in life, liberty, or property, in any way.

In the United States Constitution, again, it was stipulated that—

> "full faith and credit should be given in each State to the public acts, records, and judicial proceedings of every other State." (Art. IV, Sec. 1.)

Each State was to forever retain "a republican form of government." The States had such power as the people of each should grant, and "reserved" all their power not "delegated to the United States by the Constitution." The States, therefore, can make such laws as their constitutions shall authorize, not contrary to the United States Constitution, concerning land, domestic business, corporations and their powers, individual rights, crimes, and local governments. In particular, the States are supreme as to land, corporations, and domestic business, within their own borders.

U. S. vs. Fox, 94 U. S., 340.
Hooper vs. Cal., 155 U. S., 648.
U. S. vs. Knight, 156 U. S., 1.

For violating law, or for want of heirs, lands and corporative properties of State corporations, or citizens, escheat to the States and not to the United States.

Hamilton vs. Brown, 161 U. S., 263.
Am. L. & T. Co. vs. Gr. R. Co., 159 Fed., 775-779.

The citizens of the different States, however, are upon an equal footing in doing business in a State. Subject to that condition, each State makes its own laws.

"One of the leading cases in which the general question has been examined is *Corfield vs. Coryell*, decided by Mr. Justice Washington at the circuit. He said: 'The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: Protection by the Government; *the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety;* subject, nevertheless, to such restraints as the Government may justly prescribe for the general good of the whole. *The right of a citizen of one State to pass through or to reside in any other State for the purposes of trade, agriculture, professional pursuits, or otherwise*; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of any kind in the courts of the State; *to take, hold and dispose of property, either real or personal;* and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or Constitution of the State in

which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, *and the enjoyment of them by the citizens of each State in every other State* was manifestly calculated (to use the expression of the preamble to the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union." (4 *Washington C. C.*, 371, 380)," approved in

Blake vs. McClung, 172 U. S., 248-249.

C.

The Nation.—Authorities do not agree upon when this nation was born. A few claim it was born with the Declaration of Independence. A few others claim it was born with the Articles of Confederation. The great majority claim it was born when enough States had ratified the Constitution to make it binding upon them; and this is the view of that time when that ratification was hailed with such joy. Such disputes, however, do not affect this case. *In either case, the people created the nation. In either case, they created it to preserve and retain to themselves their "unalienable" and fundamental rights.* In either case, the people retained all those rights not granted by them to the States, or to Congress, in the Constitution, as "herein granted." The only right granted Congress over the business of the people was the right to "regulate commerce with foreign nations and among the several States," etc. This did not grant the right to destroy the "unalienable" rights, but only the right to regulate their exercise. Congress could not take from them "life, liberty, or property" lawfully obtained by them under State or other laws, "without due process of law." If a State organized people into a corporation and authorized them to buy coal lands and "mine, transport, and vend coal," by

"constructing railroads," and the people obtaining such powers proceeded to exercise them, and thus to make securities, borrow money, buy property, build railroads, and mine, transport, and vend coal, Congress cannot wholly prohibit the exercise of such powers because such corporations own both mines and railroads. The extent to which Congress can go in such regulation is to compel the railroad to carry other coal to market upon the same public terms and conditions upon which it carries its own coal. Congress has so required, and the courts have shown that requirement can be enforced and other shippers can thus be put upon an equality with the railroad.

New York & New Haven Ry. Case, 200 U. S., 361.

Kansas vs. Colorado, 206 U. S., 46.

D.

Corporations and lands.—England long created corporations, public and private. The colonies themselves were generally the result of public corporate charters. Under such charters, some of the colonies sparingly created private corporations, although such right was not unquestioned by England. With State constitutions and sovereignty, the States began to create private business corporations more freely. At first this was generally done by special act; and many of the corporations here involved, or their predecessors, were so created. Finally, all citizens were given the right to form such corporations by State constitutions and statutes in nearly all States. All the great railroad companies and coal corporations affected hereby were organized by States—most of them by the State of Pennsylvania. They were given ample power to buy and hold coal lands, and to "mine, transport, and vend" such coal, and even to construct railroads. These powers have never been taken from them. They are necessary to the ownership of the property. They are protected

from impairment or destruction by the Constitution. Congress cannot affect or destroy them. Congress cannot absolutely prohibit them from transporting their coal out of the State to purchasers thereof, just because such coal was mined or produced in Pennsylvania, in accordance with charter rights granted by Pennsylvania. As long as such coal is carried to other States to buyers thereof upon the same terms and conditions upon which Congress requires coal to be carried to other buyers by other common carriers, all constitutional interstate regulations of Congress are observed. The Commodity Claus is unconstitutional, because it does not rest upon, or observe, this constitutional equality of right that constitutes "the law of the land," or "due process of law." If the corporation charters were repealed by Pennsylvania, the right to hold the lands and mine, transport and vend their coal would still remain to the stockholders and bondholders of such corporations. Congress has no power over the right to hold or use lands in Pennsylvania; the laws of Pennsylvania being supreme as to such lands. Ownership of coal lands, or interests therein, through Pennsylvania corporations, therefore, cannot be made the ground for prohibiting the transportation of coal therefrom to purchasers thereof, while other coal may be transported to the same purchasers by the common carrier, under the same conditions.

U. S. vs. Fox, 94 U. S., 315.
U. S. vs. Knight, 156 U. S., 1.
Blake vs. McClung, 172 U. S., 239.
Kansas vs. Colorado, 206 U. S., 46.
People vs. O'Brien, 111 N. Y., and United States cases there cited.

Franchises of State Corporations.

The powerful and learned opinion of Ruger, Ch. J., in the last case cited is very instructive, and rests upon leading cases of this court, there much cited and considered. The State there exercising its reserved sov-

ereign amending and repealing power for good cause, took away the life of the corporation, and put its property into the hands of a receiver for liquidation. Under the legislation there in question, the people claimed the valuable franchise to run the street railway down Broadway in New York. The stockholders and bondholders of the dissolved corporation claimed such franchise to run such street railway was a vested property right, and hence that they could not be deprived of the vested right to operate such railway, by legislation or otherwise, without just compensation. This claim of the stockholders and bondholders was sustained. Mr. Justice Peckham concurred in that decision of an eminent and unanimous court. The court said:

> "The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice, as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature, or even of the framers of our Constitution, in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution.
>
> "Considering the power which the State has to terminate the life of corporations organized under its laws, and the authority which its Attorney General has by suit to forfeit its franchises for misuse or abuse, and to regulate and restrain corporations in the exercise of their corporate powers, there is

little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations; but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law.

"It is not, perhaps, strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to courts that dicta, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

* * * * * * *

"It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party; and it may, therefore, be conceded that the State had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute, viz., those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge and similar companies,

and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading and insurance powers, and similar privileges. The franchises last referred to, being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made. (*People vs. B., F. & C. I. R. R. Co.*, 89 N. Y., 84; *People vs. Metz*, 50 id., 61.)

"In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the evalue of such franchise. (*Gue vs. Tide Water Canal Co.*, 24 How. [U. S.], 257.) And by a parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

"The statute of our State authorizing the sale of the franchises and property of a railroad company on execution, seems to recognize the indissolubility of the connection between the corporeal property, and its incorporeal right of enjoyment."

People vs. O'Brien, 111 N. Y., 36, 37, 46, 47.

Vested Rights Under State Franchises.

Nor could the State take such rights away by constitutional amendment.

Ry. vs. Texas, 170 U. S., 243.
Cherry Creek vs. Becker, 123 N. Y., 161, 170.

Apply these principles here. The Erie Railroad Company, during the years from 1832 to 1874, was acquiring rights as a railroad company and as a stockholder in

coal corporations, under the authority of both New York and Pennsylvania. Her stockholders and bondholders took such rights through three foreclosures and reorganizations. When it was claimed by the State of Pennsylvania that the coal land was escheated to Pennsylvania because the reorganized Erie Railroad Company could not hold stock in a Pennsylvania coal corporation under the constitutional amendment of that State in 1874, the highest court of that State held that stock in such coal corporations was "personal" property under the statute of 1855 of that State, and, therefore, such stockholding did not violate her constitution, or cause any escheat.

Com. vs. N. Y., L. E. & W. R. Co., 132 Pa. St., 591.

The most vital of all the corporate rights thus upheld was the right to have the coal corporations, in which she became such a stockholder, have the right to both mine and "vend" coal. If those corporations still retain that right, then the purchasers of that coal hold it by good title. They have the constitutional right to have that coal become interstate commerce. Should the purchasers of such coal tender it to any common carrier, even the Erie Railroad Company itself, for shipment, and offer to pay all legal interstate charges thereon, and should the Erie Railroad Company refuse to accept or ship the coal, why could not the purchaser enforce his constitutonal right by a mandamus proceeding, and compel such common carrier to do its duty? Wherein does this case fail to present that question?

E.

Liberty and fundamental rights.—It is impossible to now determine to how great an extent the laws of Alfred the Great recognized personal liberty and fundamental rights. It is certain that in wringing the great charter from John the Tyrant, in 1215, our English forefathers

were merely getting written evidence of their established rights that the King might not disregard, impair or prejudice those personal liberties and incidental property rights. As early as the fifteenth century, and before Columbus had discovered America, or the Protestant reformation had evidenced the growing independence and love of liberty of mankind, Sir John Fortescue, England's great and learned Chancellor, had written in his immortal "De Laudibus Legum Angliae" the following words, which show how firmly established and deep-rooted in the laws of England was the love of liberty:

> "Again, that must needs be judged to be an hard and unjust law which tends to increase the servitude and to lessen the liberty of mankind. For 'human nature is evermore an advocate for liberty.' God Almighty has declared Himself the God *of liberty:* this being the gift of God to man in His creation, the other is introduced into the world by means of his own sin and folly; whence it is that everything in Nature is so desirous of liberty, as being a sort of restitution to its primitive state. So that to go about to lessen this is esteemed both wicked and cruel. It is upon such considerations as these that the laws of England, in all cases, declare in favor of liberty."

If such words could be used touching bondmen and freemen, and their respective rights of inheritance at that time, we know that the love of liberty which had prompted the nobles to wring the great charter from John in 1215, had not decreased with the flight of years. Our advance in constitutional liberty has not been so great or so rapid since the Revolution as some have erroneously supposed. Constitutional liberty of contract, and constitutional protection of vested rights resulting from such contracts, is new only in being constitutional and in the power granted the courts to preserve such constitutional rights.

In his address at the centennial celebration of the United States Supreme Court, Mr. Justice Field, full

of learning, experience, years and honors, summed up this question and said of our constitutional liberty:

> "It had its roots deep in the past, as all enduring institutions have. The colonists brought with them the great principles of civil liberty, which had been established there after many a conflict with the Crown, and which were proclaimed in Magna Charta and in the Declaration of Rights. *Our country was in this respect the heir of all the ages.* Now a blow was struck for liberty in the Old World that did not awake an echo in the forests of the New. Every vantage ground gained there on its behalf was courageously and stubbornly held here. *Thus liberty, with all its priceless blessings, passed from country to country, from hemisphere to hemisphere, and from generation to generation.* Claiming this inheritance, the Continental Congress, assembled in 1774 to provide measures to resist the encroachments of the British Crown, declared that the inhabitants of the colonies were entitled '*by the immutable laws of Nature, the principles of the English Constitution and their several charters, to all the rights, privileges and immunities of free and natural-born subjects within the realm of England.*" (Centennial U. S. Sup. Ct., 134 U. S., 732, 733.)

What would all this eloquent talk about the fundamental law of liberty amount to if a citizen could not buy his own food or fuel in any State, according to law, and then have the seller, or any common carrier, whether person, corporation, or corporation stockholder, deliver the article purchased to him at his place of business, or home, either inside or outside the State where the purchase was made?

Fundamental law.—From 1215, when Magna Charta was first wrung from reluctant King John, down to the time the Constitution was adopted, our forefathers could only have property lawfully acquired or a lawful business, "taken" from them "by the lawful judgment of his peers, *or by the law of the land.*"

The fundamental right to follow a lawful calling and thereby acquire property, naturally became so unquestioned in all the centuries, that even petty courts upheld that right in peculiar cases, without even understanding the source of its origin. For instance, long before the Revolution, a case was before one Symonds, a magistrate who had studied and admired the common law. The case was this:

> "A dwelling had been voted by a town to its minister; the plaintiff had resisted the payment of a tax that had been levied to pay for this dwelling, and his goods were accordingly destrained. Symonds, in giving judgment for the plaintiff, says that: 'The fundamental law which God and Nature has given to the people cannot be infringed. The right of property is such a fundamental right. In this case the goods of one man were given to another without the former's consent. The resolve of the town being against the fundamental law, is therefore void, and the taking was not justifiable.' *The precedents on which he relies are colonial, and their binding force is recognized.*"
>
> *Hutchinson's Papers*, Vol. II, p. 1; *Reinsch, Colonial Common Law, I Select Essays in Anglo-Am. Legal History*, p. 376.

Such being the established "fundamental" rights of the *people* before the Revolution, did they ever part with such rights? Can Congress destroy our property, or business, by prohibiting it for the benefit of other carriers, or other owners of like property and business, any more than the town might take a little property from a man by a tax, that another man, a minister, might enjoy the use of that property? Can property or business be thus impaired or destroyed by Congress, just because it was lawfully acquired by a Pennsylvania corporation?

The colonists held charters. Their colonies were public corporations. They universally regarded the rights

of corporations, public or private, as vested rights that were inviolable. They hid the charter of Connecticut in the Charter Oak, that it might not be destroyed by the King, and they might not thus lose the only authentic evidence of their corporate rights. Not until after the Dartmouth College Case did we learn to reserve the constitutional right to alter or repeal charters of corporations. *Congress has no right to in effect repeal a corporate charter granted by a State. And while the States can alter or repeal charters, the property and rights bestowed thereby still remain in the stockholders as an unincorporated body, despite legislation to the contrary.*

> *People vs. O'Brien,* 111 N. Y., 1, and U. S. cases there cited.

So the rights here involved are really those of stockholders and bondholders of corporations who wish to sell their coal, and of citizens who wish to exercise their liberty of contract by continuing to buy such coal. Those rights remain unimpaired, unless Congress can prohibit their lawful business of producing and selling coal in Pennsylvania, by prohibiting the railroad companies that have carried it to market for half a century or more, from continuing to carry it to the same buyers in the same markets, upon the same terms and conditions upon which they can carry wood or other people's coal to the same markets.

Unalienable Rights.

It was urged as a cause for the Revolution that:

> "All men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

If man cannot alienate or transfer these God-given, fundamental rights to the State, then the right to con-

tinue to conduct a lawful business upon property lawfully acquired, is one that cannot be taken away, but one that is only subject to reasonable regulation.

A cause of complaint again George III. was for—

> "taking away our charters, abolishing our valuable laws * * * suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever."

Is not Congress trying to do the very same thing for New York and Pennsylvania in this case?

The Constitution of New York, adopted in 1777, quoted the Declaration of Independence verbatim for this purpose. Before we had the United States Constitution, under the Articles of Confederation and the State constitutions, the courts were holding laws to be unconstitutional, just as we have seen the colonial courts held even the vote of a town meeting in favor of a minister could not invade the "fundamental right" of a man to his own property.

In 1780, in New Jersey, in *Holmes vs. Walton*, referred to in *State vs. Parkhurst*, 4 Halstead (N. J.), 444; in 1782, in Virginia, in *Com. vs. Caton*, 4 Call. (Va.), 5; in 1786, in Rhode Island, in *Trevett vs. Weeden*, Judge Dillon tells us statutes were so condemned as unconstitutional. Other cases so decided while the Constitution was forming, or before Marshall's first great decision on the subject, in *Marbury vs. Madison*, in 1803, were in Virginia, in 1788, case of the *Judges*, 4 Call. (Va.), 135, and 1793, *Kamper vs. Hawkins*, 1 Va. Cas., 20; in South Carolina, in 1792, in *Bowman vs. Middleton*, 1 Bay (S. C.), 252; in North Carolina, in 1787, *Bayard vs. Singleton*, 1 Martin, 48; in Massachusetts, in 1788, 2 *Bancroft's Hist. Const.*, p. 473.

Dillon's Laws, Eng. & Am., p. 200.

No one then claimed otherwise. Even Patrick Henry, who opposed the United States Constitution, in the very debates over it, said:

> "I take it as the highest encomium on this country that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary"
>
> 3 *Elliott's Debates*, p. 325.

In such speeches of opponents even of our Constitution we learn that this great court was given its great power to have it use it in the same way that State courts were then using like power.

What are the "fundamental rights" thus vindicated? *Are they not the right to labor, to accumulate property in a lawful business, to carry on that business, to enjoy the "liberty" to make innocent contracts about it?* If these are not fundamental rights, what are such rights? Do these rights continue to belong to the people under the United States Constitution?

The United States power limited.—The Constitution states in its preamble that it was made by "*the people* of the United States" to "establish *justice*" and "secure the blessings of *liberty to ourselves and our posterity.*" What power did the "people" grant Congress? The people granted Congress "all legislative powers *herein granted*" (Art. I, Sec. 1). In the debate in North Carolina over the adoption of the Constitution, before it was amended, Justice Iredell thus commented upon the claim that Congress was given unlimited power:

> "With regard to a bill of rights, this is a notion originated in England, where no written constitution is to be found, and the authority of their government is derived from the most remote antiquity. Magna Charta itself is no constitution, but a solemn instrument ascertaining certain rights of individuals by the legislature for the time being; and every article of which the legislature may at any time alter. This, and a bill of rights also, the invention of later times, were occasioned by great usurpations of the Crown, contrary, as was conceived, to the principles of their government, about which there

was a variety of opinions. But neither that instrument, nor any other instrument, ever attempted to abridge the authority of Parliament, which was supposed to be without any limitation whatever. Had their constitution been fixed and certain, a bill of rights would have been useless, for the constitution would have shown plainly the extent of that authority which they were disputing about. *Of what use, therefore, can a bill or rights be in this Constitution, where the people expressly declare how much power they do give, and consequently retain all they do not?* It is a declaration of particular powers by the people to their representatives, for particular purposes. *It may be considered as a great power of attorney, under which no power can be exercised but what is expressly given.* Did any man ever hear, before, that at the end of a power of attorney it was said that the attorney should not exercise more power than was there given him?

"The powers of the government are particularly enumerated and defined; they can claim no others but such as are so enumerated. In my opinion, they are excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed. A gentleman has asked, What would be the consequence if they had the power of the purse and sword? I ask, in what government under heaven are these not given up to some authority or other? There is a necessity of giving both the purse and the sword to every government, or else it cannot protect the people."

IV. Elliot's Debates, Lippincott Ed., pp, 148, 149, 2[illegible]

Of course the great lawyer and judge who so spoke did not mean at all to deny all fair implications from the powers granted; or that we were not to consider in

a broad way the great powers of government actually granted our government. Upon such subjects few great lawyers or judges would disagree with John Marshall.

"The Power to Regulate Commerce."

What powers are enumerated, then, in the Constitution as to regulating commerce?

> "To regulate commerce with the foreign nations, and among the several states, and with the Indian tribes." Art. I. Sec. 3.)

Observe the word used is regulate. That is the only power granted. To "regulate" is "to lay down the rule *by which a thing shall be done.*" (*Anderson Law Dic.*)

Does that clause give the National Government the power over the interstate commerce that it gives over foreign commerce? Does it give power to prohibit harmless commerce. There is *obiter* in two or three cases to show this absolute power like that over foreign commerce, but it is only *obiter*. This question was not really considered in those cases. There are striking differences between the power over foreign and interstate commrce.

(1) A treaty may be made with a foreign power that will prefer its commerce in some respect over that of other nations, while the interstate commerce of the people, and of each of the States, is to enjoy equal advantages.

(2) Embargoes, partial, or entire, may be laid on foreign commerce of one or more nations, to prevent war, in time of war, or for other good reasons, while there is no such power as to interstate commerce.

(3) The people and the States reserved their old "fundamntal rights" of freedom as to all interstate commerce, subject to reasonable congressional regulation, while they do not do so as to foreign commerce or trade with Indians.

(4) Congress could levy imposts upon imports, while it can levy no imposts on interstate commerce.

(5) Congress has "the exclusive and absolute power to regulate commerce with the Indian tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations."

43 *Gallons of Whiskey*, 93 U. S., 194.

But Congress has no such exclusive and absolute power as to either the people or the States, *because the people and the States reserved their powers from Congress, while the Indians and foreign nations could not and did not reserve powers from Congress.*

Free Interstate Commerce.

One of the strongest reasons for creating the Constitution, was to obtain freedom in interestate commerce. Madison shows this was so. (The Federalist XVII.) It had been intolerable that New York should even levy imposts upon "garden truck from New Jersey *and firewood* from Connecticut." (VII. Winsor's Crit. Hist. Am., p. 223.)

Do not the various provisions of the Constiution show that Congress was granted no power to absolutely prohibit innocent traffic in fuel from one State to another State? *Can such commerce be so prohibited upon the ground of the ownership thereof, when such ownership is under the "public Acts" of Pennsylvania and New York?*

Fuel, of all commodities, is the most innocent and necessary. When civilization first began to dawn, it was because some savage, primitive man had the intelligence and the courage to master fire and make it his servant, and not his enemy. It followed him to cold countries and enabled him to defy climate and subdue the earth. Hamilton wanted national power, but it

never occurred to him, or any one else, so far as we can discover, that the power to merely "regulate" interstate commerce meant the power to interdict such innocent commerce just because a corporation might lawfully own, or be interested in, such commerce, under the laws of the State of its production. He, and all others, assumed the Constitution as drawn made such commerce free. He wrote:

> "*An unrestrained intercourse between the States themelves, will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants, but for exportation to foreign markets.* The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States. When the staple of one fails, from a bad harvest or unproductive crop, it can call to its aid the staple of another. The variety, not less than the value, of products for exportation, contributes to the activity of foreign commerce. It can be conducted upon much better terms, with a large number of materials of a given value, than with a small number of materials of the same value; arising from the competitions of trade, and from the fluctuations of markets. Praticular articles may be in great demand at certain periods, and unsalable at others; but if there be a variety of articles, it can scarcely happen that they should all be at one time in the latter predicament; and on this account, the operation of the merchant would be less liable to any considerable obstruction or stagnation. The speculative trader will at once perceive the force of these observations, and will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be

> much more favorable than that of the Thirteen States, without union, or with partial unions."
>
> *The Federalist*, No. XI.

This pleasing picture, so happily come true, if we are to have legislation such as that in question, will soon be at an end. We can all see where such "regulation" as this will end, if one class of common carriers and one class of fuel can be prohibited from entering into interstate commerce at all, just because it was produced by lawful corporations of a certain class, in a certain State, and by authority of that State.

Nor is this all. Jefferson was away when the Constitution was under discussion. He informed his friends however,—

> "I hope that a declaration of rights will be drawn up to protect the *people* against the Federal Government as they are already protected in most cases against the State governments."
>
> *Jefferson—Dillon's Laws in Eng. & Am.*, 208.

As every one knows that declaration of rights was at once agreed upon, proposed as the first ten amendments of the Constitution, and those amendments were duly ratified. Like Magna Charta, the amendments were to protect the *people*, to *"protect the people against the Federal Government,"* as Jefferson expressed it. He thought they were protected against State governments in "most cases," but the Fourteenth Amendment has since been added for that purpose; and very useful it has proved. Altogether the Constitution and these amendments secure the people in their personal liberties unless they are properly taken from them under the "law of the *land*"; "due process of law."

II.

DUE PROCESS OF LAW.

The Commodity Clause takes liberty, rights and property of stockholders, bondholders, citizens, and state corporations from them without "due process of law," and contrary to the Fifth Amendment.

Its most unjust discrimination is its discrimination between the millions of citizens who must buy and use fuel to keep them warm. One class can go, or send, to a railroad company, or a corporation in which the railroad company is a stockholder, and buy timber produced by it for fuel, and have that railroad company deliver it, "transport" it to their homes, or places of business for them. The other class of citizens, who have grates and furnaces in homes in which they have burned anthracite coal for half a century, cannot go to the same railroad company, or a corporation in which it is a stockholder, or to another railroad company, to buy the coal they have always used, and have it delivered it them at either homes or places of business by the vendor in the usual way, and by the usual and only available route, simply because it was mined or produced by that corporation. The liberty of the citizen to buy the very necessaries of life *where he will, and of whom he will,* no longer remains a fundamental and constitutional right if the power of Congress to pass such acts is upheld. The citizens will soon cease to have any fundamental or constitutional rights, and States will soon cease to have any real life or power, if the Commodity Clause is sustained. The necessaries of life lawfully produced and purchased can no longer be transported to interstate markets as a matter of right if Congress can make such transportation "unlawful" because Congress does not approve of the persons, or corporations,

or stockholders in corporations, who lawfully produced and sold such lawful and necessary commodities. Congress can then impair or destroy the lawful business of any citizen, corporation, State, or group of States because of want of wisdom or sectional hate. We do not question the power of Congress to regulate interstate transportation of everything; but we do question the power of Congress to prohibit such transportation of lawful articles by some common carriers while leaving others free to so tarnsport such articles, the sole reason for such legislation being that Congress disapproves of corporations producing such commodities.

Observe how despotic, unequal and unjust the Commodity Clause is, especially if it be construed to cover even a mere stockholding corporation. Note its unjust effect if upheld as a precedent. See how unjustly it affects the parties now here, and this party especially. The predecessors of the Erie Railroad Company were authorized to build their lines into Pennsylvania. They were authorized, by contract and otherwise, to acquire interests in coal mining corporations. They built their lines to coal mines "solely" to haul the coal from those mines, as the answer truthfully puts it. Their railroad lines to those mines will be valueless if they cannot haul their output to market. Generally speaking, that output has no other way of reaching the market. Other outlets cannot be created except by the needless expenditure of untold millions, while existing railroad lines become valueless. The answer shows how a railroad line is tied to mines and interstate markets.

> "Over eighty per cent. of the coal here involved is necessarily marketed in other States, and in Canada. Over ninety per cent. of the anthracite coal traffic of this defendant is furnished by the Pennsylvania Coal

> Company and the Hillside Coal & Iron Company, substantially all of which is transported from Pennsylvania to other States, and the bulk of which is marketed at points on the lines of this defendant in such other States. The anthracite coal tonnage furnished this defendant was over twenty-two per cent. of its entire freight tonnage for the year ending June 30, 1907, and * * * over twenty per cent. of its total revenue from transportation" (Ans., pp. 6-13, especially paragraphs 2-9).

To the amount of over $136,000,000 this company's bonds based upon such lines are held by "citizens" "many thousands in number" (Ans., pp. 15, 16, paragraph 12; Exs. "A," "B," and "C," pp. 18-198).

Is it not apparent the answer speaks the truth when it pleads of such a situation?

> "If such Commodity Clause be construed to apply to this defendant, the rights and property of this defendant, and of its stockholders, and of its trustees, and creditors, and bondholders, will be impaired and destroyed, contrary to the Constitution of the United States"; the particular clauses violated being then specifically pointed out (Ans., pp. 15-18, paragraphs 12, 13).

Is not the Commodity Clause partial and unjustly discriminatory as between owners or stockholders in timber lands and coal lands? Is that discrimination justifiable? The Erie Railroad Company is a stockholder in the Hillside Coal & Iron Company. That coal company, in 1869, got the chartered right to—

> "purchase and hold * * * coal, iron, mineral and *lumber* lands * * * not exceeding at any one time 5,000 acres, with power to con-

> nect said lands by railroad * * * with other railroads, canals, or public improvements," and power to use its capital in "purchasing, mining, vending, and transporting coal, iron, lumber and other products of their lands * * * as may be considered necessary and expedient" (Ans., p. 12, paragraph 7).

Now assume the Congress can prohibit interstate commerce in all the necessities of life (although we shall contend to the end Congress has no such power), has Congress the power to prohibit such commerce as to the same corporation or stockholder as to the same article—fuel—and to say that coal cannot go to market at all, if the common carrier is interested in any way therein, but its wood fuel can so go? Can it say that wheat of the farmer cannot go to an interstate market if he is a stockholder in the railroad company, but his corn can go? Can it say that corn can go if produced and sold by a farmer who is a stockholder in the common carrier, but he cannot sell his wheat and have that carried to market for the purchaser if the seller is such a stockholder? Can it say that the wheat can go to one market, but not to another? Can it say that planters who are stockholders or bondholders in railroad companies can send their cotton to market, but they cannot send their wool to the same market? Can it say the citizens of the South can send their wool to market, even if they are stockholders and bondholders in railroad companies, but that the citizens of the North, having too much such stock and bonds, should be "divorced" from them, and so they cannot so ship their wool under like conditions?

The Timber Exemption.

In short, assume Congress has the power to inhibit the interstate movement of the necessities of life, if

Congress undertakes to let owners of timber ship, and prohibits shipments by owners of coal on the same land, can such a law stand? That case is surely here. The dissenting member of the court below evidently felt the great injustice in this discrimination, and felt as any lawyer would about it. He evidently thought such injustice as between owners, or persons interested in, *or even mere purchasers of wood on the land, instead of coal taken out of the land,* might make the law invalid. So he went outside the record to find some facts to uphold this feature of the law. He said:

> "It remains to notice the objection that timber was excepted from the interdicted commodities. Reflection will show that, so far as the evils sought by this law to be cured are concerned, timber differed greatly from coal. Apart from the grants of timber lands to pioneer transcontinental roads along their rights of way, our attention has been called to no public carrier dealing in and transporting timber. Nature has prevented this. Forests make streams, and water, from its nearness, and timber, from its capacity to float, make water transportation timber's natural outlet. It is impossible, therefore, for any land carrier to become such a private carrier of its own timber as to affect its duty as a public carrier, and a railroad so quickly exhausts the forests tributary to it that it could not long remain a distinctive timber road."
>
> 12 *Fed. Reporter,* 258-259.

There are no facts in the record warranting this distinction. Nor do the facts outside of the record warrant treating timber differently from coal. The great land grants of timber lands to pioneer transcon-

tinental roads are not to be so easily brushed aside. Why several common carriers who have received such grants of timber land miles in extent on each side of their tracks, running through State after State, should be exempted from the operation of the law, while common carriers that have lawfully purchased stocks in lawfully organized coal corporations for their full value, pursuant to authority from the State creating such coal corporations, should be made subject to the statute, is not apparent. It is estimated there are from 30,000 to 40,000 miles of railroad in the timber lands of this country, so we can understand the exemption of timber.

But this is not all. The basis for this distinction, the learned Judge thought, was the fact that water is the natural outlet for timber. The learned Judge was not well informed; was not up to date. The facts to the contrary are so notorious, and have been exploited so many times in Government publications, that all courts will take cognizance of them. Indeed, Congress has made such publications *prima facie* evidence on subjects touched by their contents.

And what are the facts in this regard? Before there were any railroads, it is true that water did furnish a natural outlet for timber *that would float. But hardwood timber will not float.* It was not long after railroads appeared, however, before they were naturally made to serve lumbermen. Most men of fifty recall the time of their boyhood when rafts of lumber moved down the Allegheny River to the mills in Pittsburg, or down the Ohio to Cincinnati, or down the Susquehanna to the mills at Williamsport, or down the Hudson to mills on that river, or down the rivers of the West, or South, to mills upon them. Perhaps the learned Judge was thinking

of such a time, and did not stop to think that he had not seen such a raft on the Allegheny or Ohio Rivers in twenty-five years. Perhaps he did not realize that the railroads and the lumbering methods of today have all but ended the lumbering of fifty, or even twenty-five, years ago, in some places, where teams drew the logs to skidways on the river banks, where they could be rolled in, to pass down the stream after the Spring freshets had carried out the ice. Perhaps he did not realize that today lumbering is carried on Summer and Winter in a methodical way, by logging railways, more economically and advantageously than it was in the old way. Now the Goodyear Companies own hundreds of thousands of acres of timber in Pennsylvania and near New Orleans, and hundreds of miles of interstate railroads to haul logs and lumber. Now logging by water is almost, if not quite, a negligible quantity when compared to the logging done by railroad. The change that has taken place is thus described in a Government publication:

> "The first railroad for hauling logs was built in 1852, by Fox, Weston & Bronson, in the town of Lindley, Steuben County, N. Y. It was constructed of wooden rails and was equipped with platform cars and a locomotive which bore on its cab the name 'Bull of the Woods.' This railroad was not used as a substitute for log-driving, but for hauling logs to the bank of the Tioga River, whence they were driven to the large gang-mills at Painted Post.
>
> "Our Adirondack lumebrmen were quick to perceive the advantage of using railroads for transporting timber in localities where it was not possible to drive the logs and timber to the desired point for manufacture, and there are now several

timber tracts in Northern New York where all the logs are taken out by rail. However, it is an unquestioned fact that water furnishes the cheapest power for moving timber, as each time the logs are handled separately, in loading and unloading, adds to their cost, and the cost of transportation by rail almost invariably exceeds that of log-driving.

"The use of the railroad makes it possible to get out hardwood timber, which otherwise could not be utilized becaause the logs are too heavy to be floated down the stream and would sink. The hardwoods—birch, maple, beech, ash, and cherry —constitute, on an average, over 65 per cent. of our Northern forest."

Bulletin 34, U. S. Department of Agriculture, p. 28.

In a case that has been before this court, the findings in it being approved by this court, among the findings so approved we find the following:

"6. *Mills for the manufacture of lumber are located for the most part on railway lines where they traverse the lumber producing districts.* Until the lumber near the mills is cut, the logs are hauled to the mills by teams. When this becomes impracticable, railways built into the timber are used. These railways are called 'logging roads.' The railway lines west of the Mississippi make a certain allowance to the *mill owners for the transportation of the logs over these logging roads to the mills.* This is called a 'tap line allowance or division.' This tap line allowance ranges from 1 and 2 cents per hundred pounds up to as high as

6 cents, and varies to some extent according to the destination of the traffic.

"The mills east of the Mississippi located on the lines of defendants have *logging roads as well as those west of the Mississippi.*"

Central Yellow Pine Association vs. Illinois C. R. Co., 10 I. C. R., 515.

In *Tift vs. the Southern R. R. Co.*, a companion case, the Interstate Commerce Commission again finds:

"9. The lumber business has been an important factor in building up and sustaining many of the railways in Georgia. Those of them which penetrate the lumber sections, when first built, had little to depend upon except the transportation of lumber and the supplies necessary for the hands and animals engaged in the lumber business, and the machinery used in the lumber mills. If the lumber shipments were cut off from some of them, it would be with difficulty that they could exist in a solvent condition. It is also true that the roads have been essential to the lumber business, and it has been their policy to encourage and assist in its development with a view to increasing their own revenue.

"The tonnage of lumber hauled by the defendants is very large in proportion to that of other commodities of general use and necessity."

10 *I. C. R.*, 567, 568.

This court, in approving the findings of the Interstate Commerce Commission in those cases, and in sustaining the decision of that body, noted, and apparently approved of, these findings.

Ill. C. R. vs. Int. Com. Com., 206 U. S., 444, 445.

From these facts, ascertained after careful investigation, and approved by this court itself as the basis of the very important decisions rendered by it against the railways in those cases, it is apparent that the learned Judge who dissented was wrong as to his facts, so far as timber was concerned. How wrong he was as to his facts so far as timber is concerned is also shown by the statistics of the large tonnage of timber and lumber compiled from the annual reports of the Interstate Commerce Commission as to the timber and lumber handled by railroads annually—statistics heretofore included in this brief. That business is large.

In 1907 the Department of Agriculture issued Circular 107, compiling sawmill reports for 1905 for 10,460 sawmills, showing that as high as 98 per cent. was sometimes logged from the mills' own land; that 90 per cent. so logged was common; and that it was rare that 75 or 80 per cent. was not so logged from the mills' own land. July 19, 1907, the same department of the government issued a bulletin covering like reports from 21,077 sawmills for 1906, from which the extent of this timber business can be understood.

Some of us noted recently the reports showing that substantially one-quarter of the entire acreage of this country is still covered with timber. The foregoing facts with reference to sawmills, logging from their own lands, logging railways, the extent of the timber tonnage, and the area of timber lands still remaining untouched in this country, give significance to that part of the Commodity Clause which excepts "timber and the manufactured products thereof" from the commodities "unlawful for any railroad company to transport from any State," if such railroad company "manufactured, mined or produced" the same. It will be noticed, from the history of the Commodity Clause

heretofore detailed, or an examination of the Congressional Record, that it is difficult, if not impossible, to find why timber was thus excepted from all commodities. What interests were numerous or powerful enough to cause timber to be excepted? Why was it that timber was excepted so quietly, almost without discussion? Why is it that we do not find the reasons for excepting timber clearly stated? Is it not apparent, from the enormous extent of timber land in this country, and from the enormous tonnage of timber carried by the railways, and from the manner in which railways are employed in business, that great railroad companies owned enormous tracts of timber land, and that they desired their timber exempt from the operation of the Commodities Clause? It is doubtless true some logging railways are owned by individuals; some are owned by railroad corporations, the owners of which also own sawmill corporations; and some timber lands are owned by railroad corporations that own sawmills upon such timber lands, and carry logs to such sawmills, and lumber from such sawmills. It is perfectly apparent, however, from the magnitude of the lumber interests, and the way in which railroads are employed in them, and are connected with them, that railroads sufficiently influential owned timber lands sufficient in amount to make it essential to them that they be excepted from this Commodities Clause. When we note the extent to which the Commodities Clause may apply to other commodities aside from anthracite coal, or bituminous coal, if the broad construction which the government claims for it is given it, we can see at once the Judge who dissented entirely failed to grasp the true import of the timber proposition. As timber is used for fuel and shelter, and coal is only used for fuel, we see that they are both really used for the same thing, and that is to keep man warm in a cold climate.

Classification.

On what theory, then, should Congress exempt railroads owning timber lands from the operation of the Commodities Clause, and make railroads owning coal lands subject thereto? If one were injurious to the public, and the other beneficial to the public, the first great primary classification upon which all legislation rests would be present, and would justify the exemption. But such is not the case. No one has ever claimed that either was harmful to mankind. No one has ever disputed that each is beneficial to mankind. Then why is it wrong for the railroad to carry its own coal to market, and right for it to carry its own timber to market? A difference cannot be made between timber and coal in this respect in that one will float and the other will not, for originally coal was carried to market by water, just as timber was carried to market by water, and ultimately coal has come to be carried to market by railroad very largely, just as timber has come to be carried to market by railroad very largely. The distinction which the dissenting Judge undertook to make between them, therefore, is a distinction that rests upon no real difference between them in character or use.

This case, then, gets down to this: Can Congress forbid the railroads to transport cotton to market under the same circumstances and conditions under which they are permitted to transport wool to market, both cotton and wool being used to keep mankind warm? If any legal reason can be given for making such a difference between competing articles, under like circumstances and conditions, Congress, in the exercise of its discretion, can thus distinguish between them in enacting statutes. In the end, however, this Court must hold broadly that Congress cannot make a mere

edict to strike down a given class of owners, or a given section, or a given product, that comes into competition with some other class of owners, or some other section, or some other product, without there being some legal reason for so doing. If a czar, or a king, picks out John Smith, or some other individual, and orders him executed, or orders his property destroyed, or forbids his marketing his property just because he owns it, and also owns the vehicle by which to carry it to market, whatever the power of the despot, all agree that such an edict is not a law of the land. It does not apply to all people of the same class, under the same circumstances and conditions. It is not due process of law, as we know that term in English and American history, and in American constitutions. It does not alter the case that some State legislature, or other Congress, does the same thing. It matters not whether that thing be done to groups of individuals authorized to do business by the State of Pennsylvania as a coal corporation, or a railroad corporation, if the thing they are forbidden to do is permitted to other like groups in a competing business, instead of having a law of the land which is due process of law, we have a mere edict. Our forefathers did not mean to put a tyrant Congress, or a tyrant Legislature, in the place of a tyrant king, or a tyrant parliament. Instead, they intended by written constitutions to limit their powers, and to compel them to exercise only those powers that were granted to them. While in some States the Legislature speaks without trammel, as the agent of the people, our Congress has only the powers delegated to it, and even in regulating commerce it has no power to so regulate as to deprive one man, or groups of men, of the use of his or their property, or their right to market, under precisely the same circumstances and conditions under

which like groups of men are permitted to market a competing kind of property from the very same State, or from any other State.

All "Partial" Laws Unconstitutional.

The limitation without "due process of law" is used in both the Fifth and Fourteenth amendments, and this case gets additional interest on account of the lack of consideration given to the question of whether this limitation means the same thing in each amendment. This Court appears not to have directly decided this question in no case found in its reports.

Understanding that the idea of equality to all was the principle uppermost in the minds of the framers of our Constitution and formed the basis of its original construction, it would be unreasonable to assume that this idea was lost sight of in the adoption of the Fifth Amendment. While this amendment does not in express terms declare equality to be its object, it is fair to assume that such was the intention. The Fourteenth Amendment, adopted at a later time and inspired by new developments and threatened abuses by the States, employs, identically, certain language of the Fifth Amendment. The words "due process of law" in each amendment are of the same import. The same language when used in different articles of a document so carefully prepared, drafted and redrafted with such remarkable painstaking, and settled upon only after lengthy and exhaustive debate, may fairly be taken to mean the same when applied to similar conditions.

In one of the earliest cases in which the historical and legal meaning of the words "due process of law" was examined, an able member of this Court said:

"That a *partial law,* tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general and public laws of the land, is unconstitutional and void, we do not doubt. Our entire approbation is accorded to the decisions cited in the causes of *Dartmouth College vs. Woodworth,* 4 Wheat. R., 518, and *Holden vs. JJames,* 11 Mass. R., 396. Our Constitution, Art. II, Sec. 8, declares, 'That no free man shall be deprived of his life, liberty or property, but by the judgment of his peers, *or the law of the land.*' The clause '*law of the land*' means a general and public law, *equally binding upon every member of the community.* Our colonial history will best teach its meaning. Our ancestors were taught it by being transported across the Atlantic for trial; by the Boston port-bill, and other British legislation. A careful examination of Marshall's History of the Colonies, particularly the thirteenth and fourteenth chapters, and of Smollett's and Bissett's History of England, especially Vol. 1, Ch. 12, of the latter, will greatly tend, it is apprehended, to change the opinion of the counsel of the plaintiff, who contended, in argument, that this term had no definite meaning; at least, not the one here ascribed to it; and that it answered no useful purpose in the Constitution. Notwithstanding the provision, is it to be supposed the Legislature, equally with the Governments of France, Russia or Turkey, is sovereign in this respect, even retaining the powers of individual proscription extending to banishment, as well as power to legislate partially in reference to particular individuals, affecting their rights by partial and extraordinary remedies.

"The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs *every other member of the body politic,* or *'land,' under similar circumstances;* and *every partial or private* law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community who made the law, by another. The idea of a people, through their representatives, making laws whereby are swept away the life, liberty and property of *one* or a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. *Such abuses resulted in the adoption of Magna Charta in England,* securing the subject against odious exceptions, which is, and for centuries has been, the foundation of English liberty. *Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as part of our Constitution.* See 2 Inst. 46, and the Declaration of American Independence."

Vanzant vs. Waddell, 2 Yerger's R. (Tenn.), 269, 270, 271.

To like effect see strong opinion of Bronson, J., in *Taylor vs. Porter,* 4 Hill, 140, 146.

In *Murray's Lessee vs. Hoboken Land Co.,* 18 How., 272, Justice Curtiss, in speaking for the Court, said:

> "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean the due process of law. The Constitutions which had been adopted by the several States before the formation of the Federal Constitution, following the language of the great charter more closely, generally contained the words, 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words."

In the absence of judicial determination as to whether the Fifth Amendment limits congressional action to the same effect that the Fourteenth Amendment limits State legislation, we must look to such opinions as we have which throw light upon this subject.

In a recent case, Chief Justice Fuller said:

> "*And due process is so secured by laws operating on all alike,* and not subjecting the individual to the *arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.*"
>
> *Caldwell vs. Texas,* 137 U. S., 692, 697.

It is said that the provision that a person shall not be deprived of life, liberty or property without an opportunity to be heard in defense of his right, is a rule founded on the first principles of natural justice, and older than written constitutions. This rule is the foundation of the guaranties of due process of law. It was embraced in the provisions of the Magna Charta,

which protected every free man in the enjoyment of these natural rights, unless deprived of them "by the judgment of his peers or the law of the land;" and from this are derived the guaranties expressed in the various American constitutions.

From the instructive and learned discussion of this subject in the opinion of Matthews, J., in the *Hurtado* case, we quote:

> "This view of the meaning of Lord Coke is the one taken by Merrick, J., in his dissenting opinion in *Jones vs. Robbins,* 8 Gray, 329, who states his conclusions in these words:
>
> "'It is the forensic trial, under a broad and general law, *operating equally upon every member of our community,* which the words 'by the law of the land' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, *make it essential to the safety of the citizen, securing thereby both his liberty and his property,* by preventing the unlawful arrest of his person or any unlawful interference with his estate.'"

See also *State vs. Starling,* 15 Rich. (S. C.) Law, 120.

* * * * * * * *

> "This" (Kent's view) "accords with what is said in *Westervelt vs. Gregg,* 12 N. Y., 202, by Denio, J., p. 212:
>
> "'The provision was designed to protect *the citizen against all mere acts of power,* whether flowing from the legislative or executive branches of the government.'
>
> "The principal and true meaning of the phrase has never been more tersely or accurately stated

than by Mr. Justice Johnson, in *Bank of Columbia vs. Okely*, 4 Wheat., 235-244:

"'As to the words from Magna Charta, incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: That they were intended to secure the individual from the *arbitrary exercise* of the powers of government, *unrestrained by the established principles of private right and distributive justice.*'"

Mr. Justice Harlan dissented, but not from these principles. Instead, he would have applied them and held the legislation there in question unconstitutional. He said of the Fifth Amendment:

"This language is similar to that of the clause of the Fourteenth Amendment, now under examination. *That similarity was not accidental, but evinces a purpose to impose upon the States the same restrictions, in respect of proceedings involving life, liberty and property, which had been imposed upon the general government.*

"'Due process of law,' within the meaning of the National Constitution, does not import one thing with reference to the powers of the States, and another with reference to the powers of the general government. * * * What, then, is the meaning of the words 'due process of law' in the latter amendment.

* * * * * *

"We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding*

existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

Hurtado vs. California, 110 U. S., 526, 527, 541, 542.

In the early case of *Holden vs. James,* 11 Mass., 396, 404, in passing upon the validity of an act of the Massachusetts Legislature which required the consideration of the fundamental rights secured by the law of the land, the Court said:

"It is manifestly contrary to the first principles of civil liberty to natural justice, and to the spirit of our Constitution and laws, *that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances, or that anyone should be subject to loss, damages, suits or actions from which all others under like circumstances are exempted."*

In *Eames vs. Savage,* 77 Me., 212, the Court said:

"English political history is full of the strife between the Crown and the people, the Crown seeking to enlarge its irresponsible prerogatives and the people insisting on fixed and certain laws. The Magna Charta and the various bills of rights in which these phrases were used were demanded from the kings as safeguards against arbitrary action, against partial or unequal decrees. The barons and people insisted on general laws, *ligum terrae,* on uniformity, 'due process of law.' They insisted on law, however harsh, as better security than the prerogative, however indulgent. These

phrases did not mean merciful or even just laws, *but they did mean equal and general laws, fixed and certain.* The solicitude was to preserve the property of the subject from the inundation of the prerogative.

Broom's Const. Law, 228.

"The English colonies in America were familiar with the conflict between customary law and arbitrary prerogative, and claimed the protection of those charters. *When they came to form independent governments, they sought to guard against arbitrary or unequal governmental action by inserting the same phrases in their constitutions.* They insisted that all proceedings against the individual or his property should be uniform and by general law. *They put the same limitation upon the Federal Government in the Fifth Constitutional Amendment.*"

The idea that due process of law means equal and general laws, fixed and certain, and such as would apply with equal force and with no unjust discrimination to all under like conditions, is the line upon which our courts should proceed in construing the terms as used in the Fifth Amendment. It is not doubted that the colonies in America had in mind, in the formation of their independent governments, the struggles of English political history which found so many the victims of harsh prerogative rather than the beneficiaries of equal and fixed law. It was with this in mind that they sought to guard against arbitrary or unequal governmental enactments. It was to prevent a repetition of the old experience that the limitation upon the Federal Government was placed in the Fifth Amendment of the Constitution. It was then thought that

this phrase, "due process of law," was sufficient to guarantee equal laws, fair and just to all alike.

The people realized the aggressive tendency of power, and in drafting the charter of their existence they incorporated in it this safeguard against the exercise by the government of an arbitrary power which should discriminate in favor of one person or class of persons and against others when found in the same situation.

In drafting the Constitution of the United States, the framers were promulgating the general rules which should govern society under the new-born government. They were protecting in every citizen his right of life, liberty and property, and guaranteeing to him that he should be deprived of neither except by the operation of the "law of the land," which law should be fair and just and equal in its application. Why is it not the correct interpretation of the term "due process of law," or "the law of the land," that it was intended to perpetuate old and well-established principles of right and justice, by securing them from abrogation or violation? Can right or justice be enjoyed under a law which does not apply equally to all of the same class who come within its reach and who are in similar situation?

The Limitations in the Two Amendments Compared.

Among the fundamental principles of our government are freedom, equality, right and justice. Any act of Congress which seeks to sweep aside any one of these principles violates the fundamental ideas of our freedom of government and deprives the citizens of an inherent right promised and guaranteed to be held intact and forever secure.

In *French vs. Barber Asphalt Paving Co.*, 181 U. S., 324-329, Mr. Justice Shiras, in speaking for the court, said:

> "Certainly it cannot be supposed that by the Fourteenth Amendment it was intended to impose upon the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government in a similar exercise of power, by the Fifth Amendment."

Comparatively few cases are found touching upon the clause "due process of law" as employed in the Fifth Amendment.

In *Davidson vs. New Orleans*, 96 U. S., 97, 103, 104, the Court, in discussing the phrase "due process of law" as used in the Fifth Amendment, said:

> "It is not a little remarkable that, while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of the government have been exercised has been watched with jealousy and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion."

And in a recent learned and interestiag discussion of the rights secured to citizens of the State, as distinguished from citizens of the United States, by the term "due process of law," Mr. Justice Moody said that—

> "the words 'due process of law' are equivalent in meaning to the words 'law of the land,' contained in Magna Charta."

He further said:

> "Of course, the part of the Constitution then before the Court was the Fifth Amendment. *If*

any different meaning of the same words as they are used in the Fourteenth Amendment can be conceived, none has yet appeared in judicial decision."

Twining vs. N. J., 211 U. S., 100, 101.

In dissenting from that decision, we do not understand Justice Harlan to have dissented from the legal principles laid down as we have shown. Instead, in a powerful opinion, he proceeded to show that, properly applied, in the light of English and American constitutional history, a man could not be forced to incriminate himself by a State.

Apply these principles here and the classification cases like *Yick Wo vs. Hopkins*, 118 U. S., 356-370; *Cotting vs. Stockyards*, 183 U. S., 7; *Connolley vs. Sewer Pipe Co.*, 184 U. S., 540, 554, 561; *Dobbins vs. Los Angeles*, 195 U. S., 223, are fatal to this Federal legislation because it is prohibited by the Fifth Amendment for the same reasons that the Fourteenth Amendment prohibits like legislation by the States. Indeed, the State power is usually greater because it is sovereign, unlimited, and supreme as to internal affairs; and yet this Court, speaking by Mr. Justice Day, has said of that sovereign power that the law

"is now thoroughly well settled. Even legislative enactments undertaking to *regulate useful business enterprises* are subject to investigation in the courts, with a view to determining whether * * * under the guise of enforcing police regulations *there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use or enjoy property.*"

Dobbins vs. Los Angeles, 195 U. S., 236.

So there are constitutional rights, after all; and both State and Federal legislation is void if it discloses an "unwarranted and arbitrary interference," with "a lawful business" or with "contracts," or the "use" or "enjoyment" of property. Does not such language describe a clause that exempts one kind of fuel, while practically destroying all value in another kind of fuel under precisely the same circumstances? It is said this is not so because this legislation applies to all railroads alike, but such is not the fact. We have only to look at the green spots on any good timber map of the Forestry Department to see that there is a great deal of timber where there is no coal, and much coal, like our anthracite coal, where all timber has been removed. In other cases timber and coal are found together. Now, clearly there is unjust discrimination in favor of railroads that own timber fuel, and against those owning coal fuel. The reasons why such discrimination violates the constitutional rights at the *"foundation of free government"* are stated with great force by Mr. Justice Harlan in *Connolley vs. Sewer Pipe Co.*, 184 U. S., 554, 565.

III.

Congress cannot regulate intra state production.

Congress has no power to "regulate" persons, or State corporations, within any State, so that harmless and necessary commodities, manufactured, mined, or produced by them cannot enter into interstate commerce.

The right to regulate the use of private property claimed by our English forefathers, was to regulate such use in those cases where private property was subjected to public use. The law upon this subject was thus stated by Sir Matthew Hale, in his great treatise, De Portibus Maris, about 250 years ago:

"*A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for cranage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own.* * * * If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, * * * or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

In *Aldnut vs. Inglis*, 12 East, 527, in 1810, Lord Ellenborough thus stated the law upon this subject:

"*There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them*, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

These quotations are approved as the foundation of the decision of this Court in *Munn vs. Illinois*, 94 U. S., 127, 128.

How does this principle affect this case? A coal mine is private property not subject to a public use. A Pennsylvania corporation mining coal is engaged in private and domestic business as distinguished from national and a public business. It has never been asserted that because of some public use to which it was subjected, the business of mining and selling coal was subject to regulation by our national government. Shall such a corporation stop mining the national government has no grant of power to force it to continue mining.

It is entirely true that the State of Pennsylvania has the right to enact laws to provide for the safety of its workmen engaged in mining, but this is so because of its police power—the power the State has to make and enforce laws to preserve the lives of its citizens. It may regulate their hours of work, establish shafts, means of escape, and require to be done those things necessary to be done to keep the mines from being flooded, or destroyed by explosions, that may overwhelm hundreds of workmen with calamity. This Court has sustained the States in their sovereign power over coal and other mines within all reasonable bounds whenever such exclusive police power of the State has been questioned. Numerous State statutes regulating coal mines are referred to as valid in *Holden vs. Hardy*, 169 U. S., 393, 394. Such statutes were directly sustained as to the coal mines in Illinois in *St. Louis Con. Coal Co. vs. Ill.*, 185 U. S., 208, and *Wilmington Mining Co. vs. Fulton*, 205 U. S., 61. But the Federal Government has no such powers over these coal mines. The power of the Federal Government with reference to coal mines and coal mining does not begin until the power of the State of Pennsylvania ceases. The power

of the State of Pennsylvania over coal ceases when it has been carried to the State line, or when it has been sold to an interstate purchaser who has begun to load it for transportation out of the State. The instant the coal can be said to become interstate commerce, the right of the government to regulate it takes hold. Until the coal has been sold or shipped, or something has been done to make interstate commerce out of it, it is domestic property of Pennsylvania, subject to the laws of Pennsylvania, even to Pennsylvania's taxation laws. The instant the coal becomes interstate commerce, the laws of Pennsylvania cease to have force over it, and it becomes subject to Federal regulation and Federal taxation. (*Railway vs. Texas*, 210 U. S., 217, 225, 225, and cases there cited.) The Federal Government may regulate the railways, canal boats, or other vessels carrying it to interstate markets, in so far as such regulation is necessary. So long as it is not claimed that this coal is harmful, however, there is not a line in any hostorial precedent, any decision, or in the Constitution itself, giving Congress power to forbid a common carrier to carry it to market simply because it was mined or produced by some particular person or corporation. If a railroad corporation has the power to mine coal on its own property, under the laws of Pennsylvania, until that coal is mined and becomes interstate commerce by a sale, or by a shipment, it is in every sense the private property of its owner, and not subject to Federal regulation. And the right to mine and vend it is a vested property right that cannot be taken away or destroyed by either State or nation without just compensation therefor. The right to use or sell property is all there is to it. Without that *right* property is worthless. As Alexander Hamilton put it more than a century ago: "What is property but a fiction without the beneficial use of it?" It is not possible that

either directly or indirectly, as in this case, the Federal Government can destroy the State-given right to mine, produce and vend our coal. "The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes." *Sinking Fund Cases,* 99 U. S., 700-718. The State cannot take away vested corporation rights. *People vs. O'Brien,* 111 N. Y., 135: even by constitutional amendment. *Ry. vs. Texas,* 170 U. S., 243.

Even when this coal becomes interstate commerce, it does not become subject to confiscation at the instance of the Federal Government, unless there be just cause for such confiscation. It is still private property, although interstate commerce. The government may make regulations to enable it to pass freely to market on equal terms with similar commodities, but the government cannot prohibit it from going to market on the same terms with other commodities, because the Federal Government has been given no such power of prohibition over it. To prohibit unlawful criminal articles from becoming interstate commerce is only to keep the channels of interstate commerce open for necessary and harmless commodities like food or fuel. But the power of regulation is not an unlimited power of prohibition. To provide by law that coal may pass to market on equal terms with other commodities, is to regulate interstate commerce; and such provisions are made in the Interstate Commerce Law. To provide by law that it may not go to market at all because it has been produced by a railroad company having the right to produce it under the laws of Pennsylvania, or by a coal corporation having a right to produce it under the laws of Pennsylvania, is not to regulate interstate commerce, but is to inhibit all interstate commerce. The government can regulate the instrumentality, the common carrier, and the employees of the common carrier while engaged in

interstate commerce, within all reasonable bounds, to promote such commerce, even though there may be question about the wisdom of the action of the Federal Government in such regulation. But to forbid a common carrier to carry coal or food to market, is not to regulate the carriage of such food, or fuel, as interstate commerce, but is to prevent such food or fuel from ever becoming interstate commerce. Coal does not become interstate commerce until it begins to move a few inches at least toward an interstate market, even though that movement be by a shovel in the hand of man, or by the spout of the breaker conveying that coal to a car that shall carry it to the interstate market. But if this statute is literally obeyed, the car cannot be furnished for such coal, a necessity of life, on any terms whatever.

Functions of the States.

If the unquestioned power of the State to regulate land-holding, create corporations, and make the stock in these corporations personal property and transferable, or non-assignable, is the power of a sovereign, and an exclusive power, Congress may not directly invade that domain. If Congress cannot invade it directly by ordering the land sold it cannot do the same thing indirectly by making it useless if it is not sold. It is not necessary that Congress should invade the State functions. It is only necessary that this Court uphold the power of Congress, within all reasonable limits, in the regulation of interstate commerce. The function of the State has been fully discharged when its land, its inhabitants, or its corporations, have produced that interstate commerce. The functions of the State have not been fully discharged until such commerce, domestic or interstate, has been produced. The instant the product begins to move as interstate commerce, the power of Congress to regulate its movement is born and complete. If it is

poison, dynamite, whiskey or lottery tickets that the State has condemned as criminal then the Federal Government may say they shall not be accepted when tendered for interstate movement. But will any one claim Congress has the power to prohibit all common carriers carrying any anthracite coal to interstate markets upon any terms whatever? Has Congress the power to forbid all common carriers carrying cotton, or wheat, or corn, or wood, to interstate markets upon any terms whatever? Has Congress the power to forbid common carriers to carry anything to interstate markets except harmful articles that the States have outlawed, or might outlaw? Is not the full power of Congress exercised when it shuts out all harmful or unlawful articles and requires all common carriers to charge the same rates and grant the same privileges to all shippers of interstate commerce? If so, when the Commodity Clause is stricken from the Interstate Commerce Act, that still secures absolute equality to all shippers, and prevents discrimination in favor of the so-called railway coal corporations. It may be that it would be easier to prevent such discrimination if Congress had the power of an absolute sovereign, and was not required to respect the rights of the people, or of the States, while such people or corporations are conducting a harmless and beneficial interstate commerce. If, however, the Constitution secures to the consumers of coal liberty of contract, and the right to go to Pennsylvania and buy coal from corporations legally producing it there, then how can Congress forbid the common carriers to carry such coal to the purchaser, simply because they were once interested, directly or indirectly, in the production of such coal?

If the State, and not the nation, has the right to make laws with reference to the production of anthracite coal, is it possible that the nation can forbid a common car-

rier to carry such coal to market after it has been lawfully produced in accordance with the laws of the State where it was produced?

The Employers' Liability Cases.

It seems to us the opinions in the Employers' Liability cases, 207 U. S., 463, go far to answer these questions. The question there involved was sharply whether or not the State or the Nation had the right to legislate as to an employer's liability to his employee. In other words, which has the power to regulate personal relations and conduct? It was there held that the Nation could only legislate as to an employer's liability to the employee in so far as the relation of employer and employee was such through their common action in conducting interstate commerce by transporting articles of commerce to interstate markets. The act was broad enough to cover "all" employees, and the question mainly debated was whether or not it was permissible so to read it as to make it cover only all employees engaged in interstate commerce. In discussing the question, Mr. Justice White said:

> "The test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce," or is within "the grant conferred on Congress" (p. 495).

His opinion very pertinently answers some of the arguments in support of the constitutionality of the Commodity Clause here. He says (pp. 502, 503):

> "On this subject the opinion in the *Trade-mark* Cases, 100 U. S., 82, where an act of Congress concerning trade-marks was held to be unconstitutional, because too broad in its scope, is pertinent and instructive. The Court said (p. 99):

" 'If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, *in some instances under the act of Congress, and in others under State law. Cooley, Const. Lim.*, 178, 179; *Commonwealth vs. Hitchings*, 5 Gray (Mass.), 482.'

"3. It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits *all* his business concerns to the regulating power of Congress. To state the proposition is to refute it. *It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from*

the beginning have been, and must continue to be, under their control so long as the Constitution endures."

Mr. Justice Day concurred in this opinion. In concurring in the decision, Mr. Justice Peckham, for himself, Mr. Chief Justice Fuller, and Mr. Justice Brewer, said (p. 504):

> *"I concur in the proposition, that as to traffic or other matters within the State, the act is unconstitutional, and it cannot be separated from that part which is claimed to be valid as relating to interstate commerce.* As that is all that it is necessary to decide in this case, I place my concurrence upon that part of the opinion which decides it."

In dissenting, Mr. Justice Moody said:

> "The judgment of the Court does not deny that it is within the power of the Congress to provide a remedy for the injury or death of employes engaged in the conduct of territorial, interstate and foreign commerce. It rests upon the ground that this statute is unconstitutional, because it seeks to do more than that, and regulates the liability of employers while engaged in intra-state commerce or in manufacture. *At the threshold I may say that I agree that the Congress has not the power directly to regulate the purely internal commerce of the States, and I understand that to be the opinion of every member of the Court"* (p. 505).
>
> "Where, therefore, the business is foreign or interstate, Congress, it has frequently been decided, has the paramount, if not the sole, power to legislate for its direct control" (p. 525).

In dissenting, Mr. Justice Holmes said (p. 541):

> "I must admit that I think there are strong reasons in favor of the interpretation of the statute

adopted by a majority of the Court. But, as it is possible to read the words in such a way as to save the constitutionality of the act, I think they should be taken in that narrower sense."

Antecedent Production.

Apply this decision here and where do we come out? *Every Justice in that case assented to the proposition that if the legislation there involved did invade the rights of the States to regulate the employer's liability to his employee within the State, then that legislation was unconstitutional and void.* The only dissents in that case were based upon the proposition that that Act could be so read as to confine it to interstate commerce, and, therefore, it could be sustained.

But can the Act here be so read as to confine its force and effect to interstate commerce? We have shown that if it is literally read, and literally obeyed, it can never affect interstate commerce, and it can only affect the ownership of coal mines and the production and sale of coal within the State of Pennsylvania. If the Commodity Clause did not make it "unlawful * * * to transport * * * any article or commodity * * * mined or produced by it * * * or in which it may have an interest, direct or indirect, except * * * for its use," this case would be very different.

But it will be seen from the words quoted that the emphasis is on the fact that some one *had previously "mined or produced"* coal, or some commodity, contrary to this command. *The antecedent, the precedent, act, is the mining or producing.* If the thing is not mined or produced, there will be nothing to transport. Congress determines on whether it shall be transported or not by *who had previously mined or produced it.* Can Congress do this without necessarily invading the exclusive domain of the State government?

As we have already seen, Pennsylvania has the sole right to say who shall mine or produce coal within her domain; Congress has no right to say anything on that subject. Congress has a perfect right to make regulations with reference to its interstate carriage, but it has no right, directly or indirectly, to make a regulation with reference to its production. *The only effect of this legislation, however, is upon the production. It was only intended to affect the production.* The debates show that it was intended to affect the production. Congress intended to make it unlawful for a common carrier, directly or indirectly, to mine or produce coal, no matter whether Pennsylvania had made it lawful for a common carrier so to do or not. If Pennsylvania, however, has made it lawful for a common carrier to directly or indirectly mine or produce coal, Congress can not make that unlawful which Pennsylvania has made lawful. Congress might as well decree that the corporation should be dissolved, or amend its charter so as to deny it the power to mine coal, or to hold lands. In Pennsylvania, it is the lawful right of the corporation that has mined the coal to sell it to any buyer, intrastate, or interstate. Having sold that coal to the buyer, the buyer becomes its instant and lawful owner. The buyer having purchased that coal from a common carrier that had the right to produce it, that buyer applies to that common carrier to carry it to market. The common carrier replies: "You wish it carried to an interstate market, and Congress has made it unlawful for me to carry it to such a market." The buyer replies: "I have all the privileges and immunities of a citizen of Pennsylvania in the State of Pennsylvania, under Article IV., Section 2, Subdivision 1, of the Constitution of the United States, and, therefore, I had the right to buy this coal, and I have the right to have you carry this coal to market for me upon the same terms and

conditions on which you carry coal to market for other producers or purchasers. You are required to give full faith and credit to the public acts of Pennsylvania in incorporating the company and authorizing it to mine this coal and sell it to me, and if you do so, you must ignore ths void act of Congress and carry my coal to market for me. The Constiution guarantees me liberty, and guarantees the corporation from which I bought this coal liberty and property until they are taken away by due process of law, and, therefore, Congress could not take this property from the corporation that mined it, and render it valueless, without just compensation, or without any process of law whatever. The stock in corporations is not commerce, and if one corporation has the right to buy and hold stock in another, Congress has no right to directly or indirectly interfere with the liberty exercised in thus buying and selling corporate stocks. All these rights were reserved to the people of the United States by the Tenth Amendment to the Constitution of the United States." But the common carrier replies: "If I carry your coal, I must carry the coal of all others, and that means six or eight hundred carloads of coal a day, which will subject me to the risk of five thousand dollars fine for each carload so transported." And the would-be shipper answers: "Such excessive fines are not lawful, within the Eighth Amendment to the Constitution."

Any such discussion at once shows that the question upon which this legislation depends all the while is—*who* produced the coal before it became interstate commerce at all? What person or corporation produced it? The question is not whether its production was lawful or unlawful. The question is not whether its production is beneficial or criminal. It is not made to depend upon the Constitution or law of any State. The sole question on which this legislation hinges is: *Who* mined

it? *Who* produced it? This legislation does not depend upon the ownership of the coal, nor its offer for shipment. No ownership of the coal, nor offer for shipment, can be innocent enough to purge it of the sin forced into this innocent price of coal if it has been produced by a corporation in which a railroad company owns some stock, if the argument of the learned Attorney General is valid in its entirety. That a common carrier, or its predecessor, fifty years ago acquired stock in a coal mining corporation when it was lawful so to do, is no answer to this legislation. If that coal corporation has mined or produced the coal and then sold it, and the purchaser offers it for transport, the common carrier that owns stock in that coal corporation must decline to receive it or carry it to an interstate market.

Is such legislation any regulation of commerce? Is it not plain instead that what it regulates is the mining and production of coal? It indirectly undertakes to do what it could not do directly. It could not directly make it unlawful for these corporations of Pennsylvania to mine and produce coal. As it could not directly make it unlawful for them to mine and produce coal, it undertakes to do the same thing indirectly, by making it unlawful for a common carrier to carry it to market after it has been lawfully mined and sold in Pennsylvania. It seems to us very clear that this legislation cannot be upheld in so far as it undertakes to regulate the mining and production of coal by corporations of Pennsylvania in accordance with the laws of that State. If the laws of that State have not been obeyed it is for that State to enforce them. If the Commodity Clause is construed to reach the Erie Railroad Company, as a stockholder in such corporation, contrary to the intent of Congress in passing the Commodity Clause, as we have shown, then it is unconstiutional, because it invades the province of the State, just as the Employers' Lia-

bility Act invaded the province of the States. The same reason that overthrew the Employers' Liability Act is equally potent, then, to overthrow this Act. Fortunately the Commodity Clause can be cut out of the Interstate Commerce Act without harming that Act in any way, and, therefore, that entire Act will not fall to the ground, as the Employers' Liability Act did because the good and bad portions could not be separated.

We close this discussion with one further authority.

An Unbiased View of the Commodity Clause.

No lawyer of standing has had occasion to make a closer study of the constitutional provisions that grant Congress the power to regulate interstate commerce, and that limit the exercise of that power, than Senator Knox, as a practicing attorney in a great city, as Attorney General, and as a United States Senator. In the lottery cases, and in the Northern Securities case, he showed that he fully comprehended the government's side of the question. Nor was he backward in asserting the power of the government to the uttermost in those cases. As a United States Senator, in the debates over the Interstate Commerce Act amendments, and over the Commodities Clause, he showed an independence and a lawyer-like, statesman-like view of these questions that attracted much attention. About a year after the Senate voted to make the Commodities Clause a Federal statute, he delivered an address at Yale University considering the very question before this Court, which showed that he had not stopped thinking about it, and which attracted favorable comment throughout the country. About six months later, the revised address appeared in the Yale Law Journal as his deliberate judgment of the question in hand. Portions of that address bear so pointedly upon this case that we here take the liberty of quoting from that address, because we think its logic and law,

may be of service to this Court. In quoting the italics will be our own. Senator Knox said:

> "Over this subject of commerce among the States and with foreign nations, and its instrumentalities, the power of Congress is plenary. It may be exercised in the most general or minute way. For this purpose, Congress possesses all powers which existed in the States before the adoption of the National Constiution, and its power when the subject is national is or may be made exclusive. The constitutions, laws, corporations and citizens of the States are subject to this paramount authority. Congress can regulate anything, everything, any and every person, natural or artificial, in the sense that it can prohibit or prevent any use or act that will interfere with Congressional control over interstate commerce, or that will injuriously affect such commerce. Congress may likewise prevent the arteries of interstate commerce from being employed as conduits for articles hurtful to the public health, safety or morals, and may remove obstructions from the highways of commerce whether they be physical or economic, whether they may be sand bars, mobs or monopolies.
>
> "The power of Congress may be exercised by prohibition and by prescription.
>
> "Congress has prohibited combinations in restraint of interstate and foreign trade and has prohibited the carriage of diseased cattle, explosives and lottery tickets, and Congress has prescribed that certain safety appliances shall be used upon railroads doing an interstate business. The one class of laws is designed to keep the channels of commerce free and unpolluted; the other is designed to secure the safety of the employees and patrons of the carriers.

"I cite these acts because their constitutionality has been sustained, because they obviously bear directly upon commerce and for that reason will serve to make clear the distinction between the well established rule to be deduced from the decided cases and the extension of the rule involved in certain pending legislative propositions of Federal control, to which I shall now direct your attention.

"The existing rule, as it has been judicially determined, may be restated in these words: Congress has the power to regulate interstate commerce, which includes the power to regulate the means or instrumentalities by which commerce is conducted.

"*The new proposition is this: Congress has the power to regulate commerce including its instrumentalities, and likewise power to regulate the persons by whom articles of commerce are produced in respect to matters not connected with commerce.*

"This addition to the rule finds expression in the suggestion to prohibit the interstate transportation of articles of value *which are in themselves innocuous and which are lawfully made or produced in a State* for reasons not affecting interstate commerce.

"Let us now consider whether the regulation of the business of producing articles which may in whole or in part go into interstate commerce for reasons not affecting such commerce, is a legitimate regulation of commerce. *In other words, is the mere production of goods commerce?* If it is not, then can Congress regulate such production within a State under the constitutional power to regulate interstate commerce?

"It would be difficult to overstate the importance and seriousness of the question thus presented, *as*

upon its ultimate authoritative determination depends, it may be, the autonomy of the States in substantially all matters of internal police.

"It is scarcely worth while to discuss the proposition that production is not commerce.

"Mr. Justice Lamar remarked in *Kidd vs. Pearson*, 128 U. S.:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacturer is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transaction in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. *The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does* not *the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow*

as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management.

"In *Veaze vs. Moore*, 14 How., 574, the Court said:

"The phrase 'to regulate commerce' can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase *foreighn commerce*, or fairly implied in any investiture of the power to regulate such commerce. *A pretension as far reaching as this, would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the colliers and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned.*

"But is is claimed that as the power to regulate commerce is absolute, complete and mainly exclu-

sive in Congress, the right to forbid the shipment in interstate trade of any kind of goods, for any reason, comes within that power. That is to say, under the guise of a commercial regulation, not necessary for the promotion or protection of commerce, a producing regulation, which Congress could not have enacted, may be enforced; *or, in other words, Congress can deny a person the right to engage in interstate commerce for doing that which Congress cannot prohibit him from doing.* But, as we have seen, Congress cannot regulate production, and Chief Justice Marshall said in *McCulloch vs. Maryland:*

"Should Congress under the pretext of executing its powers pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

"In my judgment, the power to regulate commerce between the States does not carry with it the power to prohibit commerce, unless the prohibition has for its purpose the facilitation, safety or protection of commercial intercourse or the accomplishment of some other National purpose.

"The power to regulate interstate commerce does not extend to the laying of an arbitrary embargo upon the lawfully produced, harmless products of a State, nor to the right to defeat the policy of a State as to its own internal affairs.

"I concede that the National power to regulate interstate commerce carries with it the right to prohibit commerce in order to secure equality of commercial right, or to prevent restraint of or in-

terference with commerce, *but not to prohibit the shipment from the State of the innocuous products of producers who are pursuing a course sanctioned by the laws of the State and in no wise in itself interfering with interstate commerce. If prohibition of interstate trade is within the arbitrary power of Congress, it might be exercised so as to exclude the products of particular State or sections of the country. Congress then might prohibit the shipment of cotton or wheat to promote the interests of wool or corn.*

"There is no authority for any such proposition. The power of prohibition has never been sustained except as against articles noxious or dangerous in themselves. It is not possible to find even a suggestion that in respect to natural products which are prime necessities, Congress can prohibit commerce in them between the States in order to enforce its conseption of what would be a wise police regulation of a State.

"In the case of *Champion vs. Ames,* 188 U. S., 321, it was held that lottery tickets are subjects of traffic and their carriage by independent carriers from one State to another is interstate commerce, which Congress may prohibit under its power to regulate commerce among the several States, *but this was specifically placed upon the character of the business.* The court said, through Mr. Justice Harlan, 'It is a kind of traffic which no one can be entitled to pursue as of right.'

"The Court also said:

" * * * The power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such

limitations or restrictions as are prescribed by the Constitution. This power, therefore, may be not exercised so as to infringe rights secured or protected by that instrument.

"The right of each State to regulate its domestic affairs is 'secured and protected' by the Tenth Amendment reserving to the States respectively, or to the people, the powers not delegatd to the United States.

* * * * * * *

"In aword I do not take issue with the general proposition that Congress may prohibit transportation, but I say the prohibition must have for its real object the regulation of interstate commerce and not something *dehors* the Federal power.

"In a recent case, the Supreme Court of the United States, through the Chief Justice, speaking of the power and sovereignty of a State, uses this language:

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, *the power to govern men and things within the limits of its domain, 'is a power orignally and always belonging to the State,'* not surrounded by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

"That the Congress of the United States *has no general legislative powers,* but only such as are granted to it by the Constitution *is not an old-fashioned and exploded notion.*

"It has been reaffirmed with emphasis by the Supreme Court within the last sixty days in a

great opinion by Mr. Justice Brewer in the case of *Colorado vs. Kansas.*

"The learned Justice said: 'That this is such a government' (one of delegated powers) 'clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.'

"We cannot make progress in developing a body of substantive remedial law without an accurate appreciation of the restrictions upon both the State and Federal powers.

* * * * * *

"It is beside the question to urge the desirability and popularity of measures if Congress has no power to enact them. Our heartiest sympathy may be enlisted in many movements and yet our judgment may be compelled to reject the means proposd for their accomplishment. I remember and am impressed by the words of President Roosevelt in his first message to Congress, that 'The men

who demand the impossible or the undesirable serve as the allies of the forces with which they are nominally at war, for they hamper those who would endeavor to find out in rational fashion what the wrongs really are and to what extent and in what manner it is practicable to apply remedies.'

"The last words of Washington and the first words of Lincoln contained a solemn admonition to us on the necessity of preserving our dual government intact.

"In his farewell address to the American people, Washington said:

" 'If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.'

"And in his first message to the American Congress, Lincoln said:

" 'To maintain inviolate the rights of the States to order and control under the Constitution their own affairs by their own judgment exclusively, is essential for the servation of that balance of power on which our institutions rest.'

"And, finally, Chief Justice Marshall, the great expounder of the Constitution, said, in *Gibbons* v. *Ogden*:

"The genius and character of the whole government seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; *but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.*"

Yale Law Journal, Vol. XVII., January, 1908, pp. 144-147, 148, 149, 150. It is very vital now and hereafter to the liberty and property of all citizens and corporations, and the very life of the States, that the unbiased views of Senator Knox be upheld.

We respectfully submit that they are sound and this Court should hold that the Commodity Clause is uncontitutional.

GEO. F. BROWNELL,
General Solicitor Erie Railroad Co.,
50 Church Street, New York.

ADELBERT MOOT,
Of Counsel,
45 Erie County Savings Bank,
Buffalo, N. Y.

PRESS OF
THE BUFFALO COMMERCIAL,
BUFFALO, N. Y.

Office Supreme Court, U. S.
FILED.
JAN 14 1909
JAMES H. McKENNEY,
Clerk.

OCTOBER TERM, 1908.

IN THE

SUPREME COURT OF THE UNITED STATES.

United States of America,
Plaintiff in Error and Appellant,
vs.
The Delaware and Hudson Company.
— In Equity, No. 565. At Law, No. 559.

United States of America,
Plaintiff in Error and Appellant,
vs.
Erie Railroad Company.
— In Equity, No. 566. At Law, No. 560.

United States of America,
Plaintiff in Error and Appellant,
vs.
The Central Railroad of New Jersey.
— In Equity, No. 567. At Law, No. 561.

United States of America,
Plaintiff in Error and Appellant,
vs.
Delaware, Lackawanna and Western Railroad Company.
— In Equity, No. 568. At Law, No. 562.

United States of America,
Plaintiff in Error and Appellant,
vs.
The Pennsylvania Railroad Company.
— In Equity, No. 569. At Law, No. 563.

United States of America,
Plaintiff in Error and Appellant,
vs.
Lehigh Valley Railroad Company.
— In Equity, No. 570 At Law, No. 564.

(FILE NOS. 21355 TO 21366 INCLUSIVE.)

APPEALS AND WRITS OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

GENERAL BRIEF FOR DEFENDANTS IN ERROR AND APPELLEES.

JOHN G. JOHNSON,
ROBERT W. DEFOREST,
Of Counsel.

Lane & Scott, Pr., Phila.

IN THE

Supreme Court of the United States

October Term, 1908.

United States of America, *Plaintiff in Error and Appellant,* vs. *The Delaware and Hudson Company.*	In Equity, No. 565. At Law, No. 559.
United States of America, *Plaintiff in Error and Appellant,* vs. *Erie Railroad Company.*	In Equity, No. 566. At Law, No. 560.
United States of America, *Plaintiff in Error and Appellant,* vs. *The Central Railroad of New Jersey.*	In Equity, No. 567. At Law, No. 561.
United States of America, *Plaintiff in Error and Appellant,* vs. *Delaware, Lackawanna and Western Railroad Company.*	In Equity, No. 568. At Law, No. 562.
United States of America, *Plaintiff in Error and Appellant,* vs. *The Pennsylvania Railroad Company.*	In Equity, No. 569. At Law, No. 563.
United States of America, *Plaintiff in Error and Appellant,* vs. *Lehigh Valley Railroad Company.*	In Equity, No. 570. At Law, No. 564.

GENERAL BRIEF FOR DEFENDANTS IN ERROR.

Six bills in equity and six petitions for *mandamus* were filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, against six railroad companies located in Pennsylvania, largely engaged in transporting anthracite coal from, or near, mines in that State, into other States. The hearing was upon bills, and petitions and answers.

The purpose of said bills and petitions, was, to prevent each of said companies from transporting, in interstate commerce, coal manufactured, mined or produced by it, or owned by it in whole or in part; and also to prevent each from transporting coal in which it had at the commencement of transportation, or in which at any time antecedent thereto, it had had any direct or indirect interest. It was averred that each defendant was the owner of shares of stock of coal companies of Pennsylvania, in some cases of all, in others of the major, and in others of the minor, part thereof, and that it had a direct, or indirect, interest in coal manufactured, mined or produced or owned in whole or in part, by such coal companies.

The six companies defendant were: (1) The Pennsylvania Railroad Company; (2) The Central Railroad Company of New Jersey; (3) The Lehigh Valley Railroad Company; (4) The Erie Railroad Company; (5) The Delaware, Lackawanna and Western Railroad Company; and (6) The Delaware and Hudson Company.

Proceedings were also pending against another company, *i. e.*, the Philadelphia and Reading Railway Company, whose answers had been filed before the argument in the Circuit Court of the above cases; but the Government was unwilling to argue it upon bill, petition and answer.

The Philadelphia and Reading Railway Company transports, in interstate commerce, a large amount of coal. Its answers averred that it neither mined nor owned said coal, in whole or in part; and that it owned the shares

of stock of no coal company. If that Company is not within the Commodities Clause, it will have a practical monopoly of the transportation, in interstate commerce, of anthracite coal.

The possibility of such result illustrates the hasty and ill considered action of Congress in enacting the statute.

Before discussing the legal questions involved, it may be advisable to present to the court the situation of each of the six defendants, as established by its answer.

Wherever coal is spoken of in this brief, it may be taken that anthracite coal is meant.

As to the Pennsylvania Railroad Company.

It was incorporated under an act of Pennsylvania, April 13th, 1846.

It is the owner, its ownership having commenced as early as 1871, of all the shares of the Susquehanna Coal Company; of all the shares of the Summit Branch Mining Company; and of one-third of the shares of the Mineral Railroad and Mining Company, corporations of Pennsylvania.

Neither the president, nor the vice-president, of either of these coal companies has, for many years, occupied a like position in the railroad company.

It mines, or owns, no coal. The coal companies whose shares it owns, do. Approximately, sixty-five per centum of the coal so mined is carried in interstate commerce. Such carriage has continued for very many years.

The most largely producing of the properties belonging to these coal companies are located, either directly upon, or so contiguous to, the system of railroads operated by it, as to render transportation of products by any other railroad companies, not reasonably practicable.

As to the Central Railroad Company of New Jersey.

It was incorporated by the State of New Jersey in the year 1847. By the general corporation law of that State,

it is permitted to hold shares of stock in any other corporation, or corporations, of New Jersey, or elsewhere.

During a period commencing long prior to the year 1874, and continuing until the present, it has been the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company, and of the Wilkes-Barre Coal and Iron Company, now merged into the Lehigh and Wilkes-Barre Coal Company, a corporation of the State of Pennsylvania, whose shares, as to a large majority thereof, are held by it. A minority of the shares of the Temple Iron Company is also held by it.

About seventy-five per centum of the coal mined by said coal companies is transported in interstate commerce.

All the shares of the Lehigh and Wilkes-Barre Coal Company are pledged under its general mortgage, dated July 1st, 1887, which secures bonds issued to an aggregate amount of $45,091,000.

On the 31st of March, 1871, it became the lessee of the Lehigh and Susquehanna Railroad, a Pennsylvania corporation, and as such, it has ever since operated the same, under obligation to pay a rental of not less than $1,414,400, nor more than $2,043,300 per annum.

For the year ending June 30th, 1907, its gross earnings from the transportation of coal, amounted to $9,312,268.04, representing over forty-eight per cent. of its entire freight receipts. A large part of its earnings from freight and miscellaneous passenger traffic results as an incident to, and is dependent upon, the operation of the mines and collieries of said coal companies. The greater part of its earnings from transportation of coal, results from its carriage of that mined by the Lehigh and Wilkes-Barre Coal Company.

Its lines of railroad, by which said coal is, and for long has been, transported, are substantially, the only ones reasonably practical and conveniently available, for such transportation.

Large sums of money have been expended by it in extending its lines, and in constructing sidings, branches and terminal facilities, to enable it to transport said coal, as interstate commerce. These outlays will be rendered, to a large extent, valueless, if it is forbidden to transport said coal.

As to the Lehigh Valley Railroad Company.

It was originally incorporated by Act of Pennsylvania September 20th, 1847. From time to time, prior to the year 1874, other railroad and coal companies were merged into it, under the authority of various Acts of Assembly of Pennsylvania. One of these was the Beaver Meadow Railroad and Coal Company, incorporated 7th April, 1830, which was authorized to construct a railroad and to carry on the business of mining, transporting and vending coal. Others of the railroad companies thus merged had powers similar to those of the Beaver Meadow.

Its railroad system consists, not only of the Lehigh Valley Railroad Company of Pennsylvania, but also of the Lehigh Valley Railroad Company of New Jersey and of various other railroad companies of New Jersey and of New York. It is also the lessee of other railroads in Pennsylvania.

By means of its own, and of said, lines of railroad, it conducts, and for very many years has conducted, an interstate transportation of coal.

Anterior to the year 1874, it acquired the shares of various coal companies of the State of Pennsylvania, which became merged into the Lehigh Valley Coal Company, of whose shares it has always been practically the sole owner.

Since 1872 it has also owned the majority and control, of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania. It also owns the entire capital stock of Coxe Brothers & Co., a coal mining corporation of the State of Pennsylvania. It owns

a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal and Iron Company; and a minority interest in the capital stock of the Packer Coal Company and of the Temple Iron Company. All these are corporations of the State of Pennsylvania, organized for the purpose of mining coal, many of them more than half a century ago.

It has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns. This business has been conducted by it for very many years. Said coal can be gotten to market practically only by its railroads.

Its shares of stock in said coal companies are pledged to the Girard Trust Company under a general consolidated mortgage, for the purpose of securing bonds issued to the extent of $23,539,000.

The shares of capital stock of Coxe Brothers & Co. are held by the same Trust Company, under a collateral trust agreement as security for the issuance of bonds to the extent of $18,000,000.

Nearly forty-two per cent. of its gross annual earnings during the last fiscal year of $36,068,431, or $15,110,899 thereof, were derived from coal freights, which represented over fifty-one per centum of its entire freight tonnage.

The greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned. It transports annually, in interstate commerce, upwards of 7,600,000 tons of coal by them shipped. The coal to them belonging, transported by it annually within the State of Pennsylvania, is about 1,500,000 tons. A very large part of its earnings from freight and passenger traffic, is incidental to, and dependent upon, the operation of the mines and collieries of said coal companies. If deprived of the earnings derived therefrom, its business cannot be continued except at a net loss of many millions of dollars per annum.

The mines and collieries of said coal companies are all located in portions of the coal fields tributary to its lines of railroad, many of them being so situated that no means of transporting their product exists, or can practically be made available, except by its railroads.

The value of the stock of said coal companies is dependent upon their right and ability to transport the coal owned, or produced, by them, to markets in other States. Without this, such value would be little or nothing.

The extensions of its railroads and its acquisitions of other railroads have been made, in reliance upon prospective earnings from the transportation of the coal of said coal companies in interstate commerce from their mines and collieries. Many branch lines have been constructed at large expense, solely to provide a means of transporting, interstate, the product of said coal companies. If coal transportation is prevented, such branches will be practically valueless.

It transports, in interstate commerce, twelve hundred cars a day.

As to the Erie Railroad Company.

It was originally organized under the laws of the State of New York in 1832. From time to time, under mortgage foreclosures, there have been reorganizations. The present company came into existence as the result of foreclosure sales of the original franchises and subsequently acquired properties, and of reorganizations, by the purchasers, about 1895. Its system includes an ownership or lesseeship of the Jefferson Railroad, and of the Erie and Wyoming Railroad, organized under the laws of Pennsylvania; the former incorporated under an Act of 1849, and supplements thereto.

By Acts of the Pennsylvania Legislature of March 26th, 1846, and of April 1st, 1848, the railroad company, incorporated by the State of New York, was authorized to construct and operate its railroad in the

State of Pennsylvania, in consideration of an annual payment of $10,000, which has ever since been made.

The Jefferson Railroad Company, constructed, or acquired, its railroad, to enable the coal of the Hillside Coal & Iron Company to be transported in interstate commerce. The Erie and Wyoming Valley Railroad Company, at great expense, built additional lines of railroad and branches, solely for the purpose of transporting, in interstate commerce, the coal owned, mined or produced by the Pennsylvania Coal Company and the Hillside Coal and Iron Company. The answer states (Record in No. 560, page 14):—

> "A portion of the said railroad and its branches, "constituting a mileage of thirty-five miles was "constructed and is now used solely for the purpose "of transporting coal from, and mine supplies to, "collieries of the Pennsylvania Coal Company and "of Hillside Coal and Iron Company, and is so situ- "ated that no traffic from any other shipper, either "of anthracite coal or otherwise, can be obtained, "and if the coal of the Pennsylvania Coal Company "and the Hillside Coal and Iron Company cannot "be carried by it, such portion of said railroad will "be substantially valueless."

Large outlays have been made by it solely to enable the coal of said coal companies to be transported in interstate commerce.

Over eighty per cent. of the total tonnage transported by it over the Jefferson Railroad Company, is coal tonnage of the Pennsylvania Coal Company and of the Hillside Coal and Iron Company. Over seventy per cent. of the entire revenue from transportation by it over the Jefferson railroad is derived from the transportation of the coal of said Pennsylvania Coal Company and Hillside Coal and Iron Company, substantially all of which, is transported in interstate commerce.

By Act of the State of New York (Ch. 66, Laws of 1862), it was, *inter alia*, granted the right, if any corporation of the State of New Jersey or Pennsylvania should

undertake to construct a coal road, to connect with its road for the transportation of coal. (Record in No. 560, page 13):—

> "to lease the said coal road and to contract for the "leasing and operation of the same, and for the "transportation of coal over said coal road, and upon "any road that may be owned or operated by said "Erie Railway Company."

In pursuance of this authority, the Pennsylvania Coal Company undertook to construct a railroad to make said connection, and a railroad thereunder was constructed, of which it became the lessee, and the Pennsylvania Coal Company's coal has been since transported over said railroad to it's main lines and thence, in interstate commerce.

The Pennsylvania Coal Company was organized in 1838 under the laws of the State of Pennsylvania (P. L., 434), and was given the right of

> "transacting the usual business of companies en- "gaged in mining, transporting to market, and selling "coal and the other products of coal mines."

For that purpose *inter alia*, power was given to it to purchase, or lease, coal lands in Pennsylvania, and "to "construct railroads with one or more tracks."

The Hillside Coal and Iron Company was organized in 1869 under another Act of Pennsylvania (P. L. 1312), with power, *inter alia*, to

> "'purchase and hold in fee simple, by lease or other- "'wise, coal, iron, mineral and lumber lands in this "'Commonwealth, not exceeding at any one time "'5000 acres, with power to connect said lands by "'railroad not exceeding twenty miles in length "'with other railroads, canals, or public improve- "'ments;' also with power to use its capital in 'pur- "'chasing, mining, vending and transporting to "'market coal, iron, lumber and other products of "'their lands; in manufacturing, vending and trans-

"'porting iron and other minerals and metals, and "'in such other objects as may be considered neces- "'sary and expedient in the prosecution of said "'business."

It is the owner of a majority of the shares of capital stock of the Pennsylvania Coal Company and of the Hillside Coal and Iron Company. It also owns a minority of the shares of the Temple Iron Company.

Said Pennsylvania and Hillside companies annually mine, and sell, several million tons of coal in interstate commerce. More than ninety per cent. of the coal by said companies produced, is consumed outside of Pennsylvania. Over ninety per cent. of its coal traffic is furnished by said two companies, substantially all of which is transported by it in interstate commerce.

Its coal tonnage, furnished by said coal corporations for the year ending June 30, 1907, was over twenty-two per cent. of its entire freight tonnage. Its revenue therefrom was over twenty per cent. of its total revenue from transportation.

A considerable amount of the coal mined or produced by said companies is by it used as fuel. This requires the breaking up of lump to obtain the smaller sizes, leaving on hand the larger sizes, which must be disposed of to others, and can be thus disposed of, practically, only in interstate commerce.

Not only does it now own, but for a long time it has owned, a majority of the shares of said Jefferson Railroad Company and of said Erie and Wyoming Railroad Company. Said shares, together with those to it belonging of the Pennsylvania Coal Company and of the Hillside Coal and Iron Company, are pledged, under various mortgages, to secure bonds now outstanding, aggregating upwards of $136,000,000.

No coal is by it mined or owned.

As to the Delaware, Lackawanna and Western Railroad Company.

It was chartered by special acts of the General Assembly of Pennsylvania. At the foundation of its corporate

structure lie two Acts: one approved April 7th, 1832, providing for the incorporation of the Liggett's Gap Railroad Company, and authorizing said company to construct a railroad from a point in Cobb's Gap, near Scranton, "to a point on the New York State line in "Susquehanna County, passing through the coal region "on the Lackawanna and Liggett's Gap;" the other approved April 7th, 1849, providing for the incorporation of the Delaware & Cobb's Gap Railroad Company, and authorizing said company to construct a railroad beginning at the Delaware River, near Water Gap, thence by a "practicable route, terminating at or near Cobb's "Gap in the County of Luzerne or Wayne." In 1853 said two companies were consolidated, the consolidation assuming the name of "Delaware, Lackawanna & "Western Railroad Company." By various other special acts there were conferred upon the Lackawanna Railroad Company additional rights, powers, privileges and franchises, among which acts were one approved April 14th, 1851, authorizing it to hold coal lands, and another approved March 22d, 1855, authorizing it to hold coal lands and "to mine, purchase, transport and vend coal." By authority of other special acts of the General Assembly of Pennsylvania, there were merged into the Delaware, Lackawanna and Western Railroad Company between 1832 and 1870, various coal and railroad companies, chartered by the State of Pennsylvania. All of said merged companies were, by their charters, expressly authorized to purchase and hold large tracts of coal lands, to mine and vend coal, and four of such merged coal companies were by their charters expressly authorized "to use the capital of said Company in * * * "transporting to market coal and other minerals." Each of said merged companies had, pursuant to such charter powers, acquired large tracts of coal lands which vested in the Delaware, Lackawanna and Western Railroad Company upon such mergers, as did likewise all the charter powers, rights, privileges and franchises of each of said merged companies. Its railroad was author-

ized to be constructed to enable it to carry to market, and vend, its anthracite coal.

Before it was constructed the Company owned, in fee, large tracts of coal lands.

Pursuant to the authority of such special acts, it lawfully owned, in fee, prior to the year 1871, some 17,000 acres of coal lands, and, prior to said date, pursuant to legislative authority, had also acquired by lease many thousand additional acres of coal lands. Its railroad system consists of lines of railroad owned by it wholly within the State of Pennsylvania, and various other lines of railroad leased to it, in the States of New York and New Jersey. Its Pennsylvania lines were constructed commencing with the year 1851. At that time (Record in No. 568 page 14)

> "said portion of the State of Pennsylvania traversed "by its said railroad was an almost unbroken "wilderness, mountainous, and largely uninhabited, "and its said railroad was constructed to enable it "to carry to market and so vend its anthracite coal "owned by it as aforesaid. * * * No railroads "were then constructed from said coal lands to "points where the coal to be mined therefrom could "be advantageously sold, so that it became necessary "to construct said railroad in order to enable the "defendant and its stockholders to dispose of the "coal from the lands so held by them. * * * "Having so lawfully acquired large holdings of "coal lands in the State of Pennsylvania as afore-"said, and for the purpose of obtaining lines of "railroad by and over which it might transport "such coal to market, it acquired by lease the "various lines of railroad hereinbefore set forth in "the States of New Jersey and New York. In "order to sell its coal in the City of New York it "acquired lines of railroad in the State of New "Jersey, connecting with its railroad at the Delaware "River. In order to market its coal in Canada it "acquired lines of railroad extending northerly "through New York State to Lake Ontario. In "order to sell its coal in the western markets it

"acquired a line of railroad extending to the City "of Buffalo, connecting there with other railroads "extending thence westerly and with boat lines "on the Great Lakes. * * * That by the terms "of the leases of all of said lines the defendant obli- "gated itself in perpetuity to pay dividends upon "the capital stock of said companies, all their taxes "and outstanding obligations, including interest on "their bonds, and to operate and maintain their "railroads. That on account of the obligations so "assumed * * * its fixed charges for interest "on stocks and bonds of said companies for the "year 1907 * * * was the sum of $5,155,697, "and for taxes the sum of $1,163,916.95. * * * "That the contracts and leases aforesaid * * * "were made to enable the defendant to transport "over said railroads its anthracite coal as afore- "said, whereby it could obtain sufficient revenues "to pay the obligations assumed by it. * * * "Over said lines the defendant has yearly trans- "ported many thousand tons of its coal. Out "of a total of about 8,700,000 tons of coal pro- "duced by "it" in the year 1907 from its lands "owned in fee and leased, upward of 6,700,000 "tons were transported over its lines of railroad "in interstate commerce. From 40% to 60% of "the annual transportation earnings of the de- "fendant from the operation of said leased lines "aforesaid have been derived from the carriage "of its anthracite coal thereover."

It now owns in fee, and by leases, in perpetuity, practically many million tons of unmined coal. It has expended millions of dollars in equipping mines for mining said coal and in equipping its railroads to enable it properly to transport the same. It has been engaged in the mining of coal since 1851.

By reason of its ownership of its coal and the revenues derived from the transportation of the same, it has been enabled to expend millions of dollars in betterments and improvements of its railroads. It uses, in the conduct of its business, approximately 1,700,000 tons

of anthracite coal of the size of pea or smaller, annually. The public uses the larger sizes of coal, but, in preparing coal for market, a considerable proportion is necessarily broken up into the small sizes, used by it for its own purposes. If the Lackawanna Company be forbidden to transport to market, in interstate commerce, the larger sizes, which it does not require and cannot use, great waste would occur and an enormous loss will result to it.

As to the Delaware and Hudson Company.

It was incorporated by Act of Legislature of the State of New York, April 23d, 1823. By its charter, it was authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market, coal mined from such lands.

By various Acts of the Legislature of Pennsylvania, between the years 1823 and 1871, it was authorized to purchase, and hold, coal lands in Pennsylvania; to mine coal therefrom; and to transport the coal mined by it from such lands by it owned.

When it was organized, the sections of Pennsylvania through which it now runs were known to contain large deposits of anthracite coal, but the lands themselves were of no appreciable value except by reason of such deposits. There was not sufficient demand in Pennsylvania for said product. To utilize the same, for the benefit of the people of the United States, it was essential that means of communication should be created to interstate commerce points. The State of Pennsylvania, desiring to create and foster the industry of mining such coal and developing the transportation thereof, by various enactments, made from time to time, commencing in the year 1823, authorized the defendant to purchase land, and to build railroads to facilitate the transportation of said coal.

Under the authority of Statutes of Pennsylvania and of New York, this defendant in error, beginning as early as the year 1825, invested its capital in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania and from the Delaware River to the Hudson River. Later, under statutes of both States, it invested further portions of its capital in the construction of railroads in said State of Pennsylvania and in the construction and acquisition of leasehold estates and railroads in the State of New York.

It avers it is not a railroad company within the meaning of the Act of Congress, but that it is a coal mining company, and that since the year 1870 it is "incidentally "to its business as a coal mining company, a common "carrier, by railroad, of passengers and property."

It has invested large sums of money, not only in the acquisition of coal properties, but in the erection, in the several States, of structures for mining and terminal facilities. Some coal properties were acquired under leases, upon royalties, payable to the lessors in respect to each ton of coal mined, the leases fixing large minimum amounts by way of royalties, and providing for forfeiture in case of non-payment of the same.

Large fixed rentals are required to be paid, not only of these mining lands, but of railroads, acquired for the purpose of transporting coal.

There are three coal companies whose shares are all practically owned by it, viz.: the Northern Coal and Iron Company, the Jackson Coal Company, and the Hudson Coal Company.

The coal lands acquired, as before stated, by this defendant in error, and by said three coal companies, would have little, if any, value, except "for the mining "of coal therefrom and its sale as commercial com-"modity." If it is deprived by virtue of the Act of Congress of the right to transport said coal, it will be deprived of the only possible enjoyment of its property.

Its mining lands and mines, thus owned and acquired,

are located upon, or contiguous to, its railroads which railroads are the only reasonably practical and conveniently available, avenues of transportation, whereby the coal by it produced can be transported in interstate commerce.

Its expenditures in the way above stated, and for lateral railroads, will be rendered practically valueless, if the prohibition asked for is made.

The railroads designated were acquired and constructed, in the expectation that it would be able to secure transportation thereon, of the coal mined from the lands acquired by it, and by said three coal companies.

The coal mined by it and by said coal companies, upon its lines of railroad, amount, approximately, to seventy per cent. of the entire transportation by it, or to about four million, three hundred thousand gross tons.

Its daily shipments average about twelve trains of thirty-seven coal cars each.

The coal mined by it upon its own lands and upon the lands of said three coal companies,

> "is sold before such transportation begins by this "defendant to third persons" (except as hereinafter "stated as to steam sizes) "at the mines in Pennsyl-"vania from which such coal has been produced, and "that this defendant does not, at the times when "the same is so transported by it in interstate com-"merce, own the same nor any interest therein, "direct or indirect, apart from its obligations and "rights as a common carrier in the transportation "thereof. It carries said coal for the account of the "purchaser thereof, who is the consignor and owner "of said coal."

To some extent, the smaller sizes of coal, known as steam sizes, mined by it, are transported for its own convenience to its storage yards in the State of New York and there stored, until used by it, in the conduct of its business, or sold to purchasers.

It could not find a market within the State of Pennsylvania for the larger part of the coal so mined, and

the value of its property would be so seriously impaired by not permitting the same to be carried in interstate transportation, that the result would be a destruction of its right in, and to, its property.

Nearly all of its coal bearing lands, together with all its railroads in the State of Pennsylvania, north of Scranton, are subject to the lien of a mortgage dated August 30th, 1877, securing an issue of $5,000,000 of its bonds.

It will thus be seen that two of the corporations, defendants in error, were brought into existence, or nourished, by the Legislature of Pennsylvania, one of them three quarters of a century ago and the other half a century ago, in order, in each case, that the coal lands of each might be developed and that coal might be by it transported thereafter, for the benefit of the people of Pennsylvania and of other States.

Since the 15th of April, 1869 (P. L. 31) there has stood upon the Statute books of Pennsylvania, unrepealed, the following enactment:—

"An Act entitled 'An Act to authorize railroad and canal companies to aid in the development of the coal, iron, lumber and other material interests of this Commonwealth.'"

It is thus provided:—

> "That it shall and may be lawful for railroad and "canal companies to aid corporations authorized by "law to develop the coal, iron, lumber and other "material interests of this Commonwealth by the "purchase of their capital stock and bonds, or "either of them, or by the guarantee of or agreement "to purchase the principal and interest of either of "such bonds."

The ownership of coal lands by two of the defendants, and of shares of stock in coal companies by all, has resulted, not from any desire to monopolize the production and transportation; but from necessity.

Ordinarily, the construction of railroads in the United States has resulted as an incident to its growth. The development of the country brought about a need for the transportation of persons, of manufactures, and of farm products. This need was followed by a supply of the means requisite for such transportation.

It is true, as is suggested in the dissenting opinion of Judge Buffington, although the fact was never referred to in argument, or in the pleadings, because properly not deemed material, that in 1874, by its new Constitution, the Commonwealth of Pennsylvania provided thus:—

> "Article XVII, Section 5: No incorporated company doing the business of a common carrier, shall, directly or indirectly, prosecute or engage in mining or manufacturing articles for transportation over its works; nor shall such company, directly or indirectly, engage in any other business than that of common carriers, or hold or acquire lands, freehold or leasehold, directly or indirectly, except such as shall be necessary for carrying on its business; but any mining or manufacturing company may carry the products of its mines and manufactories on its railroad or canal not exceeding fifty miles in length."

This policy, however, was one, not meant to affect those who were then entitled to contract rights and legislative grants. It was not intended to operate, by way of destruction of the enormous interests which had been acquired upon the faith of a prior policy and of prior legislation.

The corporations of Pennsylvania which were engaged in the carriage of coal, defendants in error, were then in existence. They had acquired their coal lands and their shares of stock, to a very great extent, anterior to the enactment of this Constitution, which exempted them, by its express provisions, from application to them. In the Schedule of the Constitution was the following provision:—

"Section 2. All laws in force in this Common-
"wealth at the time of the adoption of this Consti-
"tution, not inconsistent therewith and all rights,
"actions, prosecutions and contracts shall continue
"as if this Constitution had not been adopted."

By Section 12 of Article XVII it was provided:—

"Section 12. The General Assembly shall enforce,
"by appropriate legislation, the provisions of this
"Article."

It was not intended the new Constitution should be operative without express legislation, and, at the next session of the Legislature and thereafter, from time to time, statutes were enacted, carrying out the various provisions thereof, so far as was possible.

It was sought to bring private corporations, ultimately, within the provisions of Article XVII by Article XVI, which reads thus:—

"Section 2. The General Assembly shall not remit
"the forfeiture of the charter of any corporation now
"existing, or alter or amend the same, or pass any
"other general or special law for the benefit of such
"corporation, except upon the condition that such
"corporation shall thereafter hold its charter subject
"to the provisions of this Constitution."

By Section 10 of the same Article XVII, the fact that the Constitution was not meant to be retroactive and that the contractual rights and existing charter obligations were to be recognized, is shown by what is provided concerning the making avail, by existing corporations, of future legislation. It reads thus:—

"Section 10. No railroad, canal or other trans-
"portation company in existence at the time of the
"adoption of this Article, shall have the benefit of
"any future legislation by general or special laws,
"except on condition of complete acceptance of all
"of the provisions of this Article."

In the case of anthracite coal, the lands required great outlays of money, as a necessary preliminary to their being operated. No capitalist would be willing to make such outlays until insured of transportation. On the other hand, none would be willing to make the great expenditures incidental to providing means of transportation, until assured that adequate mining would be done. In such an emergency, the furnishing of money for mining and transportation, by the same set of capitalists, became imperative.

The citizens of Pennsylvania, and the citizens of the United States, needed coal. There was no other way of supplying the demand, saving to organize companies under such circumstances as necessitated duality in the ownership of coal lands and of railroads, or a development of mines by coal companies supplied with the requisite capital by railroad companies.

No one familiar with the history of coal mining in Pennsylvania, will be likely to assert that such duality has been over-rewarded.

In the case of the Delaware, Lackawanna & Western Railroad Company and of the Delaware & Hudson Company, lands were bought at a time when no one wanted them, at a very trifling cost, which, in the course of time, have become enormously valuable. Financial success has resulted from a rise in values in the course of long holdings similar to that which has contributed to so many fortunes, not in Pennsylvania alone, nor in coal land owning alone, but everywhere, throughout the United States, and in all kinds of land. Some of the defendants have gone through foreclosures and reorganizations, in the course of which the moneys first invested were lost and stockholders, after waiting, through cycles of years, for dividends which never came, were obliged to make additional outlays before receipts were possible.

On the mine hills, and along the mine valleys of Pennsylvania, are strewn financial wrecks innumerable.

Those who framed the Constitution of Pennsylvania knew the extent to which, in that Commonwealth, under inducements which had been held out by past legislation, the coal carrying railroad companies were possessed of coal lands and coal shares and, knowing this fact, neither possessed, nor sought to exercise, a power to divest the property rights which had been acquired or to violate the charters which had been granted. No legislation, applicable to coal lands, or coal shareholdings, was enacted. No legal proceedings based upon any idea of a forbidding of such holdings in the case of the present defendants in error, were ever brought.

The laying down of a policy applicable to future corporations was one which involved no violation of right nor more than a determination as to what, in the future, by those meant to be affected, must be done. To have practically stripped the coal carrying railroad companies of the enormous properties in which their capital was then invested, would have been to precipitate a ruin which none contemplated, or dared to contemplate.

Because of these considerations, the Constitution required future legislation to make it operative. It was expressly made non-applicable to existing contracts and charters.

The fact that, since the enactment of this Constitution, all the defendant corporations have conducted their business as before, is the best evidence that the constitutional provision with regard to duality of ownership and transportation was not intended to apply, and did not apply, to them.

Perhaps none will dispute the abstract proposition that where business has been established by other persons, and its transportation becomes necessary, it may be well to do what the Constitutional Convention of Pennsylvania did in 1874—decree that the manufacturing and transportation shall be kept separate. The coal lands of Pennsylvania were improved at a time, and under circumstances, which made it necessary to grant rights as a condition precedent to the bringing into existence of the thing to be transported.

The learned dissenting Judge did not correctly draw his inferences when he said (Record in No. 562, page 66):—

> "Yet certain it is that it" (the Constitution in "question) "strips every purchase in Pennsylvania "since 1874 of mining properties by common "carriers of the status of innocent purchases."

The Constitution itself is not self-enforcing. By its express provisions, it requires to be enforced "by appropriate legislation." So long as a corporation should not require to avail itself of any general, or special, law, passed subsequently to the adoption of the Constitution, it was not to "hold its Charter subject to the provision of this Constitution."

The power of the General Assembly to revoke charters was thus limited by Section 10 of Article XVI of said Constitution:—

> "Section 10. The General Assembly shall have "the power to alter, revoke or annul any charter of "incorporation now existing and revocable at the "adoption of this Constitution, or any that may "hereafter be created, whenever in their opinion "it may be injurious to the citizens of this Common-"wealth, in such manner, however, that no injustice "shall be done to the corporators."

Power to alter, and revoke, was expressly withheld in the case of all corporations then existing, whose charters were not then revocable.

It has never been held by the Supreme Court of Pennsylvania, that Section 5 of Article XVII forbade a railroad company to hold shares of stock of a coal company. On the contrary, in Commonwealth *vs.* New York, Etc. Railroad, 132 Pa., 591, when this Article and Section of the Constitution were passed upon by the Supreme Court of Pennsylvania, it was held that the Act of fifteenth April, 1869, having authorized the holding by railroad companies of shares of stock of mining companies, any

such holding subsequent to the said Constitution was not a "device" within its meaning.

Speaking of the Act of 1869 the Chief Justice, Paxson, said (page 606):—

> "The object of this legislation is obvious. It was "to authorize railroad and canal companies to "employ their capital and credit to aid in the develop- "ment of the mineral resources of the common- "wealth. Such development, as every one knows, "is in many instances beyond the reach of individual "enterprise. It was easy enough to form corpora- "tions with all the requisite powers for this purpose. "It was a very different thing to find capitalists "to take their stocks or bonds. Hence it was that "the legislature gave to railroad and canal companies "the power to purchase both stocks and bonds of "such companies. Nor was any limitation placed "upon this power. They might buy a portion or "all of the stock. It probably never occurred to the "legislative mind that, while the purchase of a "portion of the stock of a mining company would "be aiding such corporation to develop the mineral "resources of the state, the purchase of a majority "of or the whole of the stock of such company "might be held to be a 'device' to evade the act of "1855. However that may be, the act of 1869 "was evidently intended to legalize, and perhaps "encourage, railroad and canal companies to invest "in this species of mining companies. It involved, "necessarily, the control of such companies by the "corporations making such investments, to the "extent of the stock held by them. A majority of "the stock controls the corporation; the corpora- "tion controls the land held by it. In this sense, "and to this extent, the act of 1869 enabled rail- "road companies to control real estate, the title "to which they were forbidden to hold directly or "indirectly by the act of 1855. It must not be "forgotten, however, that controlling real estate, "by means of the ownership of a majority of the "stock of such corporation, is a very different "matter from holding the title to such real estate.

"The one is legalized by the act of 1869; the other 'is forbidden by the act of 1855."

It appeared by the answers of all the corporations that all had been incorporated antecedently to 1874. It affirmatively appeared that most of the acquisitions of coal lands and of coal shares antedated that period. It was not necessary, because, judiciously, the Attorney General had made no allegation averring the fact, to deny what had not been averred, with respect to acquisitions subsequent to 1874, or to elections to accept the provisions of the Constitution.

In considering the cases now before the court, we must always bear in mind the fact that we are not dealing with powers of the legislative body exercised in the moment of calling corporations into existence, to do what was done in Great Britain, *i. e.*, so to limit the carriers' powers as to confine them to the performance of one duty, excluding them from everything else.

We must also bear in mind the fact, that we are not dealing with a legislative enactment, which forbids a railroad corporation from purchasing, in future, an article in which, at the time of such enactment, it had no interest of any kind. The Act with which we are dealing is one which deprives railroad corporations already vested with the ownership of a product, or of lands, or of shares of stock of companies owning such land or product, in effect, of all beneficial use of the same; with an enactment which deprives the citizens of the Union of the right to obtain an article of necessity; and which deprives independent corporations and partnerships of the power of realization of their possessions.

Somewhat airily, the defendants in error are told they can sell their mines and their coal shares.

Were such sales otherwise possible, the terms of mortgage pledges, securing hundreds of millions of dollars of bonds, would forbid. In a business way, however, such sales, under any circumstances, would be im-

possible. The sacrifices which would be entailed would bring about hopeless bankruptcy. But, beyond all, no person or corporation, possessed of property by a valid title, though he or it may be obliged to part therewith under a hostile exercise of the right of eminent domain, is compelled to sell to individuals. Incidental to ownership is the right to hold, as well as to sell, and to elect between the two courses.

During the year 1907, forty-five sixty-eighths of all the anthracite coal mined in Pennsylvania was transported in interstate commerce. From seventy, to seventy-five per centum, of all the coal mined by the defendants, and by coal companies whose shares are owned by the defendants, was transported in such commerce. We may assume that this resulted from the fact that the coal so transported could not be sold profitably, or, perhaps, at all, in Pennsylvania.

At the present time, ninety per centum of all the unmined anthracite coal in Pennsylvania belongs to the defendants in error, or to coal companies whose shares, in whole or in part, are held by them.

If they are permitted to carry only such coal as is not mined, or is not owned, by them, or by companies whose shares they hold, the owners of the coal permitted to be carried, will reap a rich financial harvest; but, expenditures of almost incalculable amount, by the defendants, in the acquisitions of lands, and in the construction of mines and collieries and of railroads, branches, terminals and sidings, will become almost worthless.

If, in the case of each mine, there were two lines of railroad by which its product could be transported, an arrangement would be possible by which each railroad company would carry the coal belonging to the other, or to its coal companies. Interstate commerce transportation would not profit by this; nor would the country, in any way, be benefited. Unfortunately, however, owing to the circumstances under which the coal lands were acquired and operated and transportation facilities

supplied, there is practically but one line of railroad available for each mine. If the carrier is forbidden to carry the prohibited coal by its own line, no carriage will be possible.

If the Commodities Clause be enforceable, either all the people outside of Pennsylvania will be deprived of anthracite coal, only obtainable from Pennsylvania, it being the unquestionable right of the owner to retain possession of the same; or, the owner of the coal lands and coal shares, being an interstate commerce carrier, will be obliged, as the cost of a permission to use its own highways, to sell its coal lands or shares of coal companies, although those highways were constructed often solely to enable the transportation of its own products. The use of highways, constructed in the State of Pennsylvania, under the authority of the laws of Pennsylvania, for the transportation of such products, will be forbidden when such products are intended to be delivered to the citizens of other States, although those citizens never could have received the same had not the carrier been permitted and encouraged, at the outset, to buy coal lands and coal shares, as well as railroads.

If the relief demanded by the Government be accorded and the defendants in error be ordered to discontinue the transportation of coal, in interstate commerce, the following results, *inter alia*, will ensue:—

1. Loss to such of them as are the actual owners of mines, of their unmined coal.

2. Loss to such of them as are the lessees of coal lands, of the unmined leased coal, the royalties upon which they have contracted to pay.

3. Loss to such of them as are the lessees of railroad lines intended for the transportation of coal, because if deprived of the tonnage expected they will be unable to obtain sufficient revenues to meet taxes and fixed charges.

4. Loss to the stockholders of the leased lines themselves.

5. Loss to the public who have been purchasers of the coal whose transportation will be prevented.

6. The dismemberment of the various systems of railroad which, as separate systems, are thoroughly equipped for transportation.

7. Loss to all co-owners of coal shares; and to all co-partners of coal mines, who will be deprived of a market for their coal.

All this wrong will be perpetrated, because of a supposed desire to protect "independent" operators from the danger of favoritism on the part of those coal carriers who are alleged to be interested directly, or indirectly, in coal.

The record shows that these so-called "independent" operators represent an infinitesimally small percentage of the coal carried. It is hardly fair to say that the smallness of this percentage is the result of constantly increasing acquisitions by the coal carrying railroad companies. At a very early stage in the coal history of Pennsylvania, this preponderating acquisition of coal lands or coal shares occurred. The whole business has been built up on a foundation of coal development, which resulted from the investments by the coal carrying railroad companies.

The discussion of the legal points involved will be made under seven heads:—

I. The Commodities Clause is not applicable in the case of carriers who do not own or mine coal, but simply own shares of stock in coal companies.

II. The Commodities Clause is unconstitutional because its penalties are so prescribed, as practically to bring about a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved.

III. The Commodities Clause is unconstitutional because, making illegal discriminations, it is not "due process of law."

IV. The Commodities Clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessaries of life. The Act is not a regulation, but a prohibition.

V. The Commodities Clause is unconstitutional because it was intended to violate, and does actually violate, a right reserved to the States.

VI. The Commodities Clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of "liberty and property."

VII. The Commodities Clause is unconstitutional because it is in effect a taking of private property for public use without just compensation.

I. The Commodities Clause is not applicable in the case of carriers who do not own or mine coal, but simply own shares of stock in coal companies.

The statute is a highly penal one, and whilst, of course, a reasonable construction must be given to it, words which, in common acceptation, have a well understood meaning, must not be so construed, in order to extend the application of the Act, as to give them an unusual interpretation.

Not only is the Act a highly penal one; but, if by a railroad corporation misunderstood, it may be subjected to very serious pecuniary loss. The railroad company is entitled to know, by language unmistakable in meaning, whether it is, or is not, forbidden to carry the coal of coal companies in whose shares it may have an interest, small or great. As a common carrier, unless a valid statute excuses, it is bound to carry coal for every person who

presents the same for carriage. If it refuses to transport, it exposes itself to a claim for enormous damages.

If, upon the supposition it is forbidden to carry such coal, it refuses so to do, and if it be afterwards held to have erred in its construction, it will be subjected to the consequences attached to a wrongful refusal to carry.

Presumably, Congress dealt with knowledge of the fact that some of the railroad companies owned, not lands, but shares of stock of coal companies, by whom such lands were held. It was said by the Attorney General, in oral argument in the court below, that there were reports in the hands of the members of Congress which clearly set this forth. This being so, a presumption arises, from the fact that words were used which did not necessarily, or even ordinarily, include a holding of shares, that the holding thereof was not intended to be included.

We cannot accept as sound, the suggestion that because Congress knew railroad companies held, not coal lands, but shares of coal companies, when, failing to allude to such shareholding, they spoke of an "interest direct or indirect," in the product, they meant to cover share ownership, though the words were used in connection with a provision, not concerning shares, but simply concerning the product, in which such railroad companies do not, in any ordinary acceptation of the word, have an "interest." In some, perhaps in most, of the cases, the defendants in error own, not the whole, but merely a majority, of the shares of the coal companies. In some cases they own only a minority; at times, only a very small minority, of such shares.

If an ownership of shares, is an interest in the coal which results from the mining by the company whose shares are held, then such interest exists, no matter how small may be the holding, inasmuch as the Act does not provide for a majority holding, but condemns, without discrimination, any interest, however small. If such ownership of shares is an interest in the coal itself, every railroad company is forbidden to carry coal for every company whose shares may be held, no matter how small may be

the percentage of such shares by it thus held. Its interest in the shareholding might be so small that favors to the company would sacrifice its own interest. Though such favor would require the carrier to sacrifice its own interest, yet the Attorney General's construction would necessarily bring about a prohibition of carrying, to the disadvantage of disinterested majority holders. It would be absurd to say, a railroad company ought to be forbidden to carry coal for a company whose shares it holds, where such holding is too small to justify even a suspicion, of favor.

Construed as is suggested, the Act might afford an easy method of working discriminations against a coal company, through the acquisition by a railroad company of a few of its shares, and a subsequent refusal to carry.

Thus construed, the minority holders, in some cases, and the majority holders in others, of shares of coal companies, who could not have prevented their fellow holders from selling out to railroad companies, would be punished to an extent amounting almost to destruction.

In order that we may ascertain to what the Act is properly applicable, it may be well to quote its provisions. The clause reads thus:—

> "From and after May first, nineteen hundred and "eight, it shall be unlawful for any railroad com- "pany to transport from any State, Territory, or the "District of Columbia, to any other State, Territory, "or the District of Columbia, or to any foreign "country, any article or commodity, other than "timber and the manufactured products thereof, "manufactured, mined or produced by it, or under "its authority, or which it may own in whole, or "in part, or in which it may have any interest, "direct or indirect, except such articles or commod- "ities as may be necessary and intended for its use "in the conduct of its business as a common carrier."

Does a railroad company, which owns shares of stock of a coal company, have an interest, direct or indirect,

in the coal it mines, the mining being done not for the purpose of distributing amongst its stockholders, but of selling in the usual course of business? In the case of a coal company, created solely for the purpose of mining coal to be distributed amongst its shareholders, such holders might be said to have an indirect interest in the coal, although to say this would be, we submit, improperly to strain language.

In no case is mining done for the purpose of giving, directly or indirectly, to the stockholders, the product thereof. The Act deals only with the product. It makes, as a condition precedent of prohibition of its carriage, the existence of an interest, direct or indirect, in the thing carried. It deals, not with abstractions, nor with ownership of shares, although Congress knew shares were held and coal properties were not, in many cases. It is the coal itself, the railroad company is debarred from carrying, if it has a "direct or indirect "interest" therein. Nothing is said about shares, nor about an interest, "direct or indirect," in coal held by another company whose shares are owned.

Even though the Act be constitutional, if the right of a railroad company, engaged in transporting coal belonging to a coal company whose shares, as to the major or minor part thereof, are by it held, to transport such coal, is challenged because of an alleged "indirect interest" therein, it may reply that under no circumstances, does it possess any interest in the coal itself. The interest of the railroad company, in the coal company's shares, held in its own name, is direct. If such shares are held in the name of another, or with a right, under certain circumstances, to demand an assignment thereof, it may have an "indirect interest" therein. Its interest, however, in either case, is not in coal, but in shares.

To illustrate. An insurance having been made in favor of a railroad company upon all coal, in a certain place, "owned by it, or in which it has an interest, direct or indirect," would such company, in case of fire, be able to recover for the destruction of coal belonging to a company whose shares it held, as sole or partial owner?

No coal company is organized for the purpose of distributing amongst its members its product. If its business should prove prosperous, even in case of liquidation, there would be no division in kind. The company would liquidate into cash, all its assets, and would distribute the proceeds, in the shape of money, not of commodities.

Even if a coal company neither makes, nor loses, as the result of its operations, its stockholders will never be entitled to demand any portion of the coal it produces, nor of the specific proceeds of its sale. The proceeds would be applicable to the settlement of its expenses and debts.

If the Company should become insolvent, the proceeds resulting from a sale of the coal, after payment of expenses, would go, not to the stockholders, but to the creditors.

The holders of its shares may be interested in seeing that the business of the coal company is successfully conducted; but it is not an interest of this kind which the Act, fairly construed, covers. It is not a sentimental interest, nor an interest in the successful, or unsuccessful, conduct of the business, which is condemned, but an interest in the *rem* produced.

It is not necessary, in order to give to the words "in which it may have any interest, direct or indi-"rect," meaning, that they must be construed as including the holding of shares of stock.

In many cases, without there being an actual ownership, there might be such a "direct or indirect interest" in the coal, as might well be supposed to have been contemplated. It may, for instance, be said that Congress intended to prohibit the transportation of coal not owned by the railroad company, but held for it by a trustee. Again. A railroad company might, in order to evade the Act, authorize a delivery in Pennsylvania to some third person, upon the undertaking of the latter to forward the goods thus delivered, to another State; to sell the same, and to pay over the net proceeds to the carrier.

Again. The railroad company might purchase, in Pennsylvania, coal belonging to a third person, under a contract by which such person would agree to retain title and to deliver the coal to the order of the railroad company in another State upon payment, there.

Again. The railroad company might agree to sell coal in the State of Pennsylvania to a person, under a contract, by which such person would take title thereto, in Pennsylvania, being only obligated to pay therefor after delivery to him in another State.

In all these cases, though, there would be no actual ownership; there would be in the carrier, an "interest, "direct or indirect," in the coal. It is not necessary to multiply enumerations of cases in which there could be such an interest in the carrier, and in the thing carried, as might bring the transportation within the policy of the Act, though such interest would not amount to ownership. To the words used a meaning can be given which would amount to a provision against evasion, in cases in which the carrier was really the owner of the coal.

Why, then, when we can give a meaning to the words used, such as makes them sensible and useful, in the carrying out of what was intended by the Act, shall we put upon them one not accepted in business or in law?

We must bear in mind, we are dealing with a question of what amounts to an "interest, direct or indirect," in Pennsylvania, in a "*rem*," *i. e.*, in the present case, in coal. The carrier, it is argued, must not commence an interstate transportation, if it has an "interest, "direct or indirect," in such coal. Under the statutes of Pennsylvania and under the decisions of that State, does a railroad company have an interest in the coal because of its ownership of shares of stock of coal companies?

By Act of Assembly of Pennsylvania, approved April 26th, 1855 (P. L., 329), it is thus provided:—

"Section 3. That the shares held by shareholders "in all incorporated land and building associations, "and mining and manufacturing companies shall be "taken to be personal property, conferring a right "to receive dividends of the profits and proceeds of "the real estate held by such companies, but not to "create any title in the shareholder in or to such "real estate, which shall be subject only to the liens "of, and be fully conveyed by the corporation hold- "ing the title and owning the same."

In Commonwealth *vs.* Monongahela Company, 216 Pa., 114, it is said:—

"That the bridge company should be held to have "lost its corporate functions by reason of the sale by "the shareholders of their stock to the city, is indeed, "as the court below says, a staggering proposition. "Yet no other reason for forfeiture has been shown "in this case. If the stock had been purchased "by private individuals no one would have thought "of suggesting that the transfer could in any way "affect the right of the company to exist.

"It was pointed out in Bridge Co. *vs.* Traction "Co., 196 Pa., 25, that under the authorities, a cor- "poration is an entity irrespective of, and entirely "distinct from, the persons who own the stock. 'It "'is well settled that all the shares in a corporation "'may be held by a single person, and yet the cor- "'poration continue to exist; and if the charter or "'by-laws should require certain acts to be done by "'more than one shareholder, the sole owner may "'transfer a portion of his shares to other persons, "'so as to conform to the letter of the rule.' Mora- "wetz on Private Corporations, sec. 1009.

"In Rhawn *vs.* Edge Hil Furnace Co., 201 Pa., "637 (644), it was again held that 'the fact that one "'person owns all of the stock does not make him "'and the corporation one and the same person,' and "in Kendall *vs.* Klappertha Co., 202 Pa., 596, Judge "Endlich said in an opinion approved by this court "(page 607): 'A corporation does not lose its legally "'distinct and separate personality by reason of

"'the ownership of the bulk or the whole of its "'stock by another;' citing Monongahela Bridge Co. "*vs.* Traction Co., 196 Pa., 25.

"The judicial decisions seem to be unanimous to "the effect that the mere fact that all the shares "of a corporation pass into the ownership of one "person does not of itself dissolve the corporation. "They rest upon the principle that a corporation "is not dissolved by the destruction of an integral "portion of its membership, so long as the remaining "portion has the power to restore or renew the "defective part. * * * Such sole owner may "so dispose of the shares as, by the election of the "necessary directors and officers, to continue the "corporate existence: 10 Cyc. Law and Pr., 1277.

"It makes no difference in principle whether the "sole owner of the stock of a corporation is a man "or another corporation. The corporation owning "such stock is as distinct from the corporation whose "stock is so owned as the man is from the corporation of which he is the sole member: Exchange "Bank *vs.* Construction Co., 97 Ga., 1 (6).

"The fact that the city of Pittsburgh is the owner "of the stock of the bridge company is immaterial in "this case, because it makes no difference to the "Commonwealth who the owner of the stock may "be so long as the proper and legitimate functions "of the corporation are discharged. Ownership of "the stock does not vest in the city the ownership of "the physical properties of the bridge company."

In Shepard's Estate, 170 Pa., 323, it is said:—

"Under the Act of March 15th, 1832, sec. 13, "P. L., 138, the creditor of an heir is not 'a party "'interested,' entitled to appeal from the decree of "the Register of Wills admitting to probate the "ancestor's will, by which the heir is excluded."

In Conley *vs.* Mathieson Alkali Works, 190 U. S., 406, it was held that the defendant was not doing business in the State of New York, although it had formerly operated a plant and business within that State, which it had

conveyed to another corporation, in consideration of the entire capital stock of the new company. The court approved the following conclusion of the Master (page 409):—

> "The fact that it held the entire capital stock of "the Castner Electrolytic Alkali Company and that "the operations of that company were carried on "under the same management as before December "31st, 1900, is not material. The new corporation "was a separate legal entity, and whatever may have "been the motives leading to its creation it can "only be regarded as such for the purposes of legal "proceedings. 'It was that corporation alone which "'transacted any business in this State, notwith-"'standing that it may have been for all practical "'purposes merely the instrument of the defendant "'corporation.'"

See also

Commonwealth *ex rel.* Attorney General *vs.* New York, Lake Erie & Western Railroad Company, 132 Pa. State, 591;

Buffalo Loan, Trust & Safe Deposit Company *vs.* Medina Gas & Electric Company, 162 N. Y., 67, 76;

Saranac & Lake Placid Railroad Company *vs.* Arnold, 167 N. Y., 368, 374.

In Peterson *vs.* Chicago, Rock Island & Pacific Railway Company, 205 U. S., 364, where the Pacific Company was the owner of all or part of the stock of the Texas Railroad Company; had made advances to assist the latter in its operations in that State; and had exercised such authority in the selection of directors as a stockholder might, it was held that said company was not doing business in Texas. This Court, speaking through Mr. Justice Day, said (page 390):—

> "It is a fact that both companies had common "agents and employes to a certain extent, but the "record shows that such employes were paid in

"proportion to the business done for each company. "And that while in the service of the companies "respectively they were under the exclusive manage- "ment and control of the company in whose service "they were engaged, with no power to discharge or "employ, the one company for the other; and that, "although the service was in a sense common, it was "kept distinct and separate in the control and pay- "ment of the employes while in the separate service "of the respective companies.

"It is true that the Pacific Company practically "owns the controlling stock in the Gulf Company "and that both companies constitute elements of the "Rock Island System. But the holding of the "majority interest in the stock does not mean the "control of the active officers and agents of the "local company doing business in Texas. That "fact gave the Pacific Company the power to control "the road by the election of directors of the Gulf "Company, who could in turn elect officers or re- "move them from the places already held; but this "power does not make it the company transacting the "local business.

"This record discloses that the officers and agents "of the Gulf Company control its management. The "fact that the Pacific Company owns the controlling "amounts of the stock of the Gulf Company and has "thus the power to change the management does "not give it present control of the corporate prop- "erty and business."

In Pullman Car Co. *vs.* Missouri Pacific Co., 115 U. S., 588, it was said:—

"By a written contract entered into on that day "the Pullman Company agreed to furnish the Mis- "souri Pacific Company, for fifteen years, upon "certain specified terms, with drawing-room and "sleeping cars sufficient to meet all the requirements "of travel, and the Missouri Pacific Company agreed "'to haul the same on the passenger trains on its "'own line of road, and on all roads which it now "'controls, or may hereafter control, by ownership,

"'lease, or otherwise.' The railway company also "agreed that the Pullman Company 'shall have the "'exclusive right, for a term of fifteen years from "'the date * * * to furnish for the use of the "'railway company drawing-room or parlor and "'sleeping cars on all the passenger trains of the "'railway company, and over its entire line of rail-"'way, and on all roads which it controls, or may "'hereafter control, by ownership, lease, or other-"'wise * * * and that it will not contract with "'any other party to run said class of cars on and "'over said lines of road during said period of "'fifteen years.' * * *

"We are also of opinion that the railroad of the "St. Louis, Iron Mountain and Southern Company "is not controlled by the present Missouri Pacific "Company in such a way as to require that company "to haul the Pullman cars over it, if the contract is "binding on the new company to the same extent "it would be on the old were that company still in "existence and standing in the place of the new. "Confessedly the St. Louis, Iron Mountain and "Southern Company keeps up its own corporate "organization. It operates its own road. It has "its own officers and makes its own bargains. The "Missouri Pacific owns all, or nearly all, its stock, "and in that way can determine who shall consti-"tute its board of directors, but there the power of "that company over the management stops. The "board when elected has controlling authority, and "for its doings is not necessarily answerable to the "Missouri Pacific Company. The two roads are "substantially owned by the same persons and "operated in the same interest, but that of the St. "Louis, Iron Mountain and Southern Company is in "no legal sense controlled by the Missouri Pacific.

"It is true the bill avers in many places and in "many ways that the purchase of the stock of the "St. Louis, Iron Mountain and Southern Company "was made by the Missouri Pacific Company for the "purpose and with the intent of getting the control "of the road of the St. Louis, Iron Mountain and "Southern and that the case is before us on de-

"murrer to the bill. A demurrer admits all facts "stated in the bill which are well pleaded, but not "necessarily all statements of conclusions of law. "What was actually done is stated clearly and dis- "tinctly. The effect of what was done is a question "of law, not of fact. It is a matter of no importance "what the purpose of the parties was if what they "did was not sufficient in law to accomplish what "they wanted. When there is doubt, the purpose "and intention of the parties may sometimes aid in "explaining what was done, but here there is no "need of explanation. The Missouri Pacific Com- "pany has bought the stock of the St. Louis, Iron "Mountain and Southern Company, and has effected "a satisfactory election of directors, but this is all. "It has all the advantages of a control of the road, "but that is not in law the control itself. Practically "it may control the company, but the company alone "controls its road. In a sense, the stockholders of "a corporation own its property, but they are not "the managers of its business or in the immediate "control of its affairs. Ordinarily they elect the "governing body of the corporation, and that body "controls its property. Such is the case here. The "Missouri Pacific Company owns enough of the "stock of the St. Louis, Iron Mountain and South- "ern to control the election of directors, and this it "has done. The directors now control the road "through their own agents and executive officers, "and these agents and officers are in no way under "the direction of the Missouri Pacific Company. If "they or the directors act contrary to the wishes "of the Missouri Pacific Company, that company "has no power to prevent it, except by the election, "at the proper time and in the proper way, of other "directors, or by some judicial proceedings for the "protection of its interest as a stockholder. Its "rights and its powers are those of a stockholder "only. It is not the corporation, in the sense of "that term as applied to the management of the "corporate business or the control of the corporate property."

Wherever a person or corporation possesses the entire ownership, or the entire interest, in a specific "*rem*," such possession of ownership or interest is necessarily exclusive of any ownership or interest in the same *rem*, by any other person or corporation. The title to the coal is held exclusively by the coal company. It possesses an interest therein to the exclusion of every other person, which interest covers every nature, or extent, of interest, whether "direct or indirect." This being so, the possibility of any other ownership or interest, in the "*rem*," is excluded.

The Act of 1869, which permits railroad companies to acquire the shares of stock of coal companies, if interpreted as the Government suggests, would require a holding that by virtue of said Act, railroad companies are permitted to mine.

It can hardly be contended, however, that it gave permission to engage in the business of mining, or to do anything else than to acquire shares of stock in corporations, conducting, upon their own account and in the exercise of their own franchises, the business of mining.

It is hardly necessary to labor, by way of argument or presentation of reasons, the proposition that the coal mined by a coal company is not mined "under the authority" of such railroad company. What cannot be done directly, because of the lack of corporate power, cannot be done indirectly, by delegation of a non-existent power, or authority, to another. The coal is mined "under the authority" of the coal company to which it belongs, and by virtue of, and in the exercise of, its own franchise only.

II. The Commodities Clause is unconstitutional because its penalties are so prescribed as practically to amount to a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved.

By the Interstate Commerce Act it is thus provided:—

"That any common carrier, subject to the provis-
"ions of this Act, or, whenever such common car-

"rier is a corporation, any director or officer thereof,
"or any receiver, trustee, lessee, agent or person
"acting for, or employed by such corporation, who
"alone or with any other corporation, company, per-
"son or party, shall willfully do or cause to be done,
"or shall willingly suffer or permit to be done, any
"act, matter or thing in this act prohibited or de-
"clared to be unlawful, * * * shall be deemed
"guilty of a misdemeanor and shall, upon conviction
"thereof in any district court of the United States,
"within the jurisdiction of which such offense was
"committed, be subject to a fine not to exceed
"$5000 for each offense."

In the case of the Lehigh Valley Railroad Company, twelve hundred cars of coal are carried each day. It may well be held that each car carried in violation of the Act, constitutes a separate offense. If it does, each day's violation subjects the Lehigh Valley Railroad Company to a possible penalty of $6,000,000. Whether this be, or be not, the proper interpretation of the Act, its wording is such that, under terrorism, the railroad company may not dare to risk putting upon it any other construction.

The Attorney General said, plausibly, in his oral argument before the Circuit Court, that the objection made under this head, goes to the validity of the whole Act and that if it be sound, the whole Act must fall. In this statement we do not concur.

The Act punishes discriminations, rebates, and divers other offenses. The carrier who perpetrates any of these, does so with absolute certainty of knowledge, that what it does is wrong. It has no right to claim a day in court in which to test the legality of discriminating, or rebating. In respect to such offences, it is subjected to no terrorism, except that which inevitably results from doing what is wrong.

In the present case, however, we are dealing with an Act capable of different interpretations, depending for its validity upon the establishment of a right in Congress

after such grant, to destroy the right without compensation.

We deny that, prior to the Constitution, any State could forbid intercourse, in the matter of transportation of persons or of property, to its citizens. Before the Constitution, a State could not forbid a public carrier, to which it had granted the right, to carry merchandise, although it did possess the right, no contractual right having been granted, to forbid a public carrier from doing what might hinder performance of public duty.

In the present case, the carriers had done nothing to hinder them in performing their public duty. There is no proof that they were not doing such duty to the fullest extent, without favoritism. The duality of ownership would not prevent performance of a public duty, and if the performance happened to be not in accordance with law, the failure to perform could be punished.

The learned dissenting Judge says (Record in No. 562, p. 71):—

> "When, then, all the States and the people "thereof granted to the United States the broad "power to regulate commerce between the States, "did the incident to such power, namely, control of "the carriers of such commerce, cease to exist or "did it pass to the nation as an incident to the "general power? If the sale of a ship vests in the "new owner the rights to thereafter control engine "and rudder without mention of such power in the "bill of sale, there could be no doubt that the grant "of the general power to regulate commerce car- "ried with it the right to regulate the carriers "thereof as agencies of commerce."

No one contends that such regulations may not be enacted as would compel the carriers to perform their duty. Breaches of duty have always been recognized as matters cognizable and punishable by the State. It is not a breach of duty for the defendants in error to own coal lands and coal shares.

The carriers, at the time of the enactment of the Commodities Clause, occupied a dual position. They were common carriers and were also owners of products which required to be by them carried.

As we have said, in an earlier portion of this Brief, the "regulation" of commerce carries with it an idea of the right to commerce, derived not from Congress or the Federal Constitution, but from the common law. The transportation by a carrier, of articles to it belonging, is commerce quite as much as the transportation for third persons. Neither private persons nor carriers can be denied this right, because there was conferred upon Congress the right to regulate transportation.

What vested in it, was the power to regulate commerce between the States, irrespective of personality or ownership.

The fault, as we submit, of the learned Judge's reasoning is, that he assumes the power to regulate, to be a power to prohibit, transportation of articles of necessity. If his premises be correct, the conclusion may follow. We deny the soundness of the premises.

There is no similarity between what has been done in the present case, and the sale of the ship, which sale is said to vest in the purchaser the right thereafter to control engine and rudder without mention of such power in the bill of sale. The purchaser of a ship becomes the absolute owner thereof, with the right to use it as he pleases.

Between the right to regulate carriers, and the right to forbid altogether that they shall carry certain articles of commerce, there is a very broad cleavage line.

The Commodities Clause is an outcrop of the theory which has made such headway within the last few years, under which one, or other, of the great departments of the Government, executive or legislative, has stigmatized the Judiciary as being inadequate to perform its duty, *i. e.*, to punish violations of law.

Will it be pretended that in any case submitted to the court, averring that a carrier, who is also an owner, has

charged different rates, or has made rebates or concessions, the court cannot ascertain the truth?

Difficulty, if such exists, in the proof of wrong doing, ought not to have, as its sequence, the visiting upon some one who may offend, the punishment which should only be inflicted after such wrong had been established.

The learned Judge says (Record in No. 562, page 71:—

> "Regulation of interstate carriers in the manner "provided by this Act, invokes no new principle "and subjects them to no other condition than "that impliedly assumed by every one who enters "upon a public duty, viz., that so far as private "right interferes therewith, it must be foregone. "The right to contract belongs to every citizen; "but when a citizen becomes a member of Congress "all right to contract with his Government is by "R. S. Sec. 3739 denied him. The profession of law "has been held a right of which one may not be "deprived by legislation, but only by decree of "Court; but when a lawyer becomes a federal judge, "the law, by R. S. Sec. 713, forbids him the right "to use his property and practice his profession. "Such prohibitions are not restrictions of liberty "or deprivations of property."

There is not much similarity of principle between the provision that no citizen, whilst a member of Congress, shall contract with the Government, or that, being made a federal judge, he is forbidden the right to "use his "property and practice his profession." In forbidding the judge to practice his profession, the nation secures what every employer, saving under special restrictions, has a right to exact, *i. e.*, undivided attention to the performance of the duty he has sworn to perform.

We are not aware, however, of any provision which forbids the use by a federal judge of his property.

No citizen can be compelled to become a member of Congress. If, however, he desires to be elected, it is proper he shall not be allowed to put himself in such position as may bring about a conflict between his private and public duty.

The right to be elected a member of Congress, and to be appointed a federal judge, is one created by Statute, and by statute there may be imposed upon it whatever is deemed essential.

It can hardly be said, with accuracy, that the Commodities Clause "invokes no new principle." The principle invoked is one which forbids interstate commerce in harmless articles, by carriers subject only to regulation as to the manner and method of carriage. The best evidence that a new principle is invoked, is to be found in the fact that no such statute has ever been enacted. The forbidding of favoritism is not a new principle, but the destruction of an immense amount of property because a carrier owner *may* violate the law is altogether new.

In this connection the learned dissenting Judge says (Record in No. 562, page 72):—

> "They" (the law in the particulars last specified) "make the public servant have an eye single to "the public duty, voluntarily assumed, and in "forbidding legislators, judges and public carriers "alike to act in a dual capacity, the law but throws "around them the time proved safe-guard of faith-"ful service, that 'no man can serve two masters.'"

Crime is never assumed. Its existence must be judicially ascertained. In the present case, the common carriers came into existence under legislation which approved of the "dual capacity."

The learned dissenting Judge says (Record in No. 562, page 72):—

> "Satisfied, then, with the three propositions, "namely, first, that under the Constitution the power "to regulate commerce between the States is vested "in Congress; secondly, that such power includes "the power to regulate carriers thereof; and thirdly, "that the divorce of the dual relation of public "carrier and private transporter is a regulation "of commerce, I hold this law is constitutional."

We are quite willing, for the purposes of this case, to concede the vesting in Congress of the power to regulate interstate commerce, and that included in this power to regulate, is the power to regulate carriers.

It is with the third proposition we disagree.

By private transporter, we assume "private owner" is meant.

There can be no Federal divorce of the dual relation of public carrier and private transporter. The divorce of the dual relation cannot be made within the State of Pennsylvania, which brought the same about. We contend that to forbid the carrier who has reached the State boundary line with his goods, the right to transport them into another State, because such goods, at the moment they are so ready to be transported, are owned by him, is a prohibition of commerce in articles universally recognized as proper subjects of commerce. It far transcends a "regulation."

If a power exists, to the extent claimed, an individual who had acquired horses and wagons for use in transporting his own goods could, after he had consented to carry a small quantity of goods for other persons, be forbidden to carry any other than the goods of such third persons. More than this, the doctrine would cover the case of such individual who had never carried any goods other than his own.

The Commodities Clause is as applicable to the case of carriers transporting their own goods only, as to that of carriers transporting their own goods partly and also goods of others.

The act complained of practically confiscates the property of the carriers for the benefit of a few individuals. A monopoly of the worst sort must result. The independent owners will have no competition and can demand their own prices.

Under the guise of protecting a few, the great bulk of coal property is rendered valueless. The act is a discrimination in favor of the few, by a pretended exercise of a power to regulate transportation, by punishing those

who have done no wrong and have a right of transportation equal to that of every other person.

The ability of the inhabitants of other States to obtain coal, and of independent coal miners to have the same transported, has resulted from the construction of railroads by companies, for the express purpose of transporting their own coal. It seems an anomaly, to use the railroad for the benefit of other persons and to close it as against those for whose benefit it was constructed.

The right to buy, and sell, goods, in the course of interstate commerce is not limited to any particular class of persons. Equally, each and all, possess this right. "Regulation" of transportation is within the power of Congress. To deny to one owner, a right permitted to another, especially where the owner whose right is denied, will thereby lose practically the whole value of his property, is not merely to regulate commerce. Such denial carries with it the assumption of a right to discriminate between owners, permitting one and forbidding the other, to transport.

To exclude a large amount of merchandise from the benefits of interstate commerce, is not a regulation of interstate commerce in the articles included; but a prohibition.

The Commodities Clause expressly forbids the transportation of coal mined, or produced, by a common carrier, even though it had parted with all title thereto in favor of a purchaser.

The owner of coal in Pennsylvania, by an indisputable title, is forbidden to have it transported over the only railroad accessible. Between two owners of coal in the State of Pennsylvania, each possessing a valid title and neither charged with any public duty, discrimination is made to such extent that one owner is forbidden to have his coal transported. Is there any possible justification for such exercise of power to be found in that of regulation of interstate commerce?

As we have said, the right of an owner of coal to

sell the same, and, after sale, to transport it into another State, is one not derived from the Constitution of the United States. It is an inherent right. The exercise of this right may be regulated. It cannot be prohibited.

If Congress can forbid a common carrier from transporting coal to it belonging, or belonging to coal companies in whose shares it is interested, because of the power to "regulate," it is difficult to so limit the right as not to extend it to a prohibition of carriage by the common carrier of coal owned by one of its stockholders, or by a majority stockholder.

The right contended for by the Government, is a right to forbid any owner of coal, because of some objection it entertains, to have it transported. If regulation is defined as covering a prohibition of harmless articles, there is no limit to the extent to which Congress may go, in destroying commercial relations between the States. If the power to regulate is really but a power to regulate and not to prohibit, except in the case of wrongdoing, or an attempt to transport harmful articles, most salutary ends may be accomplished. If, however, the power is one to prohibit, there is no limit to it.

With the establishment of this doctrine, Imperialism will have replaced Federalism.

JOHN G. JOHNSON,
ROBERT W. DEFOREST,
For defendants in error.

Office Supreme Court, U. S.
FILED.
JAN 20 1909
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA

against

THE "ANTHRACITE COAL RAILROADS," *viz.*: THE PENNSYLVANIA RAILROAD COMPANY, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, THE LEHIGH VALLEY RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE DELAWARE AND HUDSON COMPANY *and the* ERIE RAILROAD COMPANY.

IN EQUITY, NOS. 566 TO 570 INCLUSIVE.
AT LAW, NOS. 559 TO 564 INCLUSIVE.

FILE NOS. 21356 TO 21368 INCLUSIVE.

APPEALS AND WRITS OF ERROR FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE CONSTITUTIONALITY OF THE "COMMODITY CLAUSE" OF THE "HEPBURN ACT."

OPENING ARGUMENT OF ROBERT W. DE FOREST, OF COUNSEL FOR THE DEFENDANT COMPANIES, LIMITED TO THE FACTS AND THE PRACTICAL EFFECTS OF THE LAW IF CONSTITUTIONAL.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA AGAINST THE "ANTHRACITE COAL RAILROADS," viz., The Pennsylvania Railroad Company, The Delaware, Lackawanna and Western Railroad Company, The Lehigh Valley Railroad Company, The Central Railroad Company of New Jersey, The Delaware and Hudson Company and The Erie Railroad Company.	In Equity, Nos. 565–570. At Law, Nos. 559–564.

ON BILLS IN EQUITY. ON ALTERNATIVE WRITS OF MANDAMUS.

THE CONSTITUTIONALITY OF THE "COMMODITY CLAUSE" OF THE "HEPBURN ACT."

OPENING ARGUMENT OF ROBERT W. DE FOREST, OF COUNSEL FOR THE DEFENDANT COMPANIES.

THE IMPORTANCE OF THE QUESTIONS INVOLVED.

Our President-elect, speaking in Augusta a few days ago, said: "We must look forward during the next decade, or two decades, or three decades, to a

test of our present institutions and present method of civilization; of the question whether the institution of private property is one worthy of being preserved, and to the test as well whether the courts and the lawyers behind the courts shall maintain themselves in the economic and political struggle that we are likely to have with forces opposed to our present institutions. The institution of private property, I have had occasion to say a number of times, and I don't hesitate to repeat it, next to that of personal liberty has had more to do with the progress of civilization, with the uplifting of the human race, than any other institution that we have in our community; but we have reached a time when we must recognize certain limitations which previous conditions did not require the assertion of in the form of statutory law upon the use of private property wherever it is represented in combinations of capital."

This test of our institutions which Mr. Taft has in mind must be made by this Court, and no action of this Court will be more potent in this testing process than the decision which they will render in these "Commodity" cases now before them.

If Congress, under its power to regulate interstate commerce, can prohibit it in innocent articles of universal use and prime necessity, like coal, it can erect a barrier at State lines against anything and anybody. For commerce is "intercourse" not only of things but of persons.

Interstate intercourse is essential to our existence as a nation. The power to deny it, except under conditions which conform to the economic or social policy of the moment, call it "public policy" if you will, is a power to force those conditions into being. The power to deny it under conditions upon which private property has been lawfully held and used for generations, conditions which were created by that Supreme "public policy" of the past which has been embodied in our Constitution, is a power to destroy private property.

Only Clear-cut Questions of Constitutional Law are Presented.

Both court and counsel can congratulate themselves that these cases involve only clear-cut questions of constitutional law, within the compass of a brief record and without the obscurity of any conflict of evidence. They can congratulate themselves all the more because these constitutional questions have an interest far beyond the amount of property involved, vast as it is. To decide these questions we must look back over the beginnings of our national life when the constitution was framed, and was being interpreted by the great justices of this court. And we must equally look ahead and forecast the consequences to our national progress of whatever decision may be now rendered.

The position of each side on the fundamental questions involved is as follows:

To maintain the constitutionality of the law the Government contends:

(1) That under the commerce clause of the constitution which gives to Congress power to "regulate commerce among the states," Congress has power to absolutely prohibit such commerce, not merely in articles detrimental to good health, such as diseased meats, or in articles detrimental to good morals, such as lottery tickets, but in articles of prime necessity and universal use, such as coal, iron, copper—indeed, in everything except timber, and in that, too, except for the special grace accorded to timber by the act, which might at any time, be withdrawn; and

(2) That this power to prohibit can be exercised without regard to the extent to which such prohibition may deprive "any person of life, liberty or property without due process of law." In other words, that the commerce clause of the Constitution is not limited by the fifth amendment or otherwise.

The contention of the railroad companies on these points, which has been sustained by the Court below is:

(1) That the right of the Federal Government to regulate commerce among the states is not the right to raise a barrier at state lines against innocent articles of commerce which Congress may from time to time wish to put under the ban by reason of their corporate ownership or production, but a right to prevent the erection of any such barrier for every article of commerce that is not noxious to health or morality; and

(2) That even if the commerce clause of the Constitution be construed as a power to absolutely prohibit the thing to be regulated, such a power cannot be exercised respecting such articles in violation of the fifth amendment so as to "deprive any person of life, liberty or property without due process of law" or "to take private property for public use without just compensation."

THE COMMODITY CLAUSE OF THE HEPBURN ACT.

It became a law June 29, 1906, and reads as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Legislative History of the Commodity Clause.

It was not part of the original Hepburn Bill; nor was it in the Act as it passed the House of Representatives; nor was it ever suggested or recommended by any Presidential Message or by any committee of either House, or by either the Committee of the House or that of the Senate which reported the bill. It was not, therefore, a part of any deliberate or scientific plan of railroad regulation.

It was injected into the Act by amendment in the Senate during the last stages of debate, and became a law with the rest of the Act without any apparent realization of its practical effect or far-reaching consequences.

The original amendment presented to the Senate made it unlawful "for any common carrier subject to the provisions of the Act, *unless authorized by its charter to do so*, to engage directly or indirectly in the production, manufacture, buying, furnishing, or selling of coal or coke or any other commodity or commodities of commerce in competition with any shipper or producer on its line or lines, provided that nothing in this Act shall be construed to prevent a carrier from mining coal exclusively for its own use."

In the course of the debate, it was amended until it finally passed in its present form, excluding lumber and products of lumber from its prohibition, and changing "common carrier" to "railroad company," thus favoring oil as well as timber by excepting pipe lines from its prohibition.

Its motive was undoubtedly to separate the function of rail transportion from that of manufacturing, mining or producing, to eliminate any possible temptation to discrimination and may have been suggested by the opinion of this court in the New Haven case (200 U. S , 361).

There is no evidence that this Commodity Law was ever intended to be a substitute for the Anti-Trust Act in preventing combination or monopoly.

Senator Elkins, who introduced the amendment, announced that it was his purpose "to divorce transportation from production on the part of the railroads engaged in transporting coal they mined and sold in competition with other shippers, which was a great abuse. This abuse grew into a grievous wrong to independent shippers. I sought to correct this abuse by an amendment confining railroads to their legitimate business of transporting freight and passengers and prohibiting them from engaging in the transportation of any commodity which they might own except for their own use" (Congressional Record for June 26, 1906, page 9250).

The senator seems to have overlooked the fact that the "legitimate business" of many "transporting" companies was quite as much "mining and producing" as "transporting."

If the effect of the amendment upon transportation companies had been confined, as was originally proposed, to preventing this union of business interests in the future, it would have initiated a policy, new, to be sure, but one to which the industrial development of the future might have adjusted itself. It ignored, however, the past public policy of many of the States, which for more than three-quarters of a century has joined in a single corporate entity the business of mining, producing and transporting. Whatever the present or future policy of our Government should be regarding the union of the functions of mining, producing and transporting anthracite coal (and as that is the only commodity concerned in these proceedings, it is not now necessary to consider others), it is unquestionably true that the vast material resources of Pennsylvania in anthracite coal were everywhere developed through generous legislation on the part of Pennsylvania and other States, not only making it lawful to combine the businesses of mining, production and transportation, but encouraging such a union of functions in a single corporation.

This was a natural and inevitable evolution. The owners of coal lands in the twenties and thirties required highways on which to bring coal to market. They were given power to build such highways and join them in ownership to their coal lands. In the earlier period these highways were canals; hence the earlier titles of "The Delaware and Hudson Canal Company" (1823) and the "Lehigh Coal and Navigation Company" (1822). In the later period these highways became railroads.

The owners of coal lands originally had no highways provided for their use over which their coal might pass to market. They were obliged to build these highways, first canals and later railroads, at their own expense, and were given authority to do so. Mining and transporting were equally their "legitimate business."

The marketing of coal in the last century was in the same period of development as is the marketing of timber in this. The same public policy which now makes timber an exception to the Commodity Clause, and permits the transportation of timber by the same company that produces it then applied to coal.

Possibly the development of coal lands might have progressed without such legislation; but whatever might have been done, the fact remains that capital was invested and development of the country resulted from such investments by reason of legislation which invited and legalized mining and transportation by the same corporate entity.

The Legal Interpretation of the "Commodity Clause" as Applied to the Anthracite Railroads.

The enactment of this law in its final shape was a surprise to the business world. That the timber interests of the West and the South were considered is manifest because they were excepted from its operation, but there is no evidence in the Act of any

consideration having been given to the historic union of coal production and transportation in the North and East.

The law as originally proposed, recognizing charter rights and applying a new public policy to the future, did not affect vested property, and during the process of incubation it was understood that the law, whatever form it finally took, would not prevent the railroad companies from carrying coal which was sold at the mines, and in which *at the time of transportation the railroad companies had no interest.* Had the law been passed in this form, every "legitimate" purpose of its proposers could have been accomplished. The coal of railroad companies and their subsidiary coal companies could have been sold at the mine and all owners of coal thus placed on an equality of opportunity as respects transportation.

The law as enacted, however, absolutely *outlaws* from interstate commerce all anthracite coal which is

(*a*) "*Mined or produced*" by a railroad company; or

(*b*) "Mined or produced *under its authority;*" or

(*c*) "Which it may *own* in *whole* or in *part;*" or

(*d*) "In which it may have any *interest, direct or indirect;*"

except such as is necessary or intended for its own use in the conduct of its own business.

No coal coming under any of these categories may be transported by the interested railroad company outside of the State of Pennsylvania. This outlawry is not affected by any change of title.

The coal which the railroad company "produces," or which is produced "under its authority," or in which it has any degree of ownership, or "any interest direct or indirect," no matter how many times the title to it changes within the State of Pennsylvania, is denied interstate transportation.

Monstrous as this proposition is, no other interpretation can be wrested from this law by counsel

on either side. It should be noted, however, parenthetically, that Judge Buffington, shrinking naturally enough from the practical consequences of such a law, seems to base his dissenting opinion on the theory that the law does not apply to commodities produced by railroad companies which have changed ownership within the state of production. He says in the initial part of his opinion, as a premise upon which his conclusion with regard to the constitutionality of the law is based:

"It (the Commodity Clause) does not forbid a railroad to own or operate mines or manufactories. It does not preclude sale of its product or *debar carriage thereof from the state.* It simply puts the carrier-owner on the basis of all other owners and shippers of commodities, viz., *transportation of its and their product by a disinterested carrier.* Its manifest purpose is to prevent, in shipments, favor to any, and secure fairness to all."

The only other construction which can be given to Judge Buffington's premise is that while each railroad is debarred from carriage of any coal produced by it or by its authority over its own lines, it may transport this coal over the lines of another railroad company. In other words, that the Delaware and Hudson, though it may not transport its own coal, may ship that coal over the lines of the Delaware, Lackawanna and Western, and, conversely, the Delaware, Lackawanna and Western, though debarred from carriage of its own coal, may transport it over the lines of the Delaware and Hudson.

Practically such an exchange would be impossible, except by the construction of innumerable additional lines of railroad, for although some mines are so situated that without prohibitory expense their product can be shipped over different lines of railroad, the vast majority are not so situated. And if it were, *cui bono!* What con-

sideration of public policy would thus force an exchange of traffic between two competing railroads?

The only point on which there can be any doubt in the interpretation of this Act relates to what is meant by "under its authority" and by "indirect" interest.

According to the contention of the Attorney-General the prohibition of the Act affects any coal in which a railroad company has any kind of interest, and it particularly affects the coal of all coal companies any part of the stock of which is held by a railroad company, or the officers or directors of which are identical in personality with the officers and directors of the railroad company, and, therefore, presumably, personally under the authority of such company.

As appears by the answers, the interest of the different anthracite railroads in anthracite coal is "direct," as in the case of the Delaware, Lackawanna and Western, which is authorized by its charter to itself own coal lands, and in which the business of mining and selling coal, and operating the railroad, is conducted by the same legal entity; or, from the point of view of the Attorney-General, "indirect," as in the case of the Lehigh Valley Railroad Company, which owns the entire capital stock of the Lehigh Valley Coal Company, and in which the coal is mined and sold by one legal entity, that is the coal company, and transported by another legal entity, that is the railroad company, which itself owns the stock of the coal company.

And the degree of "indirect interest," from his point of view, is entire, as in the case of the Lehigh Valley Coal Company, the entire stock of which is owned by the Lehigh Valley Railroad Company, or a majority interest, as in the case of the Lehigh and Wilkes-Barre Coal Company, a majority of the stock of which is owned by the Central Railroad Company of New Jersey, or a minority interest, as in the case of the Temple Iron Company. And the extent of authority is entire, as in the case of the

Lehigh Valley Coal Company, whose officers and directors are identical with the officers and directors of the Lehigh Valley Railroad Company, or partial, as in the case of the Temple Iron Company, some one or more of whose officers and directors are identical with some one or more officers or directors of the same Railroad Company.

All the answers deny that owership by the railroad company of stock in a coal company, whatever community of directors or officers there may be, makes that railroad company, within the purview of the act, "indirectly interested" in the mining or production of coal by the coal company, or that when coal is mined or produced under the authority of the officers or directors of the coal company, even though they be the same individuals as those at the same time officers or directors of the railroad company, this constitutes any mining or production under the "authority" of the railroad company.

This point is here alluded to not for the purpose of present discussion, but only to make plain the different positions respecting it taken by the Attorney-General and by the railrood companies, and also to explain that in assuming for the purposes of this argument respecting the practical effect of the law if constitutional, that the Attorney-General's interpretation is correct the railroad companies in no sense waive their contention to the contrary.

Assuming, therefore, that the interpretation of the Attorney-General is correct, and that the stock interest of a railroad company in a coal company, whether it be an entire, a majority or a minority interest, makes that railroad company "indirectly" interested in the coal mined by that coal company, and that any community of directors or officers between a railroad company and a coal company brings the production of that coal company under the authority of its related railroad company, the prohibition of the act extends *to every coal company* in which the railroad company has *any* stock

interest, be it an *entire* interest, or a *majority* interest, or a *minority interest however small*, and to *every coal company* a *majority* of whose directors or officers are identical with directors or officers of the railroad company, and this prohibition would attach to the coal of such a coal company hereafter whenever the railroad acquired any stock interest in that company.

Moreover, this prohibition would affect all the other stockholders of the coal company, whatever their numbers, and whether constituting a majority or a minority, because they were unfortunate enough to be co-stockholders with a railroad company.

It may be suggested, parenthetically, that if the law should be declared to be constitutional, and the interpretation of the Attorney-General be put upon it, it would be quite possible for any railroad company to prevent the transportation over its lines of the coal of any coal company by acquiring the smallest interest in its stock, and thus stifle a competition which those interested in the railroad company might wish to suppress. But this suggestion has no materiality now except to point out one consequence of constitutionality.

The Practical Situation which Confronts the Anthricite Coal Railroads in View of the Commodity Clause.

This has been given most careful consideration by directors, officers and counsel, with the following results:

If the Attorney-General is wrong in his contention that coal mined or produced by the "subsidiary" coal companies in the stock of which a railroad company has an interest, and the officers or directors of which are more or less identical in personality with the officers and directors of the coal company, then the prohibition of the act would apply to the Delaware, Lackawanna and Western, and would

also apply to the Delaware and Hudson (if the latter company be a railroad company, which is denied by its answer, and which under the admitted facts is a question of law), but it would not apply to the coal mined by the "subsidiary" coal companies in the stock of which the other railroads have an interest. Under this hypothesis all the coal mined by the Delaware, Lackawanna and Western and the Delaware and Hudson (if a railroad company) would be barred from transportation outside of Pennsylvania by the railroad company on the line of which it is mined, and all the other defendant railroad companies would be free to carry the coal of their "subsidiary" coal companies.

If, on the other hand, the interpretation of the Attorney-General be correct then all the coal mined by the different railroad companies, and by the coal companies in the stock of which any of them is interested, is equally debarred from such interstate transportation, and no change of title in the coal so produced can restore to it such transportability in interstate commerce.

Under this hypothesis all coal mined by the Delaware, Lackawanna and Western, and by the Delaware and Hudson (if a railroad company) on their property, and also all coal mined by the "subsidiary coal companies" of all the other defendant railroad companies on the property of these coal companies would be barred from transportation outside of Pennsylvania by the railroad company on the line of which it was mined.

How much coal would this prohibition affect? Approximately *ninety per cent.* of the anthracite region is so owned. *Not less than four-fifths of the present production of anthracite coal passes in interstate commerce* (Jersey Central Answer, Record, No. 567, pp. 12 and 13).

This enormous proportion of the present production of anthracite coal would, therefore, be impounded in Pennsylvania.

The railroad companies have asked themselves

whether they could sell their coal property, and thus separate its ownership and free it for interstate transportation. There are two difficulties in the way of this, both serious, and one insuperable.

The coal properties, whether directly owned as in the case of the D., L. & W., or owned by "subsidiary" coal companies, are in each case, to use the words of the answers: "Located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic and transportation uses, both without and within the State of Pennsylvania."

It would be a very serious difficulty to find any purchaser at any adequate price for coal lands so situated unless the purchaser were "directly or indirectly" interested in the railroad, and such interest under this law, or some future extension of it to meet the supposed requirements of the same public policy, which led to its enactment, would presumably close any market for coal outside of Pennsylvania over the railroad on which they were located, and with which they were connected. This difficulty is serious.

But these coal lands in the cases of all the defendant companies except two (the exceptions being the Pennsylvania and the Delaware, Lackawanna and Western) are mortgaged to secure long term bonds. These mortgages are directly upon the land where the land is owned, as in the case of the Delaware and Hudson, and in other cases upon the stocks of the different "constituent coal companies." In some of these mortgages as in the cases of the Reading and the Lehigh Valley, there is an absolute inhibition, against any separation of the coal and railroad properties. In others, as in the case of the Erie,

here is no provision for releasing any part of the mortgaged property. In all the security of the bonds is the common ownership of the railroad and the coal properties, and neither bondholders nor trustees would consent to a diminution of their security.

The mortgage indebtedness of the railroad companies defendant whose railroad and coal property are pledged as security for their bonds aggregates $678,901,542. Most of the bonds have long terms to run, those of the Jersey Central, for instance, not being payable until 1987.

The existence of these mortgages presents an insurmountable objection to any separation of coal and railroad property.

It has been suggested that the first difficulty, that of finding a purchaser, might be met in the case of a company which had not mortgaged its coal property by organizing a coal company which could take title to its coal lands, and by distributing the stock of this company *pro rata* to its stockholders. This could not be done by any of the defendant companies except the Pennsylvania and the D., L. & W., for the others could not distribute the coal lands or stocks of coal companies which are pledged. But suppose it were done, and the same persons as stockholders of the new coal company owned and controlled by this ownership this new company as well as the railroad company from which it was separated. Would not the railroad company still continue to have an "indirect interest" in the new coal company, or would not the "Commodities Act," in spirit if not in law, equally apply to such a situation, and would not every motive of public policy which called for the enforcement of its prohibition against transportation of the coal from these lands apply quite as much whether they continued to be owned by the railroad company as they now are, or by a new coal company owned and controlled by the same stockholders?

But these are not all the practical questions

which these officers and directors and counsel had to consider. Suppose in spite of the difficulty of finding purchasers the coal lands could be sold, and suppose in spite of every difficulty in securing the assent of bondholders and trustees that assent could be obtained and good title could be given to those purchasers and these lands passed into the hands of new parties who found means of diverting the transportation of the coal, or any considerable part of it, to other railroad or canal carriers. What would become of the railroads which lost the most important part of their business; that for which, in many cases, they were built and for which they had provided terminal facilities at large expense? Nothing short of insolvency.

Another solution of the difficulty was suggested which constituted observance of the law under any interpretation. That was that the railroad companies should not part with their coal lands and should confine the transportation of coal from them to the State of Pennsylvania, for the act did not outlaw their coal within that State.

This would mean ruin to all the companies except the Reading and the Pennsylvania, which alone could reach tide water within the State of Pennsylvania. Such a solution might be very satisfactory from the selfish point of view of the State of Pennsylvania. It might even be more satisfactory to the Pennsylvania and to the Reading Railroad Companies from the point of view of their own selfish interest. But what would become of the people of other States; the industries which had been established in reliance upon a continued supply of anthracite coal; the workers who are dependent for their living upon these industries; and the great number of people throughout the United States who count upon anthracite coal for their fuel and power?

Nor is the only commodity to which this act applies anthracite coal. Nor are the only railroads concerned in this prohibition those which carry

anthracite coal. Nor is it only that part of the public which uses anthracite coal which is affected by this act. It applies to all commodities except timber, to the soft coal interests, to the iron ore interests and to other interests too numerous to mention.

But these suits only concern anthracite coal and the anthracite coal roads, a problem quite broad enough in itself and in its consequences to occupy the undivided attention of Court and counsel at this time.

The Circumstances Under Which the Present Suits Are Brought.

This practical situation—the legal inability of most of the railroads to separate their coal from their railroad property, and the direful consequences to themselves and to the community that would result from any attempt to obey the law by discontinuing interstate transportation of their coal, was brought to the attention of the Attorney-General in the latter part of the year 1906. The law took effect May 1st, 1907, and its penalties (a fine not to exceed $5,000 for each offense against any officer, etc., and a like penalty against the corporation—and presumably the shipment of each carload of coal constitutes a separate offense) then began to accrue. It was plainly to the public interest that the constitutionality of the law should be settled before business was convulsed and deranged by criminal proceedings to enforce these extreme penalties. Under such circumstances the Attorney-General, in January, 1907, made the following announcement:

> "It is clear that this clause, if valid, will make it impossible for many railroads which own coal mines to transport the coal to market after the date named, and it is understood that some of these railroads have been advised by their respective counsel that the above quoted provision of law is unconsti-

> tutional. The Department of Justice contemplates the institution of proceedings as soon as possible after the date named whereby a prompt determination of this question by the Supreme Court of the United States may be obtained. It is expected that the railroads will co-operate with the Government to this end, and if they do so in good faith, and if they in good faith and immediately obey the decision of the Supreme Court when rendered, it is not the purpose of the Department of Justice to prosecute them for failure to comply with the terms of the Act pending the decision of the Supreme Court."

Since this announcement the railroad companies have co-operated with the Government to enable it to bring these suits. They have furnished to the Government full information with regard to their charters and charter rights and with regard to their relations to the different so-called "subsidiary coal companies." These suits have been brought to trial on both sides without regard to technicalities and with a view to present fully and fairly the constitutional questions involved.

Thus it is that the railroad companies have not denied by their answers any of the allegations of the bills and petitions, and thus it is that proceedings have been brought both at law and in equity, so that no question of jurisdiction could arise.

Both sides, therefore, come before the Court, not in any spirit of narrow partisanship or selfish interest, in which counsel on either side are ready to take advantage of any careless mistake of their opponents, but in a spirit of broad patriotism and good citizenship. These railroad companies stand ready to do whatever the supreme law of the land, as expressed in its constitution and statutes, requires them to do. The Federal Government asks them to do no more. Railroads and Government come to this Court only to learn what that supreme law requires.

THE PENDING SUITS RAISE EVERY QUESTION OF THE INTERPRETATION OF THE LAW. THEY ARE AGAINST RAILROAD COMPANIES WHICH STAND IN ALMOST EVERY POSSIBLE RELATION OF DIRECT AND INDIRECT INTEREST TO THE COAL LANDS ON THEIR LINES.

The Delaware and Hudson Company directly owns its railroad and it directly owns its coal lands. It was incorporated by the laws of New York on April 23, 1823, to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River, in New York; to purchase lands in Pennsylvania containing stone or anthracite coal, and to employ its capital in the business of transporting to market coal mined from such lands. It was by subsequent legislation authorized to build its railroads, and still later to abandon and sell its canal, and its name, which originally had been "The President, Managers and Company of the Delaware and Hudson Canal Company," was changed to that of the "Delaware and Hudson Company" (Del. & Hudson answer, Record, pages 4 and 5, and charters). This company insists that it is not a railroad company and therefore does not come within the prohibition of the Act.

The Delaware, Lackawanna and Western Railroad Company is clearly a railroad company, and also a coal company, for it is expressly authorized to own and mine coal. Under any interpretation, the law, if constitutional, would seem to apply to this company.

The Pennsylvania and the Lehigh Valley Railroad Companies are both Pennsylvania corporations, which are by law authorized to own, and do own, the stocks of coal companies. They do not directly mine coal. Whether they do so "indirectly," or whether coal mining is done "under their authority," is a question of law upon the facts stated in their respective answers.

The Central Railroad Company of New Jersey is a New Jersey corporation, also authorized to own

the stocks of coal companies. It does not directly mine coal. Its Pennsylvania line is that of the Lehigh Coal and Navigation Company (chartered in 1822), familiarly known as the Lehigh and Susquehanna Railroad, which it acquired by lease in 1871.

The Erie Railroad Company is a corporation of the state of New York, which also does not directly mine coal. Both these companies own stocks of so-called "subsidiary coal companies," and the cases of both present substantially the same questions as those of the Lehigh Valley and Pennsylvania.

The case against the Philadelphia and Reading Railway Company presents somewhat different features and for that reason is not included in this argument. All the stock of the Philadelphia and Reading Railway Company and all the stock of the Philadelphia and Reading Coal and Iron Company are held by the same holding corporation, viz., the "Reading Company." The Railway Company itself holds no stock in any coal company, nor does the Coal Company hold any stock in any railway company. Both stocks are owned by the same holding company.

What Property of the Defendant Railroads Would be Taken Without Due Process of Law and Without Compensation if the Law be Constitutional.

Practically their railroads and the right to exercise their franchises. Practically their coal lands and the stocks of subsidiary coal companies which they own. Actually and practically many of their branch railroads whose only traffic is anthracite coal. Actually and practically many leases, which with revenue from the interstate transportation of coal from mines owned by the railroad companies, or by their subsidiary coal companies, are of value because profitable, but which without this revenue would be worse than valueless.

True, the law does not in terms sequester physically these railroads or their franchises, or these coal lands or stocks of coal companies, or these leases, but it prevents their beneficial use, it impairs and in large measure destroys their earning capacity, and it deprives stockholders of their dividends, and bondholders of their interest, and indeed of their security.

This is in law quite as much a taking of property without due process of law, and without compensation, as if the railroad companies had been physically deprived of it.

In the well-known cases before the Supreme Court, in which it was held that flooding lands by the damming of streams constituted a taking of property within the meaning of the Constitution, there was no physical taking. The property of the land owner was still there, though it was covered by water and he could make no use of it. Just so in these cases. If the production of anthracite be "dammed up" at the State line and "flooded" back into Pennsylvania, the coal will still be there whether under or above ground, but there can be no general use for it and it will be rendered comparatively valueless.

All the answers allege this taking of property. The following allegation from that of the Jersey Central, Record, (No. 567), pages 11 and 12, is typical of the allegations of other answers:

> "This defendant alleges that throughout its corporate existence the transportation of coal from the anthracite coal fields of Pennsylvania has constituted its principal business, and the chief source of its earnings. Its railroad lines have been from time to time extended, the control of other railroads acquired and its facilities and equipment increased at great expense to meet the increasing demands of the markets of the United States for this coal in reliance upon the rights and franchises conferred by the statutes of New Jersey and Pennsylvania,

aforesaid, and upon the prospective earnings from the transportation of anthracite coal in interstate commerce. Large factories and other industries have been established and cities and towns have grown up on its lines in New Jersey in reliance upon its continued ability to supply them with anthracite coal for fuel and power. The value of its property is and at all times has been dependent upon its revenue from such transportation of anthracite coal, and this value would be greatly impaired if it could not so transport such coal from the mines of the coal companies in which it has a stock interest.

A very large proportion of the anthracite coal produced from the properties of the aforesaid coal companies has been continuously transported either wholly or partly to its destined markets over the railroads of this defendant, and many of the said properties and the most largely producing of them are located either directly upon or so contiguous to railroads operated or controlled by this defendant as to make said railroads the only reasonably practical and conveniently available avenues of transportation whereby the coals produced therefrom can be, as they now are and heretofore have been, transported to and delivered at accustomed markets and other points of consumption for manufacturing, domestic and transportation uses, both without and within the State of Pennsylvania.

This defendant purchased an interest in the capital stock of aforesaid companies engaged in mining and dealing in coal, as hereinbefore set forth, for the purpose of securing to itself the transportation of the product of such companies in interstate commerce, and has expended large sums of money in extending its lines and constructing branches and sidings to the collieries of said coal companies, and in providing other facilities in order to receive and so transport the products of their collieries.

The value of the stocks of said companies is largely dependent upon the right and ability of this defendant to transport the

coal owned or produced by them out of Pennsylvania to markets in other States, and such stocks would be greatly depreciated in value if this defendant should be prohibited from transporting the product of said companies in interstate commerce.

It has also expended large sums in coal trestles, coal pockets, terminal facilities, storage yards, docks and wharves at the ports of New Jersey and New York, in and about New York Harbor, for its present and prospective anthracite coal business.

If it should be deprived of the right to transport in interstate commerce the coal mined by the coal companies in which it has a stock interest, the value of such lines and branches and of these coal trestles, coal pockets, terminal facilities, storage yards, docks and piers would be to a large extent destroyed."

Almost all the answers contain allegations with regard to leases now valuable, but which would become valueless and burdensome if the Commodity Clause be constitutional. The following from the answer of the Jersey Central (Record, No. 567, p. 10) is typical of these allegations:

"This defendant alleges that at and about the time of its acquisition of the capital stock of the Honey Brook and the Wilkes-Barre Coal and Iron Companies, as hereinbefore set forth, and for the purpose of securing for itself the transportation of the anthracite coal produced by the mines owned by these companies and other companies in the State of Pennsylvania, this defendant on March 31, 1871, leased the railroad of the Lehigh Coal and Navigation Company, known as the Lehigh and Susquehanna Railroad, extending from Phillipsburg, in the State of Pennsylvania, to Union Junction, in Luzerne County, Pennsylvania, together with various branches thereof connecting it with different anthracite coal mines. This lease was subsequently modified by agreement made May 29, 1883, between the Le-

high Coal and Navigation Company, this defendant, and the Philadelphia and Reading Railroad Company, and these two agreements were afterwards modified by a third, dated June, 1887, between the Lehigh Coal and Navigation Company and this defendant. Copies of the said lease and the two agreements modifying the same are hereto annexed, marked 'Exhibits B, C and D,' respectively, and form part of this answer.

Under these agreements it is provided amongst other things that the aggregate rental, which is fixed at one-third of the gross receipts from the operation of the demised premises, shall never in any year, after May 1, 1883, be less than $1,414,400, and that whenever it shall exceed the sum of $2,043,200, after 1892, the surplus over one-third of the gross receipts shall be received by this defendant.

This lease constitutes a valuable asset of this defendant so long as it continues to transport the coal of the Lehigh and Wilkes-Barre Coal Company in interstate commerce Like its stock in the Lehigh and Wilkes-Barre Coal Company aforesaid, it is included in the assets covered by its said general mortgage. The lease would be valueless and involve this defendant in serious loss if it could not continue to transport over the leased railroad the coal mined by the Lehigh and Wilkes-Barre Coal Company."

The Grounds on which the "Commodity" Act Is Alleged To Be Unconstitutional.

Constitutional Questions Raised by All Answers.

The following constitutional questions are raised by every answer, though in some instances in somewhat different forms. They are here stated as contained in the answer of the Pennsylvania Railroad Company.

(*a*) That it does not permit and undertake to regulate the transportation in interstate commerce of anthracite coals produced from the mines of the

several coal companies hereinbefore mentioned, but, on the contrary, undertakes to absolutely *prohibit* transportation thereof, and therefore is not a "*regulation*" of interstate commerce, but a "*prohibition*" of such commerce; and consequently is not within the scope of the Commerce Clause of the Constitution.

(*b*) That the effect of said Clause will constitute a taking of the defendant's property, corporate rights and franchises without due process of law and without compensation, and that in its result this defendant will be denied the equal protection of the laws.

(*c*) That said Clause is "Class Legislation," unduly and unjustly discriminative in its results in that it expressly permits Railroad Companies to transport in interstate commerce timber and the manufactured products thereof, which may be manufactured or produced by any such company, or under its authority; or which it may own in whole or in part, or in which may have any interest, direct or indirect; and prohibits transportation in interstate commerce of other commodities, including anthracite coals—an increment in such commerce exceedingly important and highly essential to the public welfare; and is also unjustly discriminative "Class Legislation," in that it arbitrarily denies to one class of common carriers under the Act to regulate commerce and its several amendments the right and privilege of transportation of certain commodities, but imposes no such restrictions or prohibition on other common carriers under said Act and its amendments.

(*d*) That the penalties imposed by the statute for violations thereof are of such magnitude, and so unduly excessive and extortionate, as to be substantially destructive of the property and franchises of the carriers affected thereby, and in respect to

such carriers to constitute a denial of the equal protection of the law.

Other Constitutional Questions Raised by Different Answers.

(*e*) Lehigh Valley answer (Record, No. 570, p. 18, Sec. 39):

"Defendant further avers that said act of Congress, if construed as prohibiting the transportation of anthracite coal owned by the Lehigh Valley Coal Company, the New York & Middle Coal Field Railroad & Coal Company, and Coxe Brothers & Company, Incorporated, would have the direct and necessary operation and effect of impairing the obligations of the contracts between this defendant and its bondholders expressed in its general consolidated mortgage and collateral trust agreement hereto annexed, in contravention of the Constitution of the United States."

(*f*) Jersey Central answer [Record, No. 567, p. 14, clause (*e*)]:

"That the effect of said law is to prevent the transportation by interstate commerce, out of the State of Pennsylvania, of all the anthracite coal owned by railroad companies or by coal companies in the stock of which they have an interest, comprising between seventy and seventy-five per cent. of the entire production of anthracite coal, the greater part of which is and for many years has been transported to the ports of New York and New Jersey, and to cause the same, so far as it continues to be transported, to be brought for shipment to the ports of Pennsylvania, whereby preference would be given to the ports of one State over those of other States, contrary to Article 1, Section 9, Clause 6, of the said Constitution."

(*g*) Delaware & Hudson answer (Record, No. 565, p. 14, Sec. 18):

"This defendant further avers and submits that the said Commodity Clause is also invalid because

under the Tenth Amendment of the Constitution of the United States, the power which it seeks to exercise has been expressly reserved to the States and to the people thereof, and has been withheld from the United States."

(*h*) Erie answer [Record, No. 566, pp. 16, 17, Sec. 13 (*b*), (*c*), (*f*) and (*g*)]:

"It will deny full faith and credit to the public acts of the State of New York incorporating this defendant and granting it the right to own and hold stock in corporations of the State of Pennsylvania, and to the public acts of the State of Pennsylvania granting this defendant the right to own stock in mining corporations of the State of Pennsylvania, and to build, lease and operate railroads, and to transport coal and other commodities therein produced to markets in other States, contrary to Article Four, Section One, of the United States Constitution."

"It will deny to this defendant and numerous citizens of the States of Pennsylvania, New York and other States in the United States, bondholders of, and stockholders in this defendant, the privileges and immunities of citizens of the several states contrary to Article Four, Section Two, Subdivision One, of the Constitution of the United States."

"It will deny to defendant and its stockholders, and bondholders, and disparage, these certain rights possessed by the people of the several States when the Constitution of the United States and the amendments thereto were adopted and which were retained by the people under the Constitution and especially by the Ninth and Tenth Amendments thereof, among which rights are the liberty to make innocent contracts and do innocent business upon the same terms and conditions permitted to all other persons, the right to use, sell or enjoy property acquired by lawful contract, the right to have such contracts continue unimpaired, and the right to that

justice and the equal protection of the laws which the Constitution was established to make secure to all persons; and it will exceed the limitations imposed on the powers of Congress by the nature of the Federal Government, and the fundamental principles thereof."

"It will deny to this defendant and its stockholders, and bondholders, who are citizens of the United States and of the State of Pennsylvania, or New York, their certain rights in real estate, and in corporations of said States, and in the United States, contrary to the rights reserved to them, and granted to them by Section Two of Article Fourth, and by the Fifth, Eighth, Ninth, Tenth and Fourteenth Amendments of the Constitution of the United States."

This is simply a statement of the constitutional points raised. Argument of them is left to other counsel.

THE EFFECT OF THE ACT IF CONSTITUTIONAL UPON THE RAILROADS, THAT IS, UPON THEIR STOCKHOLDERS AND BONDHOLDERS.

To many, probably to most, it would mean ruin.

The total earnings of the Lehigh Valley for its last fiscal year were $36,068,431, of which $15,110,899, or nearly 42%, were derived from the transportation of coal. Over 51% of its entire freight tonnage was anthracite coal. Of its earnings derived from the transportation of coal, the greater part were received by it for the transportation of coal of its "subsidiary" coal companies. If it were deprived of the earnings derived from the transportation of the coal of these "subsidiary" coal companies its business could not be continued except at a net loss of many million dollars per annum (Lehigh Valley Answer, Record, No. 570, p. 15, Sec. 28).

The total earnings of the New Jersey Central during its last fiscal year were $25,687,403, of which

$19,417,930 were derived from merchandise and anthracite coal traffic. Of the $19,417,930 gross earnings derived from merchandise and anthracite coal traffic, $9,312,268 were derived from the transportation of anthracite coal. Its receipts from anthracite coal represented over 48% of its entire freight receipts. More than 75% of this coal was transported in interstate commerce, and the greater part of it was coal produced by its subsidiary coal company, the Lehigh and Wilkes-Barre Coal Company (Jersey Central Answer, Record, No. 567, pp. 10 and 11).

The total earnings of the Delaware and Hudson from the carriage of freight and anthracite coal for the calendar year 1907 were $16,614,832. Of these earnings $7,684,168, approximately, were from transportation of anthracite coal. Of this amount $7,566,255, approximately, was derived from the transportation of anthracite coal in interstate commerce, and of these earnings $6,489,257, approximately, came from the coal produced by its own mines or those of its subsidiary coal companies.

The total earnings of the Erie from merchandise and coal, for its last fiscal year ending June 30, 1907, were $38,550,092. Of these earnings $10,205,432 came from anthracite coal, and most of this was anthracite coal transported in interstate commerce. Almost all of these earnings, viz., $9,996,108, came from the coal produced by its subsidiary companies.

These are illustrative figures. They demonstrate that without their income from interstate anthracite coal traffic these railroads could not survive as solvent companies nor could they continue to give adequate service to the cities and towns which have grown up along their lines, and whose prosperity is involved in theirs.

The magnitude of the interest involved may be best illustrated by a statement of the capitalization of these companies whose existence and solvency

(except it be in the case of the Pennsylvania) depends upon their anthracite interstate coal traffic. In the cases of several companies this capitalization is stated in their answers. In other cases it is taken from the latest official figures as contained in Poor's Manual.

	STOCK.	BONDS.
Reading Co	$70,000,000	$108,220,372
Lehigh Valley.....	40,441,100	77,100,000
Pennsylvania.....	306,951,350	191,561,270
D., L. & W.....	26,200,000	3,067,000
Jersey Central.....	27,431,800	50,935,000
Erie	176,271,300	206,634,900
Delaware & Hudson..	40,989,000	22,450,000
N. Y., O. & W.....	58,113,982	22,000,000
	$746,398,532	$681,968,542
Total capitalization, stock and bonds, including that of the Pennsylvania		$1,428,367,074
The same, excluding Pennsylvania..		$929,855,454

These companies are not really the inanimate and unfeeling legal entities which form the popular conception of corporations to which no "soul" is attributed. They are stockholders and bondholders, real animate persons, men, women and children, who rely upon the income which they have been accustomed to receive from these companies for their support and existence. Their number easily runs into six figures. Only one answer, that of the Lehigh Valley, sets forth the number of its stockholders. These stockholders alone number 5,370, of whom 2,732 own less than twenty-five shares each (Lehigh Valley Answer, Record, No. 570, p. 17). Those of the Pennsylvania exceed in number 60,000.

THE EFFECT OF THE ACT, IF CONSTITUTIONAL, UPON THE PORTS OF STATES OTHER THAN PENNSYLVANIA.

It would give the ports of Pennsylvania preference to the ports of all other States, notably to the

ports of New Jersey and New York. Approximately four-fifths of the entire production of anthracite coal is transported in interstate commerce over the defendant railroads from Pennsylvania to markets in other States and Canada. That part of the output of anthracite not consumed in the State of Pennsylvania is carried chiefly to tide water at New York Harbor, and is thence transported by water and by railroad to points in New England and the Middle Atlantic States, where the great bulk of the anthracite output is consumed. New York Harbor is the principal distributing point for anthracite coal (Jersey Central Answer, Record, p. 14).

During the seventy-five years or more in which this course of business has grown up, since the production of anthracite coal began in 1820, it progressed in the following proportion:

1820	365	tons
1830	174,734	"
1840	864,379	"
1850	3,358,899	"
1860	8,513,123	"
1870	16,182,191	"
1880	23,437,242	"
1890	36,615,459	"
1900	45,107,484	"
1907 over	68,000,000	"

During this period terminal facilities for the shipment of coal have been acquired and improved, coal docks and coal pockets constructed, storage plants erected, and much other property purchased for the transaction of this enormous and increasing business. The great bulk of this coal, four-fifths of it, would in such event be denied access to these ports and given access to the ocean and lake ports of Pennsylvania. The expenditures made for its accommodation would in a large degree be lost. This is the inevitable effect of the enforcement of this law.

The Effect of the Act, if Constitutional, Upon the Public.

That the railroads cannot comply with the act by divorcing the ownership of their coal lands or coal stocks from their railroad property has already been stated, because:

(*a*) They could not find purchasers at any fair price; and because

(*b*) They could not give title to such purchasers if they could be found even at any price because this property is mortgaged; and because

(*c*) If they could find purchasers, to whom they could give title, and lost the transportation of the coal, they would be ruined.

Their only alternative would be obedience to the law by abstaining from any shipment of coal outside of the state of Pennsylvania. They would supply Pennsylvania industries so far as Pennsylvania industries could take, and leave the rest unmined. With what consequences? A coal famine would be produced in other states the like of which this country has never experienced. Many of their industries would be without power; many of their homes would be without fuel. Such a situation could mean nothing but widespread disaster and distress.

Most of us remember the suffering caused by the anthracite coal strike of 1902. We remember how the citizens of different towns and villages, usually law abiding, violently seized on coal in transit to supply their personal needs, and were justified by public opinion in doing so. All these consequences followed from the stoppage of coal transportation for a few short months. They are nothing compared to the situation that would be created by barring out of every state but Pennsylvania three-fourths of their usual supply of anthracite coal.

No one can foretell how these vast interests would adjust themselves to such new conditions, but assuredly it will be at the expense of the consumer as well as of the owner. Great industries which have been the growth of more than half a century cannot be dislocated and torn apart by legislation without injury to all concerned. The reorganization of an insolvent corporation, even through the aid of a court of equity, is a slow and tedious process, and is always carried through at the expense of efficiency until accomplished; and no thoughtful man, acquainted with affairs, can contemplate the consequence of a disruption of existing arrangements "at one fell swoop" without serious alarm. It is impossible to say how long it would require to get business in running order again, but it is quite certain that, for a time at least, those living outside of the producing States would suffer much before they can be given their regular supplies. It is equally impossible to tell what will be the ultimate price of fuel outside of the particular producing States when the mines now lawfully owned by transportation companies can only be operated to supply the citizens of the State in which they are located.

It may be suggested, however, that the coal of "independent operators" could be transported, and that this coal would substantially supply the needs of the public. This suggestion, however, ignores the extent of railroad ownership of coal lands and stocks of "subsidiary coal companies," and the comparatively small amount of anthracite coal that is produced or can be produced by independent operators.

The total production of anthracite coal in Pennsylvania for the calendar year 1907, exceeded 68,000,000 tons. That production for the year 1906 exceeded 55,000,000 tons. (There was a strike during a part of this year.) The total production for the year 1905, the latest normal year in which there

was no strike and for which complete statistics are at hand, and its distribution, are as follows:

New England States.....	8,692,504	tons
New York.....	18,125,419	"
New Jersey.....	7,212,341	"
Supply coal to railroads....	4,643,426	"
Southern States.....	2,080,088	"
Western States.....	6,904,314	"
Canada.....	2,187,450	"
Other foreign countries....	42,533	"
Pacific Coast.....	1,743	"
Pensylvania.....	11,520,383	"
	61,410,201	tons

Approximately *four-fifths of this entire production* was transported in interstate commerce over the defendant railroads from Pennsylvania to markets in other States and Canada. Approximately the same proportion of the entire production of anthracite coal has been so transported from Pennsylvania to other States and countries for many years before 1905, and since.

Of this four-fifths, *from seventy to seventy five per cent.* was produced either directly by these companies, as in the case of the Delaware, Lackawanna and Western, or through the agency of their subsidiary coal companies (Jersey Central Answer, Record, No. 567, p. 13).

That is, that of the entire production of anthracite coal, four-fifths, or (in 1905) 50,000,000 tons in round figures, is the subject of interstate commerce, and of this 50,000,000 tons from seventy to seventy-five per cent., or over 35,000,000 tons, was produced either directly or "indirectly" by the railroad companies. This would leave less than 15,000,000 tons to supply the demand outside of Pennsylvania. The coal of "private operators" under these conditions would become a priceless heritage.

The proportion of this coal which is transported in interstate commerce, and the proportion of the

coal so transported in the case of each company, which comes from its own mines or those of subsidiary coal companies, varies in different companies. The above is an average of all.

Of the total anthracite coal tonnage of the Delaware, Lackawanna and Western, almost all is interstate, and the proportion of that tonnage from the mines of the company and from the mines of subsidiary coal companies exceeds eleven-fourteenths of the whole.

Of the total anthracite coal tonnage of the Delaware and Hudson almost all is interstate, and of that interstate tonnage more than six-sevenths comes from coal mined by it or by its subsidiary coal companies.

These proportions are somewhat less in the cases of the Lehigh Valley, the Jersey Central and the Erie, and are still less in the cases of the Pennsylvania and the Reading, from which two last named companies the State of Pennsylvania is in large part supplied.

It might be suggested that while this would be the immediate consequence, it would in time be mitigated, for the coal production of independent operators would be increased, and that in time the needs of other States could be supplied at reasonable prices. True, it might in a long time be mitigated in degree, but only in slight degree, for *ninety per cent.*, approximately, of the entire unmined area of anthracite coal is owned or controlled by these railroad companies or by their subsidiary coal companies (Jersey Central Answer, Record, No. 567, p. 12).

Nor could the production of coal be increased rapidly. Increased production of coal involves preliminary work of great expense, and which must be continued for a long time before coal can be marketed. It means the sinking of new shafts; the construction of new breakers; the extension of railroad tracks to these breakers, and the purchase or condemnation of right of way, etc. The produc-

tion of anthracite coal cannot be increased by the mere addition of machinery, as would be the case in a rolling mill or a cotton factory.

What will happen in these other States during the time which must elapse before there can be any material increased production, even if in the end it could be materially increased?

And how about the unfortunate stockholders of these subsidiary companies, who have no interest whatsoever in the "offending" railroads, and whose property would be "wiped out"? Their relation of fellow stockholders may not be of their own choosing, but may have been forced upon them. They may constitute a minority or a majority, indeed an overwhelming majority, of the whole, but they would be equally involved in the common ruin because any stockholding of the railroad company would constitute, upon the theory of the Attorney-General, an interest which debarred the coal of such a company from interstate commerce.

THE EFFECT OF DECLARING THE "COMMODITIES CLAUSE" CONSTITUTIONAL UPON THE FUTURE ECONOMIC AND SOCIAL DEVELOPMENT OF THE COUNTRY.

Commerce is "intercourse" of persons as well as of things. If Congress can forbid the passage over State lines of such innocent articles of commerce as coal, it can forbid the passage of everything and everybody. If it can forbid transportation by rail, it can forbid transportation by every other means. If it can forbid transportation of things produced by the carrier for the reason that temptation to transport on unequal terms is thereby removed, it can forbid transportation of persons or things for any other reason of supposed public policy.

Let us look ahead a little by way of illustration at possible uses of this power. It could prevent Chinese or Japanese from going to one state from another.

It could prevent "scab labor" from going to one state from another to break a strike.

It could prevent non-union men going from one state to another to seek work.

To carry out public policy against "swollen fortunes" it could deny transit between states to the persons or effects of millionaires of any degree.

To secure in every state a proper public policy of divorce law it could prevent the interstate transportation of any divorced persons who had not been separated according to a congressional standard of marital infidelity.

To secure a proper standard of child labor, it could prevent the transportation of goods manufactured by children below a congressional age limit.

To prevent the growth of the steel trust, it could forbid interstate transportation of any iron or manufactured products of iron produced by any corporation which controlled 50% or any per cent. of the total output.

To prevent supposed "combination" or "monopoly" it could short-circuit the Anti-Trust law, and prohibit the transportation in interstate commerce of commodities any given proportion of which were produced directly or indirectly by single interests or groups of interests.

To insure small farm holdings it could debar from interstate commerce the products of farms of over any given area.

To prevent large holdings of ranch lands, it could forbid interstate transportation to cattle which have grazed on ranches of greater extent than 10,000 or 1,000 acres, or any special number of acres.

To secure the universal adoption of an eight-hour day, it could deny interstate transportation to any articles manufactured under conditions of longer work hours.

To prevent sweat shops in the tenements of New York, it could shut out all garments made in such tenements from every other State.

And it could apply all these prohibitions to future

investments without running counter to the Fifth Amendment.

These illustrations may seem fanciful and far fetched, but some of them have been seriously proposed and none of them are more fanciful or far fetched to America of to-day than would have seemed to the America of fifty years ago the prohibition from interstate commerce of coal mined by the Delaware and Hudson, or Delaware, Lackawanna and Western, because these companies were carrying out the purposes of their organization by transporting coal as well as mining it.

Such exercise of federal power would not be less effective because it did not operate directly. Congress could not directly carry into effect any supposed public policy by altering the divorce laws of the Dakotas, or the child labor laws of Georgia, or the tenement laws of New York, any more than it could directly amend the charters of these defendant corporations so as to prevent them from mining coal, but such indirection would be just as potent as if it had original jurisdiction.

There can be no better illustration of the possible extent of federal power by indirection than the argument of the Attorney-General in this very case.

He claims that the Federal Government may directly prohibit interstate transportation in necessaries of life in order to indirectly compel a new state policy in corporate ownership over which it has no jurisdiction.

He claims that such a prohibition of commerce can be exercised upon "sufficient grounds of public policy, and as to the sufficiency of such grounds to justify the enactment in any particular case *the judgment of Congress is conclusive*" (Brief for the United States, p. 125).

If so, then Congress can take up any social or economic fad sufficiently popular to win a majority, and make it current by a Congressional endorsement of "public policy." There might be some consolation for the property interests of the country

if such an endorsement did not have to be "without recourse."

Free intercourse between the States is just as essential to our national existence as is the air we breath to our individual life. Denying it, except under prescribed conditions, is to force the creation of those conditions. As well give to the federal government the right to repeal State laws and State charters directly as to accord the same power by indirection.

HISTORICALLY, THE CONSTITUTION, AND PARTICULARLY THE COMMERCE CLAUSE OF THE CONSTITUTION, GREW OUT OF A PROFOUND SENSE OF THE VALUE OF LIBERTY AND OF THE NECESSITY, AS A PART OF THAT LIBERTY, FOR UNTRAMMELED INTERCOURSE BETWEEN THE STATES FOR PERSON AND PROPERTY, AND SOME OF ITS EARLIER AMENDMENTS AROSE FROM THE PUBLIC POLICY OF PROTECTING LAWFUL PROPERTY RIGHTS ACQUIRED UNDER THE POLICY THEN ESTABLISHED FROM ANY INFRINGEMENT OF THAT LIBERTY.

Before our American Revolution, and under the old regime in Europe, when "the prying eye of the Government followed the butcher to the shambles, and the baker to the oven," when the peasant farmer could not "take the produce which he raised to market until he had bought leave to do so; nor consume what remained of his grain 'till he had sent it to the lord's mill to be ground, nor full his clothes on his own works, nor sharpen his tools at own grindstone, nor make wine, oil or cider at his own press," the right to possess property and to trade in property was indeed a privilege, and the same narrow view of human rights appears in English statutes relating to America, as, for example, those which forbade the manufacture of iron, or

with some qualifications forbade trade with other countries than England.

Our American Revolution ended this social system in America and substituted another founded on the inalienable right of liberty. With it all restrictions of trade and intercourse in this country ceased to exist.

The right of intercourse between State and State, Mr. Chief Justice Marshall said, was not granted by the Federal Constitution, "but derives its source from those laws whose authority is acknowledged by civilized man throughout the world"—in other words, the right to engage in interstate commerce is one of those inalienable rights which state governments were formed to protect, and which every person may enjoy under state law, either alone, or upon such terms as the states may permit, in combination with others, as a member of a partnership or of a corporation. Constitutional history, the theories of law, and the decisions of the Supreme Court unite to support this view.

The Constitution knows no privilege of engaging in interstate commerce conditioned on complying with a public policy approved by Congress. It knows an inalienable right to engage in any of the common occupations of life, including the liberty to engage in interstate commerce, a liberty which comes from state law and belongs to those to whom the state gives it, whether citizen, corporation or alien.

As Mr. Chief Justice Fuller very forcibly said, "under the Articles of Federation, the states might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves, to the General Government, it was undoubtedly to form a more perfect union, by freeing such commerce from state discrimination and not to transfer the power of restriction" (188 U. S. 383).

Madison, reviewing in the "Federalist" the objects to be accomplished by the new Constitution,

mentions "the maintenance of harmony and proper intercourse among the states." Its purpose was "to establish an unrestrained intercourse between the states" (Federalist, No. 41) "on the basis of equal privileges" (Federalist, No. 11).

The Constitution intended, in Madison's words, to establish "an unrestrained intercourse between the states," and this intercourse was to be "on the basis of equal privileges."

"If there be any single fruit of our national unity," Senator Sumner said, "if there be any single element of the Union, if there be any single triumph of the Constitution which may be placed above all others, it is the freedom of commerce among the states, under which that free trade, which is the aspiration of philosophers, is assured to all citizens of the Union, as they circulate through our whole broad country, without hindrance from any state."

Without hindrance, too, from the United States itself, for the jurisdiction which Congress has acquired over the avenues of interstate trade is a jurisdiction to prevent impediments, an "element of Union," in Senator Sumner's phrase, and does not authorize the closing of these avenues to any person.

Let us dwell a little longer upon the historical origin of the commerce clause of our Constitution, as bearing upon its interpretation.

> "The real evil of the Colonies lay in the commercial policy of the mother country—in the system of restriction intended to secure for England a monopoly of the colonial trade, and crush every manufacture that could compete with English industry."
>
> "The political alienation which was the inevitable and most righteous consequence of these (restrictive) laws had already begun, and it is to the antagonism of interests they created, much more than to the Stamp Act or to any isolated instances of misgovernment, that the subsequent disruption must be as-

cribed" (Lecky, History of England in the Eighteenth Century, II, pp. 7 and 10).

Independence, however, did not merely dissipate old commercial vexations, but also brought new ones. The States found under the confederacy, which preceded what may be called the Union, that their independence of each other encouraged the imposition of restrictions on interstate trade from which intercolonial trade had been free, and that there was need of a central government strong enough and sufficiently fraternal to prevent interstate restrictions grew more apparent every day. From this need sprang the demand for a constitutional convention—for the "more perfect union" attained at last under the Constitution. A few utterances of statesmen and documents may be cited for illustration.

> "We have abundant reason to be convinced that the spirit of trade which pervades these States is not to be restrained. It behooves us then to establish just principles, and this no more than other matters of national concern cannot be done by thirteen heads differently constructed and organized. The necessity, therefore, of a controlling power is obvious and why it should be withheld is beyond my comprehension" (Letter of Washington to James Warren, 7th October, 1785. Washington's Works, Volume II, p. 2).

In a letter from the Continental Congress to the States we read:

> "The United States, in Congress assembled, should have the sole and exclusive right of regulating the trade of the States as well with foreign nations as with each other" (Webster, Sub Treasury Speech, Works IV, 193, Ed. 1854).

On September 11, 1786, Commissioners from Virginia, Delaware, Pennsylvania, New Jersey and New York met at Annapolis in pursuance of a

resolution and circular letter from Virginia requesting the several states to appoint commissioners "to take into consideration the trade and commerce of the United States."

On September 14th the Commissioners reported, *inter alia*, that the States of New York, Pennsylvania and Virginia had in substance and nearly in the same terms authorized their respective commissioners

> "to meet such commissions as were or might be appointed by the other States in the Union, at such time and place as should be agreed upon by the said Commissioners, and take into consideration the trade and commerce of the United States, to consider how far a uniform system in their commercial intercourse and regulation might be necessary to their common interest and permanent harmony, and to report to the several States such an act relative to this agreed object, as when unanimously ratified by them would enable the United States, in Congress assembled, effectually to provide for the same."

The Commissioners found that mere regulation of trade was not sufficient, but that the States should make a stronger political agreement. They did not feel, however, that the terms of the commission warranted them in making recommendations to this end. In these circumstances they expressed the wish that a general meeting of the States should be held.

> "They are more naturally led to this conclusion as, in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent and will enter so far into the general system of the Federal Government that, to give it efficacy and to obviate questions and doubts concerning its precise need and limits may require a corre-

sponding adjustment of other parts of the Federal system."

Animated largely by a desire to strengthen the nation as a whole and to disarm each State of power to clog domestic trade the Convention assembled.

Absurd is the contention that when the States abdicated their power to restrain fraternal intercourse they delegated such a power to Congress; that, having determined that interstate trade should not be fettered by themselves, they stupidly gave Congress power to fetter it. The greatest obstacle to the proposed union was the dread of a federal power that might be exerted to the prejudice of this section or that as one or the other might gain control of the central government. In no way could this dread have been so well justified as by conferring power to forbid trade.

The evidence is overwhelming that a proposal in Convention expressly to confer upon Congress the right of prohibition which the Government now discovers by implication would have been flatly rejected. Historically and politically there is a right of free trade among the States of the Union and this is not merely a broad political right vested in the several commonwealths. It is the distinction of our Constitution that all its rights capable of being enjoyed by persons are guaranteed to persons. They are not political abstractions. And so this right of free trade is not merely assured generally and in a political sense to a State, but specifically to each person therein in respect of his own business.

See

"Federal Power over Carriers and Corporations." Prentice. Macmillan Co. 1907.

"Regulation of Commerce." Calvert. Thompson Co. 1907.

Conclusion.

Present-day America, in its desire to "do things," is prone to take the readiest means to attain its desire quickly without pausing to consider whether the very adoption of such means may not "undo other things."

Mr. Taft, who, had the constellations been a little different, might have been now sitting as judge in this Court, is reported to have said on Thursday last:

> "I know that sometimes the Constitution seems to be in the way of direct effectiveness. The division under systems by which the central Government is limited to certain things and the State governments carry on other things, sometimes seems to work against the rapid carrying out of some of the reforms, as, for instance, the conserving of our natural resources, and perhaps the regulation of railroads and the suppression of those abuses which have crept in with our marvelous progress in the combination of capital. And, yet, gentlemen, that Constitution, simple, clear and comprehensive, has in the past been capable of so fair construction as to meet in a marvelous way the developments and emergencies of our country which could not have been anticipated by those who framed it, in any detail at all, and I am very certain that the same Constitution will meet the emergencies which may come on in the future."

We, too, like Judge Taft, are very certain that our Constitution as interpreted by this Court will meet all further emergencies, but that certainty is based upon the assurance that this Court will never construe that Constitution to permit the prohibition of lawful commerce between the States in innocent, that is (to change from a Latin to an Anglo-Saxon derivative) unharmful, articles of universal

use and necessity; nor will it so construe that Constitution toward those who have acquired liberty and property under the Constitutional public policy of the past as to deprive them of either because of any different public policy of the present.

Dated January 18, 1909.

ROBERT W. DE FOREST,
Of Counsel for the defendant
Railroad Companies.

Supreme Court of the United States

OCTOBER TERM, [illegible].

No. [illegible].

UNITED STATES OF AMERICA,

Appellant,

against

THE DELAWARE AND HUDSON COMPANY,

Appellee.

No. [illegible].

UNITED STATES OF AMERICA, EX REL. ATTORNEY GENERAL OF THE UNITED STATES,

Plaintiff in Error,

against

THE DELAWARE AND HUDSON COMPANY,

Defendant in Error.

APPEAL FROM AND IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

REPLY BRIEF ON BEHALF OF THE DELAWARE AND HUDSON COMPANY, APPELLEE AND DEFENDANT IN ERROR.

WILLIAM S. OPDYKE,
JAMES M. BECK,
WALKER D. HINES,
Counsel for Appellee and Defendant in Error.

C. G. Burroughs, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1908, NOS. 565 AND 559.

UNITED STATES OF AMERICA,
Appellant and Plaintiff
in Error,

AGAINST

THE DELAWARE AND HUDSON
COMPANY,
Appellee and Defendant
in Error.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

AND ALSO

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

REPLY BRIEF FOR THE DELAWARE AND HUDSON COMPANY.

In this brief we shall refer to the Government's original brief as the "Brief," and to the

Government's supplemental brief as the "Supplemental Brief."

The Original Brief.

The Brief seems designed to establish, first, that the Commodity Clause is within the power delegated to Congress to regulate Commerce among the States, and, second, that the Clause does not violate the Fifth Amendment.

I.

"The Power of Congress."

Scattered through this portion of the Brief are observations which may be regarded as of a preliminary character, and which call for no comment.

These are: No part of the power of Congress has been lost by its non-action up to this time, (page 29); no powers granted by State charters can impair the power of Congress, (page 31); private interests cannot be made paramount to public interests, (page 45); the power of Congress over artificial highways is as great as its

power over natural highways, (page 74); neither individuals nor States can obstruct interstate commerce, (page 74).

We make no contest on any of these positions.

The main argument may be arranged as follows:

The Brief contends: the question of the reasonableness of the means employed by Congress to carry out a power conferred upon Congress is not for the courts, but for the Legislature (page 37); the courts should not attempt "to interfere with the constitutional discretion of the Legislature" (page 41), and may not inquire whether the particular method is the best or only means (page 42); and a choice of means is conferred upon Congress (pages 68 to 70). These propositions (as pointed out on pages 46 to 49 of our original brief), do not establish that Congress has any power to choose a means which will confiscate property contrary to the Fifth Amendment. Both as to the Federal Government and State Governments it is true (as pointed out on pages 43 to 53 of our original brief), that despite the wide choice of means possessed by any legislative body acting with respect to subjects of regulation within its power, it is the duty of the

courts to declare invalid an enactment which is an unreasonable, unnecessary and arbitrary interference with individual rights.

The Brief declares : " The true test of constitutionality of a statute is its purpose " (page 45). Yet, no matter what the purpose, Congress has no power to confiscate useful property of great value.

The Brief contends that the New Haven case held that Congress has power to divorce the public duties of common carriers from their private interests (page 36). As pointed out on page 73 of our original brief this is a question the court is not called on to deal with here. The New Haven case is discussed at length at page 103 of our original brief. The case held merely that a carrier must adhere to published rates, even though such adherence should make impracticable its continuing to do business as a dealer. The case suggested that Congress might, " under proper rules " segregate the two departments of the business, but did not hold that Congress had power to compel a common carrier to make a forced sale of property lawfully owned, or power directly to deprive a carrier, engaged in industrial pursuits and obey-

ing the law, of the beneficial use of property lawfully owned by it.

Twenty pages, (page 45 to page 65) of the Brief are devoted to the propositions that the prevention of monopoly, rather than the prevention of unjust discrimination, was the real purpose of the Clause (page 50); that the combination of an industrial enterprise with a transportation enterprise is a restraint of trade or a monopoly (pages 53, 54, 55, 63); that each of the seven anthracite companies (only six being involved in this litigation, the Government having omitted to press any proceeding against the Reading), constitutes such a restraint or monopoly (pages 52, 53, 55, 60, 61, 63). The implication is that each of these corporations constitutes a violation of the Anti-trust Act to as great an extent as did the combination condemned in the Northern Securities case, and, indeed, a more injurious violation (pages 52, 53, 63); and furthermore that whether each of the anthracite coal companies constitutes a violation of the Anti-trust Act or not, each company amounts to a restraint or monopoly of interstate commerce, which Congress has the power to prohibit, and ought to prohibit. The conclusion is that Congress may

legislate to prevent the evil inherent in a carrier transporting commodities in which it is interested, and that the only remaining question is whether the means are legitimate and appropriate (page 64).

While perhaps not of controlling importance, it seems worth while to point out that this portion of the Brief involves a decided confusion of thought. If there exist (1) a lawful industrial enterprise such as a coal company, and (2) a lawful transportation enterprise such as a railroad company, a combination of those two enterprises cannot *per se* produce a restraint of trade or a monopoly. The characteristic of a monopoly or combination in restraint of trade is that by virtue of such monopoly or combination there has ceased to exist between the elements which go to make up such monopoly and combination a competition which, but for such monopoly or combination, would have existed between those elements and presumably would have been beneficial to the public. In the nature of things there cannot be competition between a coal company and a railroad company, because the two companies are not engaged in the same business, and do not offer the same

things for sale to the public. Therefore, no one of the seven anthracite companies affords an instance of a violation of either the Federal or any State Anti-trust Act. Of course, the fact that there are seven different instances does not affect the case, although that fact does suggest the consideration that, on account of these seven different combinations of mining and transportation business, there is much more opportunity for diversity of interest than would have existed if all the mining interests in the anthracite region, instead of being respectively identified with divergent railroad interests, had been left free to form a single mining combination, which might have been dictated by considerations peculiar to that business, but which were not sufficient to bring about a combination of the divergent transportation interests involved. When we consider the extent to which there has been consolidation of other lines of industry, it is worthy of comment that there seems to have been in the anthracite coal industry a far greater degree of independent ownership and operation than in many other industries, although, on account of the restricted character of that field, peculiar facilities would

have existed for the formation of a single great anthracite mining company but for the fact of these very combinations with transportation interests, each having divergent interests and alliances.

This portion of the Brief loses sight of the fact that the only way in which a combination of a mining interest with a transportation interest tends to produce monopoly or restraint of trade, is the fact that such a combination affords a temptation and an opportunity to the transportation interest to discriminate unjustly in favor of its own mining interest, and thereby drive competing mining interests out of the field. The Brief relies upon the New Haven case as showing that a combination of transportation and selling interests tends to produce a monopoly (pages 54, 57), but the very quotation made by the Brief from the New Haven case shows that any such monopoly would result from the fact that "no other person could ship the commodity on equal terms with the carrier." Likewise the Brief quotes (page 56), from the Interstate Commerce decision in the Coxe case, 4 I. C. C. Rep., 535, but that quotation also shows that the tendency to destroy competition results

from the opportunity of railroad companies operating mines "to unlawfully prefer themselves as shippers." The only way in which a divorce of transportation and producing interests would tend to destroy combinations in restraint of trade would be through the removal of a temptation to violate the unjust discrimination and undue preference provisions of the Act to Regulate Commerce. Clearness of reasoning demands therefore that we should keep in mind that the Commodity Clause was intended to operate solely as an aid to the Act to Regulate Commerce, and could not have any operation in aid of the Anti-trust Act, except so far as that aid could be accomplished by promoting the purposes of the Act to Regulate Commerce.

But up to this point we have made no substantial progress in determining whether the Commodity Clause is a valid exercise of the power of Congress, whether the purpose of the Clause be to aid the Anti-trust Act directly, or to aid merely the Act to Regulate Commerce, and hence, indirectly the Anti-trust Act. We may concede the fullest power of Congress to pass and enforce the Anti-trust Act and the Act to Regulate Commerce, and to do all proper things

in aid of those two Acts, and yet such concessions do not establish any power in Congress in supposed aid of those Acts to destroy the beneficial use of innocent property lawfully acquired prior to the enactment of the Commodity Clause or to force an involuntary sale of such property.

The Brief, after stating (page 64), that the next question is whether the means employed are legitimate and appropriate to accomplish the valid purpose sought to be established, proceeds to consider whether, under the power to regulate commerce, Congress has the power to prohibit. In support of the proposition that Congress has such power it is urged (page 65) that regulations usually take the form of prohibitions, as in the Anti-trust Act and the Act to Regulate Commerce, and as is frequently done in the case of regulation of foreign commerce (see, also, pages 34 and 35). The Brief, however, overlooks the vital distinction that, while prohibitions are usual, it is neither usual nor permissible to prohibit the beneficial employment of innocent property lawfully acquired, thereby substantially confiscating such property. This distinction is especially clear between a prohibition on the one hand of conduct *per se* injurious as are

the acts prohibited in the anti-trust act, and on the other hand a prohibition of the beneficial use of innocent property in order merely to diminish the opportunities for injurious acts. As a part of this same idea of the right to prohibit, the Brief discusses (pages 38, 39) the proposition that it is immaterial whether the thing prohibited is *malum in se*, and shows that the things prohibited by the Anti-trust Act are not *mala in se*, and, indeed, that traffic in lottery tickets is not *malum in se*. Such a proposition, however, is wide of the mark. The question here is whether Congress has the power to prohibit the beneficial use of, and, therefore, in effect to confiscate, innocent and useful property of vital importance to its owners and the public.

On page 66 the broad assertion is made that the National Government can interfere with the free flow of commerce, and that there is nothing to prevent Congress from withdrawing from a State corporation the privilege of doing business beyond the limits of the State creating the corporation. These assertions, to have any relevancy here, must mean that Congress has an unrestricted power to grant or withhold the privilege of engaging in commerce among the

States, a view which was emphatically condemned by this court in the Employers' Liability cases, 207 U. S., 463, 502.

Apparently by way of justifying the destructive character of the Commodity Clause, the Brief (page 71) denies that the Clause destroys interstate commerce, and to support this denial assigns the peculiar reason that interstate commerce means "that belonging to the whole people," and does not mean "so much of commerce as may be controlled by some one individual, or even by some gigantic corporation, or combination of such corporations." The Brief also suggests (page 36) that the lower court was not justified in describing the Clause "as arbitrary," because the legislation was merely adequate to meet the exigencies of the case. We submit that the destruction of the beneficial use of property innocent and useful in character, and of tremendous extent and value, cannot be regarded as "merely adequate to meet the exigencies of the case." The Brief also suggests (page 48), that the effect upon the defendants is merely that they must "readjust their affairs," and that this is such an effect "as is incident to all changes made by statute," and

cites as an example the changes necessitated by the Anti-trust Act. The Anti-trust Act, however, did not in any way destroy the beneficial use of property already acquired and owned.

This portion of the Brief does no more than show, what every one will concede, that Congress has the power to enact appropriate legislation to aid in carrying out the purposes of the Act to Regulate Commerce, those purposes being to secure interstate rail transportation for all on equal terms, and that Congress has a wide choice of means in carrying out these purposes. But the Brief does not show that Congress has the power to deny the right of interstate transportation with respect to, and thereby virtually to destroy the value of, property innocent and useful in character and of substantial importance.

II.

The Fifth Amendment.

The Brief makes the following suggestions of an introductory character, which call for no comment: The Fifth Amendment is designed as a

safeguard against the exercise of arbitrary power (page 74); the principles of classification are discussed on pages 75 and 76; the Legislature has power to make some kinds of vocations unlawful (page 77); a court cannot declare limitations to exist upon the legislative power which are neither expressed nor implied in the Constitution (page 80).

The Brief announces (page 76), that it is as proper to forbid "conditionally" certain classes of shipments as to forbid discrimination, and (page 78), that contractual rights are curtailed by the Anti-trust Act in the same way and to the same extent as by the Commodity Clause. These declarations illustrate the characteristic failure of the Brief to perceive the distinction between acts like the Act to Regulate Commerce and the Anti-trust Act, whose prohibitions relate merely to injurious conduct, and the Commodity Clause which prohibits a person to make the only feasible use of property lawfully held, thereby destroying the value of the property; and the further distinction that the prohibitions of those Acts relate to conduct directly injurious while the prohibition of the Commodity Clause has only an indirect bearing upon the unjust

discrimination which alone is the thing directly injurious.

The Brief undertakes to establish that before there can be a deprivation of property, contrary to the Fifth Amendment, "there must be an interest amounting to a vested right of property," (page 81). The Brief (page 83), cites from Cooley's Constitutional Limitations to the effect that many rights usually pertaining to ownership, and many reasonable expectations, cannot be regarded as vested rights, and that there can be no vested rights in an anticipated continuance of present general laws. The Brief seems to assume, (page 82), that the question is merely whether prior activities under State laws have created a right to continue in an established method of carrying on interstate commerce. Thus the Brief again entirely loses sight of the fundamental distinctions that this case involves a statute which, if valid, destroys the right of the owner of property lawfully acquired to use that property in the only available way in which it can be used, and that thus the case comes within the very letter of the quotation from Cooley on page 83 of the Brief, which shows that there is a vested right when the right has

become a "title legal or equitable to the present or future enjoyment of property."

Certainly the right of this appellee to the beneficial enjoyment of its anthracite coal is not an "inchoate right or privilege," as is suggested on page 81 of the Brief.

The Brief, continuing this failure to consider the vital question of the destructive effect of the Clause upon existing rights in physical property of great value, proceeds to consider whether the power of Congress to regulate conduct *for the future* (where no destruction of property rights would be involved), can be impaired by the prior action of individuals or States, or by the acquiescence or non-action of Congress. Much space is devoted to this irrelevant point (see pages 82, 88, 89, 90). The Anti-trust Act and the Act to Regulate Commerce are illustrations of the sort of legislation to which the arguments of the Brief apply. Neither of those acts destroyed the ordinary uses of innocent property by the persons owning the property at the time of the passage of the act. The Commodity Clause does thus destroy the ordinary use of such property in the hands of the owner.

The Brief suggests (pages 86, 90, 91) that

this appellee's acquisition of coal lands was at the outset a trespass upon the rights of Congress, against which the case of Gibbons vs. Ogden was always a warning; a monopoly and combination in restraint of interstate commerce and a wrong of great magnitude. The argument seems to be that, therefore, this appellee's ownership of that property is not entitled to constitutional protection, or, in other words, that such property is liable to absolute confiscation, at the will of the Federal legislature. Even if the premises were true, the conclusion would be false, but we deny the premises, as well as the conclusion.

The Brief (pages 87, 88) discusses the right of Congress to adopt retrospective legislation, provided it is not *ex post facto*. Such discussion is wide of the mark. No power to give legislation a retrospective operation authorizes the destruction of the beneficial use of innocent property lawfully acquired.

The Brief discusses repeatedly, and at great length, the Union Bridge case (pages 84, 85, 92). At page 115 of our original brief we have discussed this case at some length. The well settled principles upon which it was based

are entirely consistent with the other equally well settled principles upon which, in the case at bar, we base our claim that the Commodity Clause is unconstitutional.

At no place in the Brief is there any effective argument tending to show that the Commodity Clause does not virtually destroy property rights of substantial value. Practically the only attempts in the direction of such an argument are on page 87, where it is suggested that the Clause merely deprives the owner "of some of the uses to which, without such legislation, he might devote this anthracite coal," and merely closes to the owner "particular markets." The record shows that the only access which this appellee's coal has to the markets in other States is by employing the means of transportation which the Commodity Clause prohibits. Therefore, the Clause destroys all the use of the property and all the markets for the property, dependent upon the enjoyment of interstate commerce. In other words, the Clause destroys all the property rights which come within the purview of the Federal Constitution. As a fitting sequence to such an inconclusive argument, the Brief suggests that

if the value of appellee's property is affected, uch effect results only indirectly from the legislation assailed. We deny where a statute destroys the right of transportation, and thereby destroys the value of property, that such destruction of the property "results only indirectly" from the legislation in question.

On page 91 the suggestion is made that appellee's answer virtually denies the existence of any standard of compensation, or of any means by which the value could be ascertained of the rights of which it alleges it is deprived. We are not aware of any principle of law that property is less entitled to the protection of the Fifth Amendment, because the circumstances of a proposed destruction of that property are so extreme as to make the loss incalculable.

The Brief further suggests (page 98), that it does not appear on the face of the Commodity Clause that any loss or injury will result, and that if the provision can be "collaterally" attacked on such ground, the Antitrust Act and the Act to Regulate Commerce may be likewise assailed, because their enforcement also causes more or less loss and inconvenience to the persons and corporations regulated by them. We

doubt if any statute which has ever been declared unconstitutional, because working a deprivation of property or liberty without due process of law, has shown a destructive character more clearly upon its face than does the Commodity Clause, but we are not aware of any principle that validates statutes depriving persons of property or liberty without due process of law, and validates them on the ground that the Legislature has so concealed the destructive operation as that it does not appear on the face of the statute. Many statutes have been held unconstitutional because of facts not appearing in the statute, but disclosed in the litigation in which the statute was declared to be unconstitutional.

THE SUPPLEMENTAL BRIEF AND THE ORAL ARGUMENT.

Introductory Part.

Pages 3 to 9 are devoted to establishing the proposition that there are objections to a railroad company being interested commercially in commodities which are in competition with similar commodities produced by other shippers, because such interest furnishes a motive for unjust discrimination. We do not deny this general proposition. But we claim that such objections do not authorize the destruction of the right to enjoy property lawfully owned, especially when merely to prevent a temptation to violate the law against unjust discrimination. As to the anthracite situation, the Interstate Commerce Commission since the Coxe and Haddock cases, decided in 1889 and 1890, has never sustained any substantial complaint against the anthracite companies. The Commission never recommended the Commodity Clause; its recommendation, made after the adoption of the Commodity Clause, is that common carriers shall be required to divest themselves of other interests, and even that recommendation has not specifically indi-

cated that it was contemplated to interfere with property rights already lawfully acquired.

Pages 9 to 11 return to the arguments, which we do not dispute, that the courts cannot limit the *acknowledged* powers of the Legislature, or set aside, because unwise or unjust, any legislative exercise of *constitutional* power, and that Congress has a wide choice of means. All this is consistent with our contention that the courts may, and must, determine whether the Fifth Amendment has been violated.

Question of Unreasonableness.

In his oral argument the Attorney General dwelt at considerable length upon his proposition that the Court cannot consider at all the unreasonableness of this legislation. That the contrary is true is shown, we think, in our original brief in the discussion on pages 43 to 53 and in the discussion of the McCray case, pages 112 to 115. As there pointed out, it is incumbent upon the courts when considering the applicability of the Fifth Amendment to legislation which deals which the relative rights of the public and railroad companies, where a private right of ownership in the railroad companies co-

exists with a public power of regulation, to consider the precise situation presented by the legislation before the Court. In such cases questions of degree and of unreasonableness, in the sense of being harsh, arbitrary or destructive, and of relation of the means to the end, are things which this Court has repeatedly said must be considered.

"Property of Defendants Not Taken."

On page 12 the suggestion is made that the property of defendants is not taken because (1) the title and possession remain in the owners; (2) they may use the coal themselves, and for that purpose transport it anywhere; and (3) may sell it in Pennsylvania. All this is simply another way of saying as to the Delaware and Hudson that it can lawfully be deprived by the Clause of all power to have that ordinary use of its property which consists in transporting and dealing with it in interstate commerce for other than its own consumption, *i. e.*, that Congress can lawfully destroy a vital and principal right in the enjoyment of the property of the Company without compensation. The argument further overlooks entirely the simultaneous de-

struction of the Delaware and Hudson's ability to employ its railroad for the transportation of the traffic, whose transportation gives value to the property.

Pages 13 to 17 indicate that the way to avoid the destruction of this property right would have been to sell the property within the time prescribed by the statute, being practically a year and ten months. This, of course, would mean a forced sale and would not offer a constitutional solution, unless Congress has the power to compel such a sale in such a manner. As pointed out on pages 73 to 87 of our original brief, the court is not called upon to express an opinion upon that difficult question in the present situation, where Congress has virtually expressed the opinion that it has no such power; that the Clause cannot be construed as the equivalent of a statute requiring such a sale; that neither the State nor the Federal Government has any such power; and that the Clause viewed as requiring such a disposition is so unworkable that its impracticability itself condemns it as unconstitutional.

The attempted consolations offered by the supplemental brief to the effect that anthracite coal lands have a standard value, which can be

realized at any time, but if not realized that the public will get the benefit, do not enlarge the power of Congress to deal with private property, and are not even reassuring.

"Must First Give the Statute a Practical Test."

In the course of his oral argument the Attorney General suggested that it was not open to the companies affected to complain that a forced sale would be injurious until they had experimented with such a sale! Such a suggestion is not practicable. Suppose a statute requires a person to sell his land within six months under a penalty of $5,000 per day for each day after the expiration of the six months that he continues to own the land. Does the power of the legislature to pass that act depend upon the question whether the man can sell the land for its fair value? To show that the act is unconstitutional must he demonstrate to the court by an actual sale of the land that he has lost money thereby? If the experiment has been made and he has sold his land, what good does it do him to have the act thereafter declared unconstitutional? He cannot then recover from

the purchaser either the land or any additional purchase money, nor is there any basis for any action against the Government. Certainly there is no way to make an experiment except by an actual sale. The owner cannot compel a purchaser to agree upon a price and enter into a contract to buy the land, provided at the end of litigation the court shall hold the statute to be constitutional, leaving to the seller the privilege of cancelling the sale if the statute is declared unconstitutional. With respect to such a statute there is in the nature of things no possibility of obtaining through any method of experimentation the relief which the Constitution is designed to provide. Therefore, if the owner of property is to have any protection, his protection must consist in the enforcement of the doctrine that the Legislature cannot force him to sell when the Legislature is unable or unwilling to force some one to buy at the fair value of the property.

"The State Rights of the Defendants do not Affect the Control of Congress."

Pages 17 to 24 are devoted to the propositions "that the States have not undertaken to grant

rights of property in interstate commerce beyond the power of any limitation, recall, or control, and if the States had undertaken to do so, that was beyond their power." We do not dispute these propositions but they are irrelevant. We do not base our claim upon any right derived from the State of New York, or from the State of Pennsylvania, but upon the right which every person has to be protected against the destruction of the enjoyment of property lawfully owned.

"The combination of mining and transportation is not an innocent or approved business under the policy and law of Pennsylvania."

The remaining 20 pages of the Supplemental Brief are devoted to this general proposition, the policy of Pennsylvania being assumed to be established by Section 5 of Article XVII. of the Constitution of 1874. Before showing the irrelevancy of this proposition we may point out that the policy of the State of Pennsylvania with respect to the Delaware and Hudson was fixed about fifty years before the Constitution of 1874, and has never been changed; that even

the Constitution of 1874 cannot be regarded as a substantial departure from such policy as to the Delaware and Hudson, because the Delaware and Hudson is a "mining company," and in the State of Pennsylvania carries its products "on its railroad" but a little, if any, over "fifty miles" before those products reach the State of New York. Again the policy of the Constitution of 1874, is purely a policy as to future action. Likewise the policy of the State of New York with reference to the Delaware and Hudson was established many years ago and has never been changed.

We may add that the only force of the decision in Pennsylvania R. R. Co. vs. Duncan, 111 Pa., 352 (cited on the Government's Supplemental Brief, page 38, and affirmed *sub nom.* Penna. R. R. Co. vs. Miller, 132 U. S., 75) is, that while existing charter rights were unaffected either by the Act of 1855 or the Constitutional Amendments of 1857 and 1874, nevertheless the power of a Railroad Company to condemn land without compensation for indirect damages, was not a right guaranteed to the Pennsylvania Railroad Company by its charter, but arose only from General Laws subject to amendment. In fact,

as pointed out on pages 18 to 24 of the "General Brief for defendants in error and appellees," the amended Pennsylvania Constitutions, with a clear sense of justice, carefully conserved all existing corporate rights under charters previously granted.

Since the Government seems to assume that the Commodity Clause carries out the Constitution of Pennsylvania, it may be proper also to point out that the Pennsylvania Constitution (while respecting all property rights lawfully vested), is based on the general view that a common carrier should be confined to the business of carrying for all who need transportation, and should not engage in other lines of business for commercial purposes; whereas the Commodity Clause is unique in that it permits the common carrier to continue in other lines of business for commercial purposes, and merely restricts its right to engage in the business of carrying. On pages 72 to 80 of our original brief we endeavor to show that this extraordinary restriction of the right to carry is not equivalent to a limitation upon engaging in business other than carriage.

However, we do not see how State policy has any-

thing to do with the question of the *power* of Congress. State policy may have a controlling effect in construing ambiguous language in an act of Congress, but can have no effect on what is the constitutional power of Congress. One State may have one policy, and another State another policy. Congress legislates for the Nation and must have its own policy. As illustrating that some sections of the country may still expressly favor the combination of mining and transportation functions, we may add that *Congress itself in very recent years has incorporated a company with power to operate a railroad and mine coal*, and *has authorized leases of Government coal lands to such a company* to be mined by the company and upon which the company agrees to pay to the Government certain royalties.[1]

But for the purposes of the constitutional question involved it is entirely immaterial whether the combination of mining and transportation is an innocent and approved business under the policy and law of Pennsylvania. Even

[1] Act of Cong., Oct. 1, 1890 (26 Stat. at L., 640); Act of Cong., Aug. 25, 1894 (28 Stat. at L., 502); Act of Cong., June 28, 1898 (30 Stat. at L., 495).

if the business were guilty and were disapproved, those facts would not destroy the title of the Delaware and Hudson to its coal lands. If Congress directly appropriated those lands for the public use, it could not deny compensation on the ground that they had been acquired for use and were used in a business which was contrary to the policy or law of the State of Pennsylvania. If the Delaware and Hudson had title to the lands, Congress would have to provide for just compensation before appropriating them for public use. If the title to the property is sufficient to protect it against a direct appropriation without compensation, that title is equally sufficient to protect it against any deprivation which would be unconstitutional respecting property held by a good title.

The Commodity Clause operates on the coal itself and prohibits its transportation and must be tested in the light of the innocent and necessary character of the coal itself as an article of commerce. Our argument is that that coal belongs to the Delaware and Hudson, which cannot be deprived of it without due process of law. The idea that the coal might be confiscated, or its value destroyed by Congress, simply

because it is the product of a business, which is opposed to the present policy of the State of Pennsylvania, is wholly untenable.

It cannot be seriously argued that the Commodity Class was intended to withhold the right of interstate transportation only with reference to commodities which might be used in, or the product of, a business opposed to the policy or law of the State in which the production took place or the business was carried on. The Commodity Clause is general in its application. It applies throughout the United States and to every commodity, except timber and its products. It applies to commodities which are the products of, and which are used in, business authorized and approved by the present policy of a State just as much as it does to commodities produced or used in a business condemned by the laws of a State. The situation of such last-mentioned commodities is entirely too narrow a ground to sustain a decision of the broad question as to whether the Clause is constitutional. As to the Delaware and Hudson there can be no doubt whatever as to its absolutely valid title to its coal lands. The question of the constitutionality of that act in its operation in

destruction of such property rights of the Delaware and Hudson cannot be affected by any consideration of what might be the situation with respect to some other property, the propriety of whose acquisition by somebody else might be the subject of doubt or criticism.

Delaware and Hudson Still a Mining Company with Incidental Transportation Powers.

In his oral argument the Attorney General construed our position with reference to the Delaware and Hudson situation as a Mining Company to be merely that *originally* The Delaware and Hudson Company was distinctively a Mining Company with incidental transportation powers and that, solely because of this fact, the Company was not a Railroad Company, within the meaning of the Commodity Clause, despite subsequent developments which the Attorney General intimated had changed the relation between the mining and transportation functions of the Company. This idea involved a misconception of our position. Our position is that at the outset, continuously since, and now, The Delaware and Hudson Company by its statutory

powers, and under the facts shown in the record, was, has been, and is, a Mining Company with incidental Transportation functions, and is on the same footing as all other Industrial Companies with incidental Transportation functions, none of which companies, we believe, are intended to be covered by the Commodity Clause.

Conclusion.

On the whole case the result of the contentions of the Government is that without reference to the power of Congress to compel directly the alienation of property lawfully held, Congress may attain that purpose by prohibiting the enjoyment of interstate commerce unless such alienation be accomplished. This is precisely the doctrine that was condemned in the Employers' Liability Cases, 207 U. S., 463, 502. If the doctrine so contended for by the Government be sustained in this case, the result will be to suggest and encourage Federal legislation in various directions in which Congress may wish to accomplish supposed reforms as to matters in fact relating to internal affairs of the States and wholly within their jurisdiction, such as the

regulation of child labor, hours of labor and so forth.

January 22, 1909.

WM. S. OPDYKE,
JAMES M. BECK,
WALKER D. HINES,
Counsel for The Delaware and Hudson Company, Appellee and Defendant in Error.

such as has never heretofore been asserted and such as this court, whenever the question has been submitted to it, has avoided saying exists.

The carrier is compelled to determine, whether or not this Act, so destructive of its rights, is legal or illegal, under penalty of what will amount almost to confiscation, if it shall err in its determination.

Surely, there should be some provision, which would reserve to the carrier, before being subjected to such gigantic mulcts, some opportunity to obtain a judicial determination of its rights.

To say that it has its "day in court," when each day in court will expose it to a possible loss of $6,000,000, is to substitute a sarcasm for a legal privilege.

The principle involved is not dissimilar from that which was settled in *ex parte* Young, 209 U. S., 147, where it was thus held:—

> "If the law be such as to make the decision "of the legislature or of a commission conclusive as "to the sufficiency of the rates, this court has held "such a law to be unconstitutional. Chicago, &c., "Railway Co. *vs.* Minnesota, 134 U. S., 418. A law "which indirectly accomplishes a like result by im- "posing such conditions upon the right to appeal for "judicial relief as works an abandonment of the right "rather than face the conditions upon which it is "offered or may be obtained, is also unconstitu- "tional. It may therefore be said that when the "penalties for disobedience are by fines so enor- "mous and imprisonment so severe as to intimidate "the company and its officers from resorting to the "courts to test the validity of the legislation, the re- "sult is the same as if the law in terms prohibited the "company from seeking judicial construction of laws "which deeply affect its rights.
>
> "It is urged that there is no principle upon which "to base the claim that a person is entitled to dis- "obey a statute at least once, for the purpose of "testing its validity without subjecting himself to "the penalties for disobedience provided by the "statute in case it is valid. This is not an accurate

"statement of the case. Ordinarily a law creating "offenses in the nature of misdemeanors or felonies "relates to a subject over which the jurisdiction of "the legislature is complete in any event. In the "case, however, of the establishment of certain rates "without any hearing, the validity of such rates nec- "essarily depends upon whether they are high "enough to permit at least some return upon the "investment (how much it is not now necessary to "state), and an inquiry as to that fact is a proper "subject of judicial investigation. If it turns out "that the rates are too low for that purpose, then "they are illegal. Now, to impose upon a party in- "terested the burden of obtaining a judicial decision "of such a question (no prior hearing having ever "been given) only upon the condition that if unsuc- "cessful he must suffer imprisonment and pay fines "as provided in these acts, is, in effect, to close up "all approaches to the courts, and thus prevent any "hearing upon the question whether the rates as "provided by the acts are not too low and therefore "invalid. The distinction is obvious between a case "where the validity of the act depends upon the ex- "istence of a fact which can be determined only after "investigation of a very complicated and technical "character, and the ordinary case of a statute upon "a subject requiring no such investigation and over "which the jurisdiction of the legislature is complete "in any event.

"We hold, therefore, that the provisions of the "acts relating to the enforcement of the rates, either "for freight or passengers, by imposing such enor- "mous fines and possible imprisonment as a result "of an unsuccessful effort to test the validity of the "laws themselves, are unconstitutional on their face, "without regard to the question of the insufficiency "of those rates."

Mr. Justice Field in his concurrent opinion in Pollock *vs.* Farmers' Loan & Trust Co., 157 U. S., 595, said:—

"A law containing arbitrary exemptions can in "no just sense be termed uniform. In my judgment,

"Congress has rightfully no power, at the expense "of others, owning property of a like character, to "sustain private trading corporations, such as build- "ing and loan associations, savings banks, and mu- "tual life, fire, marine, and accident insurance com- "panies, formed under the laws of the various States, "which advance no national purpose or public in- "terest and exist solely for the pecuniary profit of "their members. * * * Wherever a distinction "is made in the burdens a law imposes or in the "benefits it confers on any citizens by reason of their "birth, or wealth, or religion, it is class legislation, "and leads inevitably to oppression and abuses, and "to general unrest and disturbance in society."

The Young case made effective what had been previously foreshadowed by Mr. Justice Brewer, in Chicago Railway Co. *vs.* Minnesota, 134 U. S., 418, 456:—

"This being the construction of the statute by "which we are bound in considering the present "case, we are of opinion that, so construed, it con- "flicts with the Constitution of the United States "in the particulars complained of by the railroad "company. It deprives the company of its right to "a judicial investigation, by due process of law, "under the forms and with the machinery provided "by the wisdom of successive ages for the investi- "gation judicially of the truth of a matter in con- "troversy, and substitutes therefor, as an absolute "finality, the action of a railroad commission, which, "in view of the powers conceded to it by the State "court, cannot be regarded as clothed with judicial "functions or possessing the machinery of a court "of justice."

III. The Commodities Clause is unconstitutional because, making illegal discriminations, it is not "due process of law."

Under this head, it is hardly necessary to say, that if the Act is improperly discriminating in any vital part, it is invalid as to the whole. If the discrimination in favor

of railroad companies carrying timber or its manufactured products is bad, or if the Act is bad in so much as it discriminates between two owners of coal, each holding by a valid title, the whole necessarily falls, it being impossible to say whether, passed as a whole, any part would have been enacted, had Congress known it was invalid in an important part. All the vital portions of an Act constituting a whole, have mutual relation, and any failure in any one vital part destroys the entire enactment. Such was the decision in the Income Tax Cases; and in the recent case in which the Employers' Liability Act was held invalid.

Due process of law in national, as well as in State, legislation, means uniformity of law; not necessarily uniformity as between different classes; but uniformity in each class, and, where no classification is possible, over the whole country.

A law does not fail to be uniform where it properly affects all the members of a class to whom alone it can reasonably, or properly, be applied.

As this court has said, however, repeatedly, non-uniformity cannot be sustained because sought to be effected under guise of a classification of that which cannot be classified.

Uniformity in legislation is absolutely essential in avoidance of injustice. Such is the constitution of human nature, that those who will suffer, will take care that no unnecessary suffering shall be inflicted, and those who will not suffer, will view, with indifference, legislation which will only result in the suffering of others.

In a country like ours, under the rule of the majority, which majority may have interests widely at variance with those of the minority, the only protection of the latter against unjust legislation, is to make the statute apply to all, to rich and to poor, to the weak and to the mighty.

In the matter of the actual transportation of timber and of coal, it might well be, that regulations for the

protection of the shipper, in the way of the kind of cars to be used, and in the precautions to be taken, might be applied to one kind of shipment and not to another.

If, however, the legislation rests, and can only rest, upon a public policy, applicable equally to all, there can be no classification. In the matter of determining whether murder, or arson, or burglary, may be committed, there can be no classification. In the matter of determining whether it is wrong to discriminate, or to make rebates, there can be none.

In like manner, if it be contrary to public policy, and if, because of being such, the union is forbidden, to unite in the carrier, ownership of the transportation and of the products transported, there can be no classification as between the carriers of different products. What is wrong in one case will be equally wrong in the other.

If the present legislation can be sustained, it must be upon the theory that the union in one corporation, of transportation and of ownership of the product transported, is contrary to public policy.

Would it have been possible, under the Sherman Act, to have made illegal, combinations in restraint of trade by some classes of carriers and to have permitted them by others? The question is answered, in the putting.

A statute of the United States, establishing a public policy, in the matter of uniformity, must stand upon the same basis as a statute of a State.

In Connolly *vs.* Union Sewer Pipe Co., 184 U. S., 560, it was held:—

> "These principles, applied to the case before us, "condemn the statute of Illinois. We have seen that "under that statute *all* except producers of agricul- "ture commodities and raisers of live stock, who "combine their capital, skill or acts for any of the "purposes named in the act, may be punished as "criminals, while agriculturists and live stock "raisers, in respect of their products or live stock "in hand, are exempted from the operation of the

"statute, and may combine and do that which, if "done by others, would be a crime against the State. "The statute so provides notwithstanding persons "engaged in trade or in the sale of merchandise and "commodities, within the limits of a State, and agri- "culturists and raisers of live stock, are all in the "same general class, that is, they are all alike en- "gaged in domestic trade, which is, of right, open "to all, subject to such regulations, applicable alike "to all in like conditions, as the State may legally "prescribe.

"The difficulty is not met by saying that, gener- "ally speaking, the State when enacting laws may, "in its discretion, make a classification of persons, "firms, corporations and associations, in order to "subserve public objects. For this court has held "that classification 'must always rest upon some dif- "'ference which bears a reasonable and just rela- "'tion to the act in respect to which the classifica- "'tion is proposed, and can never be made arbi- "'trarily and without any such basis. * * * But "'arbitrary selection can never be justified by calling "'it classification. The equal protection demanded "'by the Fourteenth Amendment forbids this. "'* * * No duty rests more imperatively upon "'the courts than the enforcement of those con- "'stitutional provisions intended to secure that "'equality of rights which is the foundation of free "'government. * * * It is apparent that the "'mere fact of classification is not sufficient to re- "'lieve a statute from the reach of the equality "'clause of the Fourteenth Amendment, and that "'in all cases it must appear not only that a classi- "'fication has been made but also that it is one "'based upon some reasonable ground—some dif- "'ference which bears a just and proper relation "'to the attempted classification—and is not a "'mere arbitrary selection' Gulf, Colorado and "Santa Fe Railway *vs.* Ellis, 165 U. S., 150, 155, 159, "160, 165. These principles were recognized and "applied in Cotting *vs.* Kansas City Stock Yards "Co., 183 U. S., 79, in which it was unanimously "agreed that a statute of Kansas regulating the

"charges of a particular stock yards company in the "State, but which exempted certain stock yards from "its operation, was repugnant to the Fourteenth "Amendment in that it denied to that company the "equal protection of the laws. * * *

"'The power of taxation under this provision "'was fully considered in Bell's Gap Railroad Co. "'*vs.* Pennsylvania, 134 U. S., 232, in which it was "'said not to have been intended to prevent a State "'from changing its system of taxation in all proper "'and reasonable ways. It may, if it chooses, ex- "'empt certain classes of property altogether; may "'impose different specific taxes upon different "'trades or professions; may vary the rates of "'excise upon various products; may tax real and "'personal estate in a different manner; may tax "'visible property only and not securities; may al- "'low or not allow deductions for indebtedness. "'All such regulations, and those of like character, "'so long as they proceed within reasonable limits "'and general usage, are within the discretion of "'the State legislature or the people of the State "'in framing their constitution.' Again: 'The dis- "'crimination is obviously intended as an encour- "'agement to agriculture, and does not deny to "'persons and corporations engaged in a general re- "'fining business the equal protection of the laws.' "

The Commodities Clause discriminates in three important particulars.

1. Between different owners of coal, without justification.

2. Between the carriers of timber and its manufactured products and the carriers of other commodities.

3. Between different classes of common carriers.

1. *As to discrimination between different owners of coal.*

In the case of the Delaware and Hudson Company, it appears that a large portion of the coal mined by

it, is sold in Pennsylvania, and is transported, thereafter, by it, solely on account of the purchasers in Pennsylvania. This is not the case with all the other defendants, it being impossible for them to make such sales in Pennsylvania to any large extent. Such sales, however, may, at times, be made, and, in the case of the Pennsylvania Railroad Company, are actually made.

If a railroad carrier mines coal in Pennsylvania, even though it sells it in that State, actually and absolutely, it is forbidden, by the Commodities Clause, thereafter to transport it on account, or for the benefit of, the purchaser.

What interest can the carrier have, in favoring any person whose coal is by it transported, after it has ceased to be the owner, because of the fact that once it was? What right will it have to deny such transportation? What power is vested in Congress to confer upon it such right or to impose upon it the duty to refuse?

The Act operates, not merely upon the railroad company, but upon the owner of the coal who needs transportation. A purchaser in Pennsylvania is possessed of coal he wishes to have transported to market in another State. Under the Act, if he has purchased the same from a person other than the railroad company which must transport it, he can insist upon its being carried into other States. If, however, the coal owned by him happens to have been purchased from a railroad company which, in pursuance of its charter and legal right, had mined the same, he cannot have it transported by the only carrier able to carry it.

The commodity to be transported, in each case, is the same. The reason for forbidding transportation in one, and for permitting it in the other, is simply because of the fact that title was once vested in a railroad company.

As we will endeavor to show hereafter, the question of acquisition of title in Pennsylvania is one beyond the power of Congress to control. None the less, be-

cause of an objection, not within its power to enforce, to a legal title, Congress discriminates between owners, each of whom, *quâ* the right of transportation, occupies the same position.

2. *As to discrimination in the matter of allowing transportation of timber and timber products.*

We have endeavored heretofore, generally, to establish the fact that there is no ground for discrimination, in the article exempted by the statute, because of the fact that the policy of law, sought to be enforced, is the same in all cases of carriage.

The result of the discrimination, in one particular, is, that timber, which is an article of fuel as well as is coal, can be transported by a carrier owner, whilst the coal cannot.

The manufactured products of timber are used in the arts and in building, competitively with the manufactured products of iron and steel. The Act, however, permits one to be carried and forbids the other.

The owner of timber is not protected against the supposed impolicy of permitting a railroad company to carry its own timber, whilst the owners of other products are.

3. *As to discrimination between the different classes of common carriers.*

There are common carriers, other than railroad companies, such as canal companies, pipe line companies, telegraph companies, express companies, and others. The canal may be parallel to, and competitive with, the railroad. The like may be the case with the pipe line company.

Whilst conceding that something may be said in favor of discrimination in favor of the companies we have named, yet, we submit, the principle upon which the prohibition is based is the same in the case of every common carrier.

IV. The Commodities Clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessaries of life. The act is not a regulation, but a prohibition.

In discussing this proposition, there is no difference between the rights of an individual and the rights of a corporation. As was said in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, 204:—

> "Nor does it make any difference whether such "commerce is carried on by individuals or by corpo- "rations. Welton *vs.* Missouri, 91 U. S., 275; Mobile "*vs.* Kimball, 102 U. S., 691. As was said in Paul "*vs.* Virginia, 8 Wall., 168, at the time of the for- "mation of the Constitution, a large part of the "commerce of the world was carried on by corpora- "tions; and the East India Company, the Hudson "Bay Company, the Hamburgh Company, the "Levant Company, and the Virginia Company were "mentioned as among the corporations which, from "the extent of their operations, had become cele- "brated throughout the commercial world. The "grant of power is general in its terms, making no "reference to the agencies by which commerce may "be carried on. It includes commerce by whomso- "ever conducted whether by individuals or by "corporations. At the present day, nearly all en- "terprises of a commercial character, requiring for "their successful management large expenditures "of money, are conducted by corporations. The "usual means of transportation on the public waters, "where expedition is desired, are vessels propelled "by steam; and the ownership of a line of such "vessels generally requires an expenditure exceed- "ing the resources of single individuals. Except "in rare instances, it is only by associated capital "furnished by persons united in corporations, that "the requisite means are provided for such expen- "ditures."

In considering the Act we must bear in mind that it affects, not merely the right of the railroad company to transport; but that it also affects, (1) the right of the railroad company as an owner of, or interested in, coal (if an interest in shares be an interest in coal), holding a legal title thereto; (2) the right of other owners of the coal where the railroad company is but an owner in part; (3) the right of the coal companies whose shares are held wholly or partially; and (4) the right of the holders of a minority of the shares of the coal companies, where the railroad company holds the larger part thereof, and the right of the majority holders of shares of such companies where the railroad company holds the smaller portion thereof.

Undoubtedly, it was thought by Congress that the Lottery Case justified, to some extent, the Commodities Clause.

We submit, however, that nothing was decided in that case, justifying what is attempted to be done by the Commodities Clause.

In the Lottery Case, after it had been determined that the policy tickets were articles of commerce, it was held that the power of regulation possessed by Congress justified the prohibition of the carriage of these articles because such carriage would result in injury to the morals of the people. It was held by this court that there was no right to demand that commerce should be permitted in illegal articles; that the power to "regulate" included the right to exclude, what was not a legitimate article of commerce.

In the present case, the article carried is neither harmful to morals, nor to health. It is a necessity of life. The thing aimed at, is an interest of the carrier in the "*rem*" transported. It prevents the owner of an article, which is one of the necessities of commerce, from having the same transported because of its interest therein. The result of such prevention being that, if the owner of the coal does not sell its mines, or shares of coal stock, the citizens of many of the States will be deprived of an article absolutely needed.

It may not be amiss, in order that there may be no doubt as to precisely what was decided in the Lottery Case (188 U. S., 321) to quote, *in extenso*, from the decision (page 346):—

> "The leading case under the commerce clause of "the Constitution is Gibbons *vs.* Ogden, 9 Wheat., "1, 189, 194. Referring to that clause, Chief Justice "Marshall said: 'The subject to be regulated is com- "'merce; and our Constitution being, as was aptly "'said at the bar, one of enumeration, and not of "'definition, to ascertain the extent of the power, "'it becomes necessary to settle the meaning of the "'word. The counsel for the appellee would limit "'it to traffic, to buying and selling, or the inter- "'change of commodities, and do not admit that it "'comprehends navigation. This would restrict a "'general term, applicable to many objects, to one "'of its significations. Commerce, undoubtedly, is "'traffic, but it is something more; it is intercourse. "'It describes the commercial intercourse between "'nations, and parts of nations, in all its branches, "'and is regulated by prescribing rules for carrying "'on that intercourse. * * * It has been truly "'said, that commerce, as the word is used in the "'Constitution, is a unit, every part of which is "'indicated by the term. If this be the admitted "'meaning of the word, in its application to foreign "'nations, it must carry the same meaning through- "'out the sentence, and remain a unit, unless there "'be some plain intelligible cause which alters it. "'The subject to which the power is next applied, is "'to commerce, "among the several States." The "'word "among" means intermingled with. A thing "'which is among others is intermingled with them. "'Commerce among the States cannot stop at the "'external boundary line of each State, but may be "'introduced into the interior. It is not intended to "'say that these words comprehend that commerce, "'which is completely internal, which is carried on "'between man and man in a State, or between "'different parts of the same State, and which does "'not extend to or affect other States. Such a

"'power would be inconvenient and is certainly un-
"'necessary. Comprehensive as the word "among"
"'is, it may very properly be restricted to that
"'commerce which concerns more States than
"'one. * * * The genius and character of the
"'whole Government seem to be, that its action is
"'to be applied to all the external concerns of the
"'Nation, and to those internal concerns which
"'affect the States generally; but not to those which
"'are completely within a particular State, which
"'do not affect other States, and with which it is
"'not necessary to interfere, for the purpose of
"'executing some of the general powers of the
"'Government * * * '

"Again: 'We are now arrived at the inquiry—
"'what is this power? It is the power to regu-
"'late; that is, to prescribe the rule by which
"'commerce is to be governed. This power, like
"'all vested in Congress, is *complete in itself*, may
"'be exercised *to its utmost extent*, and acknowl-
"'edges *no limitations, other than are prescribed*
"'*in the Constitution*. These are expressed in plain
"'terms, and do not affect the questions which
"'arise in this case, or which have been discussed at
"'the bar. If, as has always been understood, the
"'sovereignty of Congress though limited to spe-
"'cific objects, is plenary as to those objects, the
"'power over commerce with foreign nations, and
"'among the several States, is vested in Congress
"'*as absolutely as it would be in a single government,*
"'*having in its constitution the same restrictions on*
"'*the exercise of the power as are found in the Con-*
"'*stitution of the United States.*'

"Mr. Justice Johnson in the same case, expressed
"his entire approbation of the judgment rendered by
"the court, but delivered a separate opinion indicat-
"ing the precise grounds upon which his conclusion
"rested. Referring to the grant of power over
"commerce he said: 'My opinion is founded on
"'the application of the words of the grant to the
"'subject of it. The "power to regulate commerce,"
"'here meant to be granted, was that power to regu-
"'late commerce which previously existed in the

"'States. But what was that power? The States "'were, unquestionably, supreme; and each pos- "'sessed that power over commerce, which is ac- "'knowledged to reside in every sovereign State. "'* * * The law of nations, regarding man as a "'social animal, pronounces all commerce legitimate, "'in a state of peace, until prohibited by positive "'law. The power of a sovereign State over com- "'merce, therefore, amounts to nothing more than "'a power to limit and restrain it at pleasure. And "'since the power to prescribe the limits to its free- "'dom, necessarily implies the power to determine "'what shall remain unrestrained, it follows that the "'power must be exclusive, it can reside but in one "'potentate; and hence, the grant of this power "'carries with it the whole subject, leaving noth- "'ing for the State to act upon.'

"The principles announced in Gibbons *vs.* Ogden "were reaffirmed in Brown *vs.* Maryland, 12 Wheat. "419, 446. After expressing doubt whether any of "the evils proceeding from the feebleness of the "Federal Government contributed more to the es- "tablishing of the present constitutional system than "the deep and general conviction that commerce "ought to be regulated by Congress Chief Justice "Marshall, speaking for the court, said: 'It is not "'therefore matter of surprise that the grant should "'be as extensive as the mischief and should com- "'prehend all foreign commerce, and all commerce "'among the States.' Considering the question as "to the just extent of the power to regulate com- "merce with foreign nations and among the several "States, the court reaffirmed the doctrine that the "power was 'complete in itself, and to acknowledge "'no limitations other than are prescribed by the "'Constitution. * * * Commerce is intercourse; "'one of its most ordinary ingredients is traffic.'

"In the Passenger Cases, 7 How., 283, the court "adjudged certain statutes of New York and Massa- "chusetts, imposing taxes upon alien passengers ar- "riving in the ports of those States, to be in viola- "tion of the Constitution and laws of the United "States. In the separate opinions delivered by the

"Justices there will not be found any expression of "doubt as to the doctrines announced in Gibbons "*vs.* Ogden. Mr. Justice McLean said: 'Commerce "'is defined to be "an exchange of commodities." "'But this definition does not convey the full mean-"'ing of the term. It includes "navigation and ""'"intercourse." That the transportation of pas-"'sengers is part of commerce is not now an open "'question.' Mr. Justice Grier said: 'Commerce "'as defined by this court, means something more "'than traffic—it is intercourse; and the power "'committed to Congress to regulate commerce "'is exercised by prescribing rules for carrying "'on that intercourse.' The same views were "expressed by Mr. Justice Wayne, in his separate "opinion. He regarded the question then before "the court as covered by the decision in Gibbons *vs.* "Ogden, and in respect to that case he said: 'It will "'always be a high and honorable proof of the emi-"'nence of the American bar of that day, and of the "'talents and distinguished ability of the judges "'who were then in the places which we now oc-"'cupy.' Mr. Justice Catron and Mr. Justice Mc-"Kinley announced substantially the same views. "* * *

"In County of Mobile *vs.* Kimball, 102 U. S. 691, "Mr. Justice Field, delivering the judgment of the "court, said: 'Commerce with foreign countries and "'among the States, strictly considered, consists in "'intercourse and traffic, including in these terms "'navigation and the transportation and transit of "'persons and property as well as the purchase, "'sale, and exchange of commodities.' This prin-"ciple was expressly reaffirmed in Gloucester Ferry "Co. *vs.* Pennsylvania, 114 U. S., 196, 203. * * *

"In Brown *vs.* Houston, 114 U. S., 622, 630, it "was declared by the court, speaking by Mr. Justice "Bradley, that 'the power to regulate commerce "'among the several States is granted to Congress "'in terms as absolute as is the power to regu-"'late commerce with foreign nations.' The same "thought was expressed in Bowman *vs.* Chicago, "&c., Railway Co., 125 U. S., 465, 482; Crutcher *vs.*

"Kentucky, 141 U. S., 47, 58, and Pittsburgh Coal "'Co. *vs.* Bates, 156 U. S., 577, 587. * * *

"At the present term of the court we said that "'transportation for others, as an independent busi- "'ness, is commerce, irrespective of the purpose to "'sell or retain the goods which the owner may "'entertain with regard to them after they shall "'have been delivered.' Hanley, &c., *vs.* Kansas "City Southern Railway, 187 U. S., 617. * * *

"In short, a lottery ticket is subject to traffic, "and is so designated in the act of 1895. 28 Stat., "963. That fact is not without significance in view "of what this court has said. That act, counsel for "the accused well remarks, was intended to supple- "ment the provisions of prior acts excluding lottery "tickets from the mails and prohibiting the importa- "tion of lottery matter from abroad, and to prohibit "the causing lottery tickets to be carried, and lot- "tery tickets and lottery advertisements to be trans- "ferred from one State to another by any means or "method. 15 Stat., 196; 17 Stat., 302; 19 Stat., 90; "Rev. Stat., Section 3894; 26 Stat., 465; 28 Stat., "963.

"We are of opinion that lottery tickets are sub- "jects of traffic and therefore are subjects of com- "merce, and the regulation of the carriage of such "tickets from State to State, at least by independent "carriers, is a regulation of commerce among the "several States. * * *

"It is to be remarked that the Constitution does "not define what is to be deemed a legitimate "regulation of interstate commerce. In Gibbons *vs.* "Ogden it was said that the power to regulate such "commerce is the power to prescribe the rule by "which it is to be governed. But this general obser- "vation leaves it to be determined when the question "comes before the court, whether Congress in "prescribing a particular rule has exceeded its "power under the Constitution. While our Gov- "ernment must be acknowledged by all to be one "of enumerated powers, McCulloch *vs.* Maryland, 4 "Wheat., 316, 405, 407, the Constitution does not "attempt to set forth all the means by which such

"powers may be carried into execution. It leaves "to Congress a large discretion as to the means "that may be employed in executing a given power. "The sound construction of the Constitution, this "court has said, 'must allow to the national legis- "'lature that discretion, with respect to the means "'by which the powers it confers are to be carried "'into execution, which will enable that body to "'perform the high duties assigned to it, in the "'manner most beneficial to the people. Let the "'end be legitimate, let it be within the scope of "'the Constitution, and all means which are appro- "'priate, which are plainly adapted to that end, "'which are not prohibited, but consist with the letter "' and spirit of the Constitution, are constitutional.' "4 Wheat., 421.

"We have said that the carrying from State to "State of lottery tickets constitutes interstate com- "merce and that the regulation of such commerce "is within the power of Congress under the Con- "stitution. Are we prepared to say that a pro- "vision which is, in effect, a *prohibition* of the "carriage of such articles from State to State is "not a fit or appropriate mode for the *regulation* "of that particular kind of commerce? If lottery "traffic, *carried on through interstate commerce*, is a "matter of which Congress may take cognizance and "over which its power may be exerted, can it be "possible that it must tolerate the traffic, and "simply regulate the manner in which it may be "carried on? Or may not Congress, for the pro- "tection of the people of all the States, and under "the power to regulate interstate commerce, devise "such means, within the scope of the Constitution, "and not prohibited by it, as will drive that traffic "out of commerce among the States?

"In determining whether regulation may not "under some circumstances properly take the form "or have the effect of prohibition, the nature of the "interstate traffic which it was sought by the Act "of May 2d, 1895, to suppress cannot be overlooked. "When enacting that statute Congress no doubt

"shared the views upon the subject of lotteries "heretofore expressed by this court. * * *

"If a State, when considering legislation for the "suppression of lotteries within its own limits, may "properly take into view the evils that inhere in the "raising of money, in that mode, why may not Con- "gress, invested with the power to regulate com- "merce among the several States, provide that such "commerce shall not be polluted by the carrying of "lottery tickets from one State to another? In this "connection it must not be forgotten that the power "of Congress to regulate commerce among the States "is plenary, is complete in itself, and is subject to "no limitations except such as may be found in the "Constitution. What provision in that instrument "can be regarded as limiting the exercise of the "power granted? What clause can be cited which, "in any degree, countenances the suggestion that "one may, of right, carry or cause to be carried "from one State to another that which will harm "the public morals? We cannot think of any clause "of that instrument that could possibly be invoked "by those who assert their right to send lottery "tickets from State to State except the one providing "that no person shall be deprived of his liberty "without due process of law. We have said that "the liberty protected by the Constitution embraces "the right to be free in the enjoyment of one's "faculties; 'to be free to use them in all lawful "'ways; to live and work where he will; to earn "'his livelihood by any lawful calling; to pursue "'any livelihood or avocation, and for that purpose "'to enter into all contracts that may be proper.' "Allgeyer *vs.* Louisiana, 165 U. S., 578, 589. But "surely it will not be said to be a part of any one's "liberty, as recognized by the supreme law of the "land, that he shall be allowed to introduce into com- "merce among the States an element that will be "confessedly injurious to the public morals. * * *

"If the carrying of lottery tickets from one State "to another be interstate commerce, and if Congress "is of opinion that an effective regulation for the "suppression of lotteries carried on through such

"commerce, is to make it a criminal offense to cause "lottery tickets to be carried from one State to "another, we know of no authority in the courts to "hold that the means thus devised are not appro- "priate and necessary to protect the country at large "against a species of interstate commerce which, "although in general use and somewhat favored in "both national and State legislation in the early "history of the country, has grown into disrepute "and has become offensive to the entire people of "the Nation. It is a kind of traffic which no one can "be entitled to pursue as of right.

"That regulation may sometimes appropriately "assume the form of prohibition is also illustrated "by the case of diseased cattle, transported from "one State to another. * * *

"The Act of July 2d, 1890, known as the Sherman "Anti-Trust Act, and which is based upon the power "of Congress to regulate commerce among the "States, is an illustration of the proposition that "regulation may take the form of prohibition. The "object of that Act was to protect trade and com- "merce against unlawful restraints and monopolies. "To accomplish that object Congress declared cer- "tain contracts to be illegal. That Act, in effect, "prohibited the doing of certain things, and its pro- "hibitory clauses have been sustained in several "cases as valid under the power of Congress to "regulate interstate commerce. * * *

"'Under this grant of power to Congress, that "'body, in our judgment, may enact such legislation "'as shall declare void and *prohibit* the performance "'of any contract between individuals or corpora- "'tions where the natural and direct effect of such a "'contract will be, when carried out, to directly, and "'not as a mere incident to other and innocent pur- "'poses, regulate to any substantial extent inter- "'state commerce. (And when we speak of inter- "'state we also include in our meaning foreign com- "'merce.) We do not assent to the correctness of "'the proposition that the constitutional guaranty "'of liberty to the individual to enter into private "'contracts limits the power of Congress and pre-

"'vents it from legislating upon the subject of con-
"'tracts of the class mentioned. The power to regu-
"'late interstate commerce is, as stated by Chief
"'Justice Marshall, full and complete in Congress,
"'and there is no limitation in the grant of the power
"'which excludes private contracts of the nature in
"'question from the jurisdiction of that body. Nor
"'is any such limitation contained in that other
"'clause of the Constitution which provides that no
"'person shall be deprived of life, liberty, or prop-
"'erty without due process of law.' Again: 'The
"'provision in the Constitution does not, as we be-
"'lieve, exclude Congress from legislating with re-
"'gard to contracts of the above nature while in the
"'exercise of its constitutional right to regulate
"'commerce among the States. On the contrary,
"'we think the provision regarding the liberty of the
"'citizen is, to some extent, limited by the commerce
"'clause of the Constitution, and that the power of
"'Congress to regulate interstate commerce com-
"'prises the right to enact a law *prohibiting* the citi-
"'zen from entering into those private contracts
"'which directly and substantially, and not merely
"'indirectly, remotely, incidentally, and collaterally
"'regulate to a greater or less degree commerce
"'among the States.'

"That regulation may sometimes take the form "or have the effect of prohibition is also illustrated "in the case of *In re* Rahrer, 140 U. S., 545. In "Mugler *vs.* Kansas, 123 U. S., 623, it was adjudged "that State legislation prohibiting the manufacture "of spirituous, malt, vinous, fermented or other in-"toxicating liquors within the limits of the State, "to be there sold or bartered for general use as a "beverage, does not necessarily infringe any right, "privilege or immunity secured by the Constitution "of the United States or by the amendments thereto. "Subsequently in Bowman *vs.* Chicago, &c., Rail-"way Co., 125 U. S., 465, this court held that ardent "spirits, distilled liquors, ale, and beer were subjects "of exchange, barter, and traffic, and were so recog-"nized by the usages of the commercial world, as "well as by the laws of Congress and the decisions

"of the courts. In Leisy *vs.* Hardin, 135 U. S., 100, "the court again held that spirituous liquors were "recognized articles of commerce, and declared a "statute of Iowa prohibiting the sale within its lim- "its of any intoxicating liquors, except for pharma- "ceutical, medicinal, chemical or sacramental pur- "poses, under a State license, to be repugnant to "the commerce clause of the Constitution, if applied "to the sale, within the State, by the importer, in "the original, unbroken packages, of such liquors "manufactured in and brought from another State. "And in determining whether a State could prohibit "the sale within its limits, in original, unbroken pack- "ages, of ardent spirits, distilled liquors, ale, and "beer, imported from another State, this court said "that they were recognized by the laws of Congress "as well as by the commercial world 'as subjects "'of exchange, barter, and traffic,' and that 'what- "'ever our individual views may be as to the dele- "'terious or dangerous qualities of particular articles, "'we cannot hold that any articles which Congress "'recognized as subjects of commerce are not such.' "Leisy *vs.* Hardin, 135 U. S., 100, 110, 125. * * *

"It is said, however, that if, in order to suppress "lotteries carried on through interstate commerce, "Congress may exclude lottery tickets from such "commerce, that principle leads necessarily to the "conclusion that Congress may arbitrarily exclude "from commerce among the States any article, com- "modity or thing, of whatever kind or nature, or "however useful or valuable, which it may choose, "no matter with what motive, to declare shall not "be carried from one State to another. It will be "time enough to consider the constitutionality of "such legislation when we must do so. The present "case does not require the court to declare the full "extent of the power that Congress may exercise in "the regulation of commerce among the States. We "may, however, repeat, in this connection, what the "court has heretofore said, that the power of Con- "gress to regulate commerce among the States, "although plenary, cannot be deemed arbitrary, "since it is subject to such limitations or restric-

"tions as are prescribed by the Constitution. This "power, therefore, may not be exercised so as to "infringe rights secured or protected by that instru- "ment. It would not be difficult to imagine legisla- "tion that would be justly liable to such an objec- "tion as that stated, and be hostile to the objects for "the accomplishment of which Congress was in- "vested with the general power to regulate com- "merce among the several States. But, as often "said, the possible abuse of a power is not an argu- "ment against its existence. There is probably no "governmental power that may not be exerted to "the injury of the public. If what is done by Con- "gress is manifestly in excess of the powers granted "to it, then upon the courts will rest the duty of ad- "judging that its action is neither legal nor binding "upon the people. But if what Congress does is "within the limits of its power, and is simply un- "wise or injurious, the remedy is that suggested by "Chief Justice Marshall in Gibbons *vs.* Ogden, when "he said: 'The wisdom, and the discretion of Con- "'gress, their identity with the people and the in- "'fluence which their constituents possess at elec- "'tions, are, in this, as in many other instances, as "'that, for example, of declaring war, the sole re- "'straints on which they have relied, to secure them "'from its abuse. They are the restraints on which "'the people must often rely solely, in all represent- "'ative governments.'

"The whole subject is too important, and the "questions suggested by its consideration are too "difficult of solution, to justify any attempt to lay "down a rule for determining in advance the valid- "ity of every statute that may be enacted under the "commerce clause. We decide nothing more in the "present case than that lottery tickets are subjects "of traffic among those who choose to sell or buy "them; that the carriage of such tickets by inde- "pendent carriers from one State to another is "therefore interstate commerce; that under its "power to regulate commerce among the several "States Congress—subject to the limitations im-

"posed by the Constitution upon the exercise of the "powers granted—has plenary authority over such "commerce, and may prohibit the carriage of such "tickets from State to State; and that legislation to "that end, and of that character is not inconsistent "with any limitation or restriction imposed upon the "exercise of the powers granted to Congress."

What is included in the word "commerce" has been well settled by numerous decisions. It is stated as concisely as in any other case, in Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196, 203, where it is said:—

"It matters not that the transportation is made "in ferryboats, which pass between the States every "hour of the day. The means of transportation of "persons and freight between the States does not "change the character of the business as one of com- "merce, nor does the time within which the distance "between the States may be traversed. Commerce "among the States consists of intercourse and traffic "between their citizens, and includes the transpor- "tation of persons and property, and the navigation "of public waters for that purpose, as well as the "purchase, sale, and exchange of commodities. "The power to regulate that commerce, as well as "commerce with foreign nations, vested in Congress, "is the power to prescribe the rules by which it "shall be governed, that is, the conditions upon "which it shall be conducted, to determine when it "shall be free and when subject to duties or other "exactions. The power also embraces within its "control all the instrumentalities by which that "commerce may be carried on, and the means by "which it may be aided and encouraged. The "subjects, therefore, upon which the power may be "exerted are of infinite variety. While with refer- "ence to some of them, which are local and limited "in their nature or sphere of operation, the States "may prescribe regulations until Congress intervenes "and assumes control of them; yet, when they are "national in their character, and require uniformity

"of regulation affecting alike all the States, the "power of Congress is exclusive. Necessarily that "power alone can prescribe regulations which are to "govern the whole country. And it needs no argu- "ment to shew that the commerce with foreign "nations and between the States, which consists "in the transportation of persons and property "between them, is a subject of national character, "and requires uniformity of regulation."

In ascertaining what is covered by the power to "reg- "ulate," it is well to bear in mind that the meaning of the word is, "to adjust by rule, method or established mode."

Whilst prohibition of the transportation of articles injurious to health or morals is included within the idea of a regulation of commerce, a prohibition of such transportation, where the articles are necessaries of life, is not within such idea. A requirement that transportation shall be conducted without favoritism, or discrimination, and not at excessive rates, is included within our idea of a regulation. Congress may forbid contracts in restraint of trade, because such contracts interfere with commerce and indirectly regulate the same. In this connection, it may not be amiss to quote what is said by Mr. Justice Peckham in the Addyston case, 175 U. S., 211, 226:—

"Assuming for the purpose of the argument, that "the contract in question herein does directly and "substantially operate as a restraint upon and as a "regulation of interstate commerce, it is yet insisted "by the appellants at the threshold of the inquiry "that by the true construction of the Constitution, "the power of Congress to regulate interstate com- "merce is limited to its protection from acts of in- "terference by State legislation or by means of regu- "lations made under the authority of the State by "some political subdivision thereof, including also "Congressional power over common carriers, ele- "vator, gas and water companies, for reasons stated "to be peculiar to such carriers and companies, but "that it does not include the general power to

"interfere with or prohibit private contracts between "citizens, even though such contracts have inter- "state commerce for their object, and result in a "direct and substantial obstruction to or regulation "of that commerce.

"This argument is founded upon the assertion "that the reason for vesting in Congress the power "to regulate commerce was to insure uniformity of "regulation against conflicting and discriminating "State legislation; and the further assertion that the "Constitution guarantees liberty of private contract "to the citizen at least upon commercial subjects, "and to that extent the guaranty operates as a lim- "itation on the power of Congress to regulate com- "merce. * * * The further remark is quoted "from Railroad Company *vs.* Richmond, *supra*, that "the power of Congress to regulate commerce was "never intended to be exercised so as to interfere "with private contracts not designed at the time "they were made to create impediments to such "commerce. It is added that the proof herein "shows that the contract in this case was not so "designed. * * *

"The power to regulate interstate commerce is, "as stated by Chief Justice Marshall, full and com- "plete in Congress, and there is no limitation in the "grant of the power which excludes private con- "tracts of the nature in question from the juris- "diction of that body. Nor is any such limitation "contained in that other clause of the Constitution "which provides that no person shall be deprived "of life, liberty or property without due process of "law. It has been held that the word 'liberty' as "used in the Constitution, was not to be confined to "the mere liberty of person, but included, among "others, a right to enter into certain classes of con- "tracts for the purpose of enabling the citizen to "carry on his business. Allegeyer *vs.* Louisiana, 165 "U. S. 578; United States *vs.* Joint Traffic Associa- "tion, 171 U. S. 505, 572. But it has never been, "and in our opinion ought not to be, held that the "word included the right of an individual to enter

into private contracts upon all subjects no mat-
"ter what their nature and wholly irrespective
"(among other things) of the fact that they would,
"if performed, result in the regulation of inter-
"state commerce and in the violation of an Act of
"Congress upon that subject. The provision in the
"Constitution does not, as we believe, exclude
"Congress from legislating with regard to contracts
"of the above nature while in the exercise of its
"constitutional right to regulate commerce among
"the States. On the contrary, we think the provision
"regarding the liberty of the citizen is, to some
"extent, limited by the commerce clause of the
"Constitution, and that the power of Congress to
"regulate interstate commerce comprises the right to
"enact a law prohibiting the citizen from entering
"into those private contracts which directly and
"substantially, and not merely indirectly, remotely,
"incidentally and collaterally, regulate to a greater
"or less degree commerce among the States."

Where articles are forbidden to be transported because the owner is engaged in the carriage of like commodities for itself as well as for others, such forbidding goes beyond the province of regulation and introduces something not within the grant of a power to regulate, *i. e.*, a condemnation of a duality of ownership and transportation which had resulted from legislation by the States, in a matter over which they had control. It practically takes away property, or at least destroys the value of property, vested in its owner by the law of the only country which can control it, *i. e.*, the State in which it is located.

Commerce does not result from any grant in the Constitution, to Congress, of power to permit or disallow the same, nor from any permission by Congress. It is an inherent right, possessed by every citizen. A prohibition, therefore, which does not regulate the right, but denies and destroys it, must rest upon a power different from that granted by a permission to regulate.

The very grant of power to regulate commerce, recognizes the existence of a right to carry it on, derived from some other, and independent, source.

At the time the Constitution was adopted, commerce amongst the States existed. The power to regulate was given, not concerning something to come thereafter into existence, but concerning something then actually existing, the nature of which was thoroughly understood. The Union largely resulted from the wish to insure its continuance.

The adoption was because the different States desired, not a prohibited, but a more thoroughly protected, commerce.

In Hale *vs.* Henkle, 201 U. S., 43, 75, speaking of a corporation chartered under the laws of New Jersey, whilst admitting that its franchises were derived from the Legislature of that State, it was held by this court that the same must be exercised in subordination "to the power "of Congress to regulate such commerce." It was asserted that in respect to such subordination of exercise

> "the General Government may also assert a sover-
> "eign authority to ascertain whether such franchises
> "have been exercised in a lawful manner, with due
> "regard to its own laws."

It was added:—

> "Being subject to this dual sovereignty, the
> "General Government possesses the same right
> "to see that its own laws are respected as the
> "State would have with respect to the special
> "franchises vested in it by the laws of the State.
> "The powers of the General Government in this
> "particular in the vindication of its own laws,
> "are the same as if the corporation had been created
> "by an Act of Congress. It is not intended to
> "intimate, however, that it has a general visi-
> "tatorial power over State corporations."

In other words, the inherent right of interstate intercourse must be exercised under the supervision and control, by way of "regulation," of the General Government; but the right, itself, is independent of the General Government and must be permitted to be exercised. The right

to regulate, recognizes the existence, and power to continue, but compels action, in accordance with such rules as are necessary, to secure a non-discriminating and proper, transportation.

The right of property is one secured to every citizen of the United States, under and against the Government, by the Constitution of the United States. This right, which, as will be probably conceded, includes that of commerce, is taken away by the Commodities Clause. Countless hundreds of millions of dollars of property values are destroyed at a stroke of the Congressional pen, without evidence of the existence of any necessity for such destruction.

The interstate commerce which is forbidden by the Commodities Clause is (1) transportation of its own products by a railroad company; and (2) sales by the citizens of one State, of their property, to citizens of another State, under certain circumstances.

Whilst conceding the right to regulate the transportation in such way and manner as to compel it to conform to all such reasonable rules as the Legislature may prescribe, we deny the right to prohibit it where such rules are complied with. Included in this denial, is a denial of the conclusion that duality of ownership and of transportation, *ex necessitate*, amounts to violation of such rules of transportation. We deny the claim that an owner of property may be deprived of its beneficial use because, acting also as a transporter, it *may* do something in violation of the law, and *may* transport in such way as will favor itself and disfavor another shipper. Even though there be no such duality, the *possibility* of evil doing is limitless.

Our contention is, that neither intercourse between the States, involving a carriage of persons or of property, nor transactions of sale and purchase, involving a delivery, can be forbidden, unless the person against whom the prohibition goes, violates some law enacted properly in exercise of the power to regulate.

As we have said, such intercourse is prevented by the Commodities Clause, because the owner of coal

in most instances can transport it into another State only through the instrumentality of the very railroad company forbidden to make the transportation.

If, at the present time, a railroad company, incorporated under the law of Pennsylvania, should purchase coal lands under authority conferred by that Commonwealth, it would thereby enter into no combination in restraint of trade. The railroad and coal lands are both located in the State of Pennsylvania. The transportation of coal owned by the carrier, in interstate commerce, is not a carriage in restraint of trade. Such carriage violates no right of other persons, or of the Government. It *may* be so conducted, as to violate the rights of others, sought to be secured by proper regulations by Congress. If so, it can be punished. Punishment, however, legally inflicted, results from the doing of an illegal act. It is contrary to the Anglo-Saxon sense of justice, to inflict it before commission of such act. We are confronted by a judgment, rendered, not by Courts of Justice, but by Congress.

The regulation must be "reasonable." The thing commanded must bear some relation to that which is within the power of Congress to prescribe.

Congress has not exercised a police power. What it has done, has been merely to exercise its power to regulate commerce. This power, however, is not more extensive than that vested in the States, over persons and property, in intrastate transactions.

To prevent favoritism and discrimination, it is not necessary to deprive the carrier of its right to transport; to render useless hundreds of millions of dollars of improvements; or, practically, to destroy the value of property by forbidding its transportation. Punishment is excessive where, not because of wrong doing, but because of a fear of wrong doing, the carrier is practically deprived of what it owns.

The right of the State to regulate intrastate commerce, has repeatedly been held by this court to be not

properly exercised where the carrier has been obliged to carry at non-remunerative rates. In the present case, if the carrier is deprived of the right to transport its own coal, or that of companies in which it is a shareholder, it will be impossible for it, though obliged to perform its duties as a carrier, to earn a sufficient remuneration for the services it will render and for the property which it will employ. Deprived of their freights upon interstate coal transportation, none of the defendants can live. The expenditures which have been made upon main tracks and terminals, have been made with a view to transporting inter, more than intra, state commerce. Enormous sums have been expended at terminal points outside the State, to secure safe and speedy handling and storage of coal. Most of their daily expenses must be maintained, and interest upon loans must be paid. If interstate transportation of the carriers' own coal can be prevented, the result must be financial death.

Nothing can be more unreasonable than to say to a person who owns coal, where a common carrier has a part ownership therein, that his coal shall not be carried because the carrier has such part interest. How can the owner prevent the acquisition by the carrier, of the title of a co-coal owner?

Can anything be more unreasonable than to say to a coal company which is conducting business upon its own account, possibly doing nothing more than meeting its expenses and the interest upon its indebtedness, that it shall not have its coal transported because the carrier which must transport it, is an owner of a majority of its shares? Why should it be punished? If it be unreasonable to make such prohibition of transportation even where the carrier is a majority owner, what must be said as to the unreasonableness of such prevention where the carrier owns a minority of the shares?

What can be more unreasonable, than to say to an owner of coal who has purchased it in Pennsylvania, from a carrier by whom it had been mined under the

laws of Pennsylvania, that he shall not have it delivered in another State? This is, however, what is said, inasmuch as the carrier vendor is usually the only corporation which can transport. If the Commodities Clause be unreasonable in any of these particulars, it must fall, as did the Employers' Liability Act, because of the invalidity of one of its portions.

In this connection, it may be well to quote what has been, from time to time, said by this court, speaking through some of its greatest judges. Having already quoted *in extenso* from the Lottery Case, we will not again repeat what has already been presented.

In Northern Securities Co. *vs.* United States, 193 U. S., 197, 199, it was held:—

> "Under its power to regulate commerce among "the several States and with foreign nations. Con- "gress had authority to enact the statute in ques- "tion. United States *vs.* E. C. Knight Co., 156 "U. S., 1; United States *vs.* Trans-Missouri Freight "Association, 166 U. S., 290; United States *vs.* "Joint Traffic Association, 171 U. S., 505; Hop- "kins *vs.* United States, 171 U. S., 578; Anderson "*vs.* United States, 171 U. S., 604; Addyston Pipe "& Steel Co. *vs.* United States, 175 U. S., 211; 'Montague & Co. *vs.* Lowry, 193 U. S., 38.
>
> "Congress may protect the freedom of inter- "state commerce by any means that are appro- "priate and that are lawful and not prohibited "by the Constitution.
>
> "If in the judgment of Congress the public con- "venience or the general welfare will be best sub- "served when the natural laws of competition are "left undisturbed by those engaged in interstate "commerce, that must be, for all, the end of the "matter, if this is to remain a government of laws, "and not of men.
>
> "When Congress declared contracts, combina- "tions and conspiracies in restraint of trade or "commerce to be illegal, it did nothing more than "apply to interstate commerce a rule that had "been long applied by the several States when

"dealing with combinations that were in restraint "of their domestic commerce.

"Subject to such restrictions as are imposed by "the Constitution upon the exercise of all power, "the power of Congress over interstate and inter- "national commerce is as full and complete as is "the power of any State over its domestic com- "merce.

"No State can, by merely creating a corporation, "or in any other mode, project its authority into "other States, so as to prevent Congress from "exerting the power it possesses under the Con- "stitution over interstate and international com- "merce, or so as to exempt its corporation en- "gaged in interstate commerce from obedience "to any rule lawfully established by Congress for "such commerce; nor can any State give a cor- "poration created under its laws authority to "restrain interstate or international commerce "against the will of the nation as lawfully ex- "pressed by Congress. Every corporation created "by a State is necessarily subject to the supreme "law of the land.

"Whilst every instrumentality of domestic com- "merce is subject to State control, every instru- "mentality of interstate commerce may be reached "and controlled by national authority, so far as "to compel it to respect the rules for such com- "merce lawfully established by Congress."

In Gibbons *vs.* Ogden, 9 Wheaton, 1, 196, it was said:—

"It is the power to regulate; that is, to pre- "scribe the rule by which commerce is to be gov- "erned. This power, like all others vested in "Congress, is complete in itself, may be exercised "to its utmost extent, and acknowledges no limi- "tations, other than are prescribed in the Con- "stitution. These are expressed in plain terms, "and do not affect the questions which arise in "this case, or which have been discussed at the "bar. If, as has always been understood, the "sovereignty of Congress, though limited to spe-

"cified objects, is plenary as to those objects, the "power over commerce with foreign nations, and "among the several States, is vested in Congress "as absolutely as it would be in a single govern- "ment, having in its constitution the same restric- "tions on the exercise of the power as are found "in the Constitution of the United States. The "wisdom and the discretion of Congress, their "identity with the people, and the influence which "their constituents possess at elections, are, in "this, as in many other instances, as that, for ex- "ample, of declaring war, the sole restraints on "which they have relied, to secure them from its "abuse. They are the restraints on which the "people must often rely solely, in all represent- "ative governments.

* * * * * *

"In pursuing this inquiry at the bar, it has been "said, that the Constitution does not confer the right "of intercourse between State and State. That right "derives its source from those laws whose au- "thority is acknowledged by civilized man through- "out the world. This is true. The Constitution "found it an existing right, and gave to Congress "the power to regulate it. In the exercise of this "power, Congress has passed 'an act for enrolling "'or licensing ships or vessels to be employed in "'the coasting trade and fisheries and for regulat- "'ing the same.' The counsel for the respondent "contend that this act does not give the right to "sail from port to port, but confines itself to regu- "lating a pre-existing right, so far only as to con- "fer certain privileges on enrolled and licensed ves- "sels in its exercise.

In Adair *vs.* United States, 208 U. S., 161, it was held:—

"It is not within the power of Congress to make "it a criminal offense against the United States for "a carrier engaged in interstate commerce, or an "agent or officer thereof, to discharge an employe "simply because of his membership in a labor organ- "ization; and the provision to that effect in §10 of

"the act of June 1, 1898, 30 Stat., 424, concerning "interstate carriers is an invasion of personal "liberty, as well as of the right of property, guaran- "teed by the Fifth Amendment to the Constitution "of the United States, and is therefore unenforceable "as repugnant to the declaration of that amendment "that no person shall be deprived of liberty or "property without due process of law.

"While the rights of liberty and property guar- "anteed by the Constitution against deprivation "without due process of law, are subject to such "reasonable restrictions as the common good or "general welfare may require, it is not within the "functions of government—at least in the absence "of contract—to compel any person in the course "of his business, and against his will, either to em- "ploy, or be employed by, another. An employer "has the same right to prescribe terms on which he "will employ one to labor as an employe has to pre- "scribe those on which he will sell his labor, and any "legislation which disturbs this equality is an "arbitrary and unjustifiable interference with liberty "of contract.

"*Quaere*, and not decided, whether it is within the "power of Congress to make it a criminal offense "against the United States for either an employer "engaged in interstate commerce, or his employe, "to disregard, without sufficient notice or excuse, "the terms of a valid labor contract.

"The power to regulate interstate commerce is "the power to prescribe rules by which such com- "merce must be governed, but the rules prescribed "must have a real and substantial relation to, or "connection with, the commerce regulated, and as "that relation does not exist between the member- "ship of an employe in a labor organization and "the interstate commerce with which he is con- "nected, the provision above referred to in §10 of "the act of June 1, 1898, cannot be sustained as a "regulation of interstate commerce and as such "within the competency of Congress.

"The power to regulate interstate commerce, "while great and paramount, cannot be exerted in

"violation of any fundamental right secured by "other provisions of the National Constitution."

The court said (page 173):—

"Mr. Cooley, in his treatise on Torts, page 278, "well says: 'It is a part of every man's civil rights "'that he be left at liberty to refuse business rela- "'tions with any person whomsoever, whether "'the refusal rests upon reason, or is the result of "'whim, caprice, prejudice or malice. With his "'reasons neither the public nor third persons "'have any legal concern. It is also his right to "'have business relations with any one with whom "'he can make contracts, and if he is wrongfully "'deprived of this right by others, he is entitled "'to redress.'

"In Lochner *vs.* New York, 198 U. S. 45, 53, 56, "which involved the validity of a state enactment "prescribing certain maximum hours for labor in "bakeries, and which made it a misdemeanor for an "employer to require or permit an employe in such "an establishment to work in excess of a given num- "ber of hours each day, the court said: 'The general "'right to make a contract in relation to his business "'is part of the liberty of the individual protected by "'the Fourteenth Amendment of the Federal Con- "'stitution. Allgeyer *v.* Louisiana, 165 U. S. 578. "'* * * There are, however, certain powers, ex- "'isting in the sovereignty of each State in the "'Union, somewhat vaguely termed police powers, "'the exact description and limitation of which have "'not been attempted by the courts. These powers, "'broadly stated and without, at present, any at- "'tempt at a more specific limitation, relate to the "'safety, health, morals and general welfare of the "'public. Both property and liberty are held on "'such reasonable conditions as may be imposed by "'the governing power of the State in the exercise of "'those powers, and with such conditions the Four- "'teenth Amendment was not designed to interfere. "'Mugler *v.* Kansas, 123 U. S., 623; *In re* Kemmler, "'136 U. S., 436; Crowley *v.* Christensen, 137 U. S., "'86; *In re* Converse, 137 U. S., 624. * * * In

"'every case that comes before this court, therefore,
"'where legislation of this character is concerned,
"'and where the protection of the Federal Consti-
"'tution is sought, the question necessarily arises:
"'Is this a fair, reasonable and appropriate exercise
"'of the police power of the State, or is it an un-
"'reasonable, unnecessary and arbitrary interfer-
"'ence with the right of the individual to his personal
"'liberty or to enter into those contracts in relation
"'to labor which may seem to him appropriate or
"'necessary for the support of himself and his
"'family? Of course the liberty of contract relating
"'to labor includes both parties to it. The one has
"'as much right to purchase as the other to sell labor.'
"Although there was a difference of opinion in that
"case among the members of the court as to certain
"propositions, there was no disagreement as to the
"general proposition that there is a liberty of con-
"tract which cannot be unreasonably interfered with
"by legislation. The minority were of opinion that
"the business referred to in the New York statute
"was such as to require regulation, and that as the
"statute was not shown plainly and palpably to have
"imposed an unreasonable restraint upon freedom of
"contracts, it should be regarded by the courts as a
"valid exercise of the State's power to care for the
"health and safety of its people. * * *

"Looking alone at the words of the statute for
"the purpose of ascertaining its scope and effect,
"and of determining its validity, we hold that there
"is no such connection between interstate commerce
"and membership in a labor organization as to
"authorize Congress to make it a crime against the
"United States for an agent of an interstate carrier
"to discharge an employe because of such member-
"ship on his part. If such a power exists in Con-
"gress it is difficult to perceive why it might not,
"by absolute regulation, require interstate carriers,
"under penalties, to employ in the conduct of its
"interstate business *only* members of labor organ-
"izations, or *only* those who are *not* members of
"such organizations—a power which could not be
"recognized as existing under the Constitution of
"the United States."

In Dobbins *vs.* Los Angeles, 195 U. S., 223, 236, it was said:—

"In Lawton *v.* Steele, 152 U. S., 133, 137, Mr. "Justice Brown, speaking for the court, said upon "this subject:

"'To justify the State in thus interposing its "'authority in behalf of the public, it must appear, "'first, that the interests of the public generally, "'as distinguished from those of a particular class, "'require such interference; and, second, that the "'means are reasonably necessary for the accom- "'plishment of the purpose, and not unduly oppres- "'sive upon individuals. The legislature may not, "'under the guise of protecting the public interests, "'arbitrarily interfere with private business or "'impose unusual and unnecessary restrictions upon "'lawful occupations. In other words, its deter- "'mination as to what is a proper exercise of its "'police powers is not final or conclusive, but is "'subject to the supervision of the courts.'

"And, again, in Holden *v.* Hardy, 169 U. S., 366, "398, the same justice, again speaking for the court, "said:

"'The question in each case is whether the legis- "'lature has adopted the statute in exercise of a "'reasonable discretion, or whether its action be a "'mere excuse for an unjust discrimination, or the "'oppression or spoliation of a particular class' "* * *.

"'But, running current with this principle, and "'to be read with it, is one of equal importance, "'namely, that when the police power is exerted to "'regulate a useful business or occupation, the "'legislature is not the exclusive judge as to what "'is a reasonable and just restraint upon the con- "'stitutional right of the citizen to pursue any trade, "'business or vocation, which in itself is recognized "'as innocent and useful to the community. It "'is always a judicial question if any particular "'regulation of such right is a valid exercise of "'police power, though the power of the courts to "'declare such regulation invalid will be exercised

"'with the utmost caution, and only where it is "'clear that the ordinance or law declared void "'passes the limits of the police powers, and in- "'fringes upon rights guaranteed by the Constitu- "'tion.'

"Applying the principles settled by these decis- "ions to the allegations of the bill, admitted by "the demurrer, we think a case is made which "called for the protection of the courts against "arbitrary interference with the rights of the plain- "tiff in error. Complying with the terms of the "ordinance which was in force when the plaintiff "in error was about to begin the erection of the "gas works in controversy, a tract of land was "purchased within the district wherein the erection "of such works was permitted, a contract was "entered into for the construction of the works, "a considerable sum of money was expended. It "may be admitted as being a correct statement "of the law as held by the California Supreme "Court that, notwithstanding the grant of the "permit, and even after the erection of the works, "the city might still, for the protection of the "public health and safety, prohibit the further "maintenance and continuance of such works, "and the prosecution of the business, originally "harmless, may become, by reason of the manner "of its prosecution or a changed condition of the "community, a menace to the public health and "safety. In other words, the right to exercise the "police power is a continuing one, and a business "lawful to-day may in the future, because of the "changed situation, the growth of population or "other causes, become a menace to the public "health and welfare, and be required to yield to "the public good. Fertilizing Co. *v.* Hyde Park, "97 U. S., 659; New Orleans Gas Co. *v.* Louisiana "Light Co., 115 U. S., 650, 672. But the exercise "of the police power is subject to judicial review "and property rights cannot be wrongfully de- "stroyed by arbitrary enactment. It was averred "that the works would be so constructed so as "not to interfere with the health or safety of the

"people. No reasonable explanation for the ar-
"bitrary exercise of power in the case is suggested.
"The narrowing of the limits within which the
"plaintiff in error, in compliance with the ordinance
"of the city and the permit of the board of fire
"commissioners, was proceeding to erect the gas-
"works, to the smaller and more limited section,
"was not demanded by the public welfare, and,
"taking the facts as alleged in the bill, seems
"rather to have been actuated by a purpose to
"exclude the plaintiff in error from further prose-
"cution of the enterprise. The limits of the priv-
"ileged district were fixed late in August. In Sep-
"tember the complainant began the construction
"of the works. In November, without changed
"conditions or adequate reason, the council by an
"amended ordinance drew a line embracing a part
"of the district including the complainant's prop-
"erty, and declared that, too, shall be prohibited
"territory. This action is strongly corroborative
"of the allegations of the bill that the purpose was
"not police regulation in the interest of the public
"but the destruction of the plaintiff's rights and
"the building up of another company still within
"the privileged district after the passage of the
"amendment. Being the owner of the land and
"having partially erected the works the plaintiff
"in error had acquired property rights and was
"entitled to protection against unconstitutional
"encroachments which would have the effect to
"deprive her of her property without due process
"of law."

It is true, in the last case, this court was dealing with the exercise by the State of its police power; but, as we have already suggested, this power is certainly as broad as, and, we submit, broader than, the power of Congress to regulate commerce.

In Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, it was held:—

"Power given to Congress to regulate interstate
"commerce does not carry with it authority to

"destroy or impair those fundamental guarantees "of personal rights that are recognized by the "Constitution as inhering in the freedom of the "citizen."

In *ex parte* Jackson, 96 U. S., 727, it was held:—

"Letters, and sealed packages subject to letter "postage, in the mail can be opened and examined "only under like warrant, issued upon similar oath "or affirmation, particularly describing the thing "to be seized, as is required when papers are sub- "jected to search in one's own household. The "constitutional guaranty of the right of the people "to be secure in their papers against unreasonable "searches and seizures extends to their papers, "thus closed against inspection, wherever they "may be.

"Regulations against transporting in the mail "printed matter, which is open to examination "cannot be enforced so as to interfere in any man- "ner with the freedom of the press. Liberty of "circulating is essential to that freedom. When "therefore, printed matter is excluded from the "mail, its transportation in any other way as "merchandise cannot be forbidden by Congress."

The court said (page 735):—

"But it is evident that they were founded upon "the assumption that it was competent for Con- "gress to prohibit the transportation of news- "papers and pamphlets over postal-routes in any "other way than by mail; and of course it would "follow, that if, with such a prohibition, the trans- "portation in the mail could also be forbidden, "the circulation of the documents would be de- "stroyed, and a fatal blow given to the freedom "of the press. But we do not think that Congress "possesses the power to prevent the transpor- "tation in other ways, as merchandise, of matter "which it excludes from the mails. To give ef- "ficiency to its regulations and prevent rival postal "systems, it may perhaps prohibit the carriage

"by others for hire, over postal routes, of articles
"which legitimately constitute mail matter, in
"the sense in which those terms were used when
"the Constitution was adopted, consisting of letters,
"and of newspapers and pamphlets, when not sent
"as merchandise; but further than this its power
"of prohibition cannot extend."

In Chicago Railway Co. *vs.* Minnesota, 134 U. S., 418, 455, it was said, quoting from the opinion in Stone *vs.* Farmers Loan & Trust Co., 116 U. S., 307, 331:—

"'From what has thus been said, it is not to be
"'inferred that this power of limitation or regula-
"'tion is itself without limit. This power to regu-
"'late is not a power to destroy, and limitation is not
"'the equivalent of confiscation. Under pretense
"'of regulating fares and freights, the State cannot
"'require a railroad corporation to carry persons
"'or property without reward; neither can it do
"'that which in law amounts to a taking of private
"'property for public use without just compensa-
"'tion, or without due process of law.'"

We have been unable to find any decision by this court, holding that a transportation, conducted in accordance with rules prescribed for the regulation of commerce, of an article not harmful, but, on the contrary, constituting a necessity of life, can be prohibited, because of the power to regulate.

The Attorney General referred, in his oral argument in the court below, to Union Bridge Co. *vs.* United States, 204 U. S., 364, in which it was held that it was within the power of Congress, without affording compensation, to cause a bridge to be removed which obstructed navigation. In that case, however, what was held, was what had practically always been held, *i. e.*, that the power to regulate commerce includes the power to remove all obstructions to the navigation of navigable rivers. Any other holding would permit an individual to encroach upon a public highway (a navigable river), and obstruct

the same perpetually, unless compensated for the removal of such obstruction.

Whilst a bridge, constructed at a past time, which, later, encroaches upon a navigable river, might not have obstructed such navigation as, at the time of its erection, was being conducted, the person who built was bound to know that his encroachment was subject to a paramount power in Congress, at any time, to cause to be thrown open to the public, when its needs should demand, the entire highway.

There is no similitude between a power to remove an obstruction to navigation and the power to forbid the use, by a railroad company, of a highway constructed by it *inter alia* for its own purposes of transportation—a use obstructing neither a natural nor an artificial way.

In the course of the opinion in the Union Bridge case, Mr. Justice Harlan said (page 399):—

> "Unless there be a taking within the meaning of "the Constitution, no obligation arises upon the "United States to make compensation for the cost "to be incurred in making such alterations. The "damage that will accrue to the Bridge Company as "the result of compliance with the Secretary's order "must, in such case, be deemed incidental to the "exercise by the Government of its power to regulate "commerce among the States, which includes, as "we have seen, the power to secure free navigation "upon the waterways of the United States against "unreasonable obstructions. There are no circum-"stances connected with the original construction "of the bridge or with its maintenance since which "so tie the hands of the Government that it cannot "exert its full power to protect the freedom of navi-"gation against obstructions. * * *
>
> "In conformity with the adjudged cases and in "order that the constitutional power of Congress "may have full operation, we must adjudge that "Congress has power to protect navigation on all "waterways of the United States against unrea-"sonable obstructions, even those created under "the sanction of a state, and that an order to so

"alter a bridge over a waterway of the United "States that it will cease to be an unreasonable "obstruction to navigation will not amount to a "taking of private property for public use, for "which compensation need be made. * * *

"The charter of the Company, as we have seen it, "expressly warned the Company that its bridge "must not obstruct navigation—that is, in legal "effect navigation as it then was or might be at "any subsequent time."

So that, in point of fact, the bridge company in that case took nothing by its charter as against, but built subject to, the right of the United States to open the navigation of the river, when such opening should become necessary.

In the opinion delivered in the Union Bridge case, by Judge Buffington, in the court below, he said (143 Fed., 377, 388):—

"The facts are not, as they were in the case of "the Monongahela Navigation Company *vs.* United "States, 148 U. S., 312. Its bridge is not taken "and used by the government for public purposes, "as were the dams and locks of the navigation com- "pany in that case. Indeed, the right of the bridge "company to maintain a bridge and to collect tolls "thereon is not denied, much less taken, and the "effect of this proceeding is not to take or condemn "its property, but is simply to compel the company "to so use its property as not to interfere with the "right of the public to an unobstructed use of the "stream. It is simply the enforcement of the time- "honored maxim which qualifies the absolutism of "all property rights: '*Sic utere tuo ut non alienum* "'*laedas.*' 'So use your own as not to injure an- "'other's property.'"

The unreasonableness of the Commodities Clause, as a regulation, appears, when we consider that it can only be justified upon the assumption that a carrier who transports his own coal, as well as that of others, *must* discriminate.

There has never been any judicial determination that discrimination is a necessary result of duality of ownership and transportation. It may be that there is a temptation to discriminate; but the wrong-doing consists not in the temptation, but in the yielding thereto—in an actual discrimination. The machinery of courts of justice is sufficient to determine, as a matter of fact, whether the carrier does, or does not, discriminate, and to punish him for the fact. To punish because of apprehensions is akin to ancient methods of witch detection. Wrong-doing, as we have said, is a fact to be ascertained judicially, not to be assumed by Congress.

In the Act to which the Hepburn Act is a supplement, and in the Hepburn Act itself, the discrimination and favoritism which are assumed to result from duality of ownership and transportation, are specified, condemned and penalized. Ample machinery is provided to ascertain their existence. The penalties imposed are such as are more than likely to deter from their perpetration. How then can it be proper, after providing ample regulations in all the particulars necessary to secure a uniform enjoyment of the right of transportation, in the absence of any finding of violation, to deprive the carrier of its property, and the owners of coal of their right to deal with the same in commerce, because it may eventuate that the machinery for detection and punishment will prove insufficient?

It is true that in the Northern Securities case this court thought concentration of shares of competing railroad companies should be forbidden because the power to prevent competition was thereby acquired. It must be borne in mind, however, that a combination to prevent competition was of itself wrong, and that the question was not whether the railroad company should be deprived of a right because it would thereby possess a power which would enable it to do wrong, but whether it should be permitted to make an illegal combination which would enable it so to do.

Much reliance is placed by the Government upon the opinion of this court, written by Mr. Justice White, in

New Haven Ry. Co. *vs.* Interstate Commerce Commission, 200 U. S., 361. This opinion discloses, in the mind of the learned justice, the greatest aversion to duality of ownership and transportation; but the decision was rendered in a case in which the carrier, practically in violation of the law of the State in which it was located, had purchased coal for the purpose of transporting, and had transported the same in such way as discriminated against other shippers. The fact of discrimination alone was in question, and it was judicially ascertained to exist and was thereupon punished. Nowhere, in the course of the opinion, does it appear that the courts are powerless, in case of favoritism or of discrimination on the part of a railroad company, to ascertain the fact. What is there in the situation presented in the case of duality of ownership and of transportation, which renders the courts powerless to determine whether or not anything wrong has been done?

It must also be borne in mind that the learned justice was not dealing with a case in which there was a vested right to continue to trade in the article to be transported, acquired by express grant. Nowhere, in the course of the opinion, is anything said which would justify the claim of a right practically to confiscate property, such as is set up, in the present case, by the United States.

In order that we may see precisely what was said, and held, in the New Haven case, we will quote *in extenso* from the opinion, 382:—

> "Specifying the grounds of the complaint, it "was alleged that in the spring of 1903, the Chesa- "peake and Ohio made a verbal agreement with "the New Haven to sell to that road sixty thou- "sand tons of coal, to be carried from the Kanawha "district to Newport News, and thence by water "to Connecticut, for delivery to the buyer at $2.75 "per ton, and that a considerable portion had "already been delivered and the remainder was "in process of delivery. It was averred that the "price of the coal at the mines where the Chesa- "peake and Ohio bought it and the cost of trans-

"portation from Newport News to Connecticut "would aggregate $2.47 per ton, thus leaving to "the Chesapeake and Ohio only about twenty- "eight cents a ton for carrying the coal from the "Kanawha district to Newport News, whilst the "published tariff for like carriage from the same "district was $1.45 per ton. * * *

"The prayer was that the Chesapeake and Ohio "and the New Haven be made parties; that both "roads be enjoined, the one from further executing "the verbal agreement to deliver coal and the other "from seeking to enforce it; that the Chesapeake "and Ohio be enjoined from 'accepting or receiving "'any rebate, concession or discrimination in re- "'spect of the transportation of any property in "'interstate or foreign commerce carried by it,' "and be moreover, enjoined from 'doing anything "'whatever, whereby coal or any other property "'shall, by any device whatever, be transported "'* * * at a less rate than named in the tariffs "'published and filed by such carrier, as is required "'by the act to regulate commerce and acts amen- "'datory thereof or supplementary thereto, or "'whereby any other advantage may be given or "'discrimination practiced.' And that the New "Haven road 'be enjoined and restrained from "'accepting or receiving any rebate, concession "'or discrimination in respect of the transportation "'of any property in interstate or foreign com- "'merce carried by it.' * * *

"The right of the Chesapeake and Ohio to buy "and sell coal, and to impute any loss on the sale "of the coal to itself as dealer instead of to itself "as carrier, was averred. * * *

"It denied that there was any departure from "the public rates or any discrimination, asserted "that at the time the original contract was made "the price was sufficient to have enabled the Ches- "apeake and Ohio to perform the contract without "losing anything either as a seller or as a carrier, "and that if in execution of the contract a con- "dition arose where a loss was suffered by the "Chesapeake and Ohio in either capacity, it was

"caused by subsequent events which could not "affect the validity of the contract when made, "and especially denied that in any way, directly "or indirectly, had it knowingly lent itself to any "discrimination, or any taking by the Chesapeake "and Ohio of less than its published rates. * * *

"For reasons to which we shall hereafter have "occasion to advert, the court held that, con- "sidering both the original contract and the verbal "agreement of 1903, there was no violation of the "provisions of the second and sixth sections of "the act to regulate commerce, forbidding the "taking of less than the published rates. It, how- "ever, held that the contracts amounted to an "undue discrimination and a violation of the third "section of the act. * * *

"On December 3, 1896, these two roads entered "into a written contract, the one to sell and the "other to buy between July 1, 1897, and July 1, "1902, not to exceed two million gross tons of "bituminous coal to be taken from the line of the "Chesapeake and Ohio road; deliveries to be made "not exceeding four hundred thousand tons per "annum. The price agreed upon was $2.75 per "gross ton, New Haven basis, settlement to be "made monthly. The coal was to be delivered by "the seller on the line of the New Haven. The "contract is reproduced in the margin.

"The Chesapeake and Ohio, not in its own name "but through others who really although not osten- "sibly acted for it, made a contract with operators "in the New River district of West Virginia, for "the delivery to it of the coal to fulfill the contract "which had been made with the New Haven. * *

"At the time this verbal agreement was made "the contract price was, leaving out of view the "claim for damages, inadequate to pay the market "price, as admitted by the pleadings, of the coal "plus the published rates of the Chesapeake and "Ohio to Newport News, and the charges thence "to the point of delivery. To put itself in a po- "sition to carry out the agreement an individual "who represented the Chesapeake and Ohio made

"contracts in his own name with operators in the "Kanawha district to furnish the desired coal. "Without stopping to state the particular methods "of accounting by which the result was accom- "plished, it is indisputable that the Chesapeake "and Ohio bore the loss arising from the difference "between the contract price, the price of the coal "at the mines, the published rate to Newport "News, and the cost of transporting thence to "the point of delivery.

"Undoubtedly long prior to the making of the "first contract the Chesapeake and Ohio, besides "its business as a carrier, bought and sold coal. "This business was carried on by the company "from about 1874 up to the time of the making "of the contract of 1896, as testified by the presi- "dent who made that contract, as follows:

"'The coal was handled by a separate and dis- "'tinct department of the railway company, the "'mine operators delivering for an agreed price "'at the mines to the coal agent of the railway "'company all coal mined by them, the net result "'realized from the selling price of the coal repre- "'senting the freight earned by the railway com- "'pany.'

"And the same official testified that he made "the contract of 1896 as a continuation of this "system.

"In 1895, however, the State of West Virginia "passed 'An act to prevent railroad companies "'from buying and selling coal or coke and to "'prevent discrimination.' The first section of "this act made it unlawful for any railroad cor- "poration to engage directly or indirectly in the "business of buying and selling coal or coke. In "consequence of this act, prior to the making of "the contract of 1896, the coal department of the "railroad was abolished. And it was the existence "of the West Virginia statute which caused the "Chesapeake and Ohio, when it contracted with "operators in West Virginia to procure as to both "contracts the coal for delivery to the New Haven "to do so not in its own name but through an- "other. * * *

"We must determine a question of fact as to "which there is some dispute; that is, was the "price at which the Chesapeake and Ohio con- "tracted in 1896 to sell the coal to the New Haven "sufficient to pay the cost of the coal at the mines, "as well as the expense of delivery, including the "published freight rate? Without stopping to go "into the evidence we content ourselves with "saying that we think the court below correctly "held that the price was not adequate to accomplish "these purposes, and that from the inception of "delivery under the contract, and during the whole "period thereof, except for a brief time, caused "by a lowering of the freight rates, the contract "price was inadequate to net the railroad its proper "legal tariff. * * *

"In approaching the consideration of the act to "regulate commerce, we for a moment put out of "view the provisions of the West Virginia statute "and its influence upon the validity of the contract "made in West Virginia for the purpose of ac- "quiring the coal which the Chesapeake and Ohio "had obligated itself to deliver. We shall also "assume for the purpose of the inquiry that the "Chesapeake and Ohio, although not expressly "authorized, was not prohibited by its Virginia "charter from buying and selling and transporting "the coal in which it dealt. The case, therefore, "will be considered solely in the light of the oper- "ation and effect of the provisions of the act to "regulate commerce, and we shall not direct our "attention to expressly determining whether the "assertion by a carrier of a right to deal in the "products which it transports would not be so "repugnant to the general duty resting on the "carrier as to cause the exertion of the power to "deal in the products which it transports to be "unlawful, irrespective of statutory restrictions.

"The question, therefore, to be decided is this: "Has a carrier engaged in interstate commerce "the power to contract to sell and transport in "completion of the contract the commodity sold, "when the price stipulated in the contract does "not pay the cost of purchase, the cost of delivery "and the published freight rates? * * *

"It cannot be challenged that the great purpose "of the act to regulate commerce, whilst seeking "to prevent unjust and unreasonable rates was to "secure equality of rates as to all and to destroy "favoritism, these last being accomplished by "requiring the publication of tariffs and by pro- "hibiting secret departures from such tariffs, and "forbidding rebates, preferences and all other "forms of undue discrimination. To this extent "and for these purposes the statute was remedial "and is, therefore, entitled to receive that inter- "pretation which reasonably accomplishes the great "public purpose which it was enacted to subserve. "That a carrier engaged in interstate commerce "becomes subject as to such commerce to the "commands of the statute, and may not set its "provisions at naught whatever otherwise may "be its power when carrying on commerce not "interstate in character, cannot in reason be de- "nied. Now, in view of the positive command "of the second section of the act, that no departure "from the published rate shall be made, 'directly "or indirectly,' how can it in reason be held that "a carrier may take itself from out the statute in "every case by simply electing to be a dealer and "transport a commodity in that character? * * *

"The all-embracing prohibition against either "directly or indirectly charging less than the "published rates shows that the purpose of the "statute was to make the prohibition applicable "to every method of dealing by a carrier by which "the forbidden result could be brought about. "If the public purpose which the statute was "intended to accomplish be borne in mind, its "meaning becomes, if possible, clearer. What was "that purpose? It was to compel the carrier as "a public agent to give equal treatment to all. "Now if by the mere fact of purchasing and selling "merchandise to be transported a carrier is en- "dowed with the power of disregarding the pub- "lished rate, it becomes apparent that the carrier "possesses the right to treat the owners of like "commodities by entirely different rules. That

"is to say, the existence of such a power in its "essence would enable a carrier, if it chose to do "so, to select the favored persons from whom he "would buy and the favored persons to whom he "would sell, thus giving such persons an advantage "over every other, and leading to a monopolization "in the hands of such persons of all the products "as to which the carrier chose to deal. Indeed "the inevitable result of the possession of such "a right by a carrier would be to enable it, if it "chose to exercise the power, to concentrate in "its own hands the products which were held for "shipment along its line, and to make it, therefore, "the sole purchaser thereof and the sole seller at "the place where the products were to be marketed; "in other words, to create an absolute monopoly. "To illustrate: If a carrier may by becoming a "dealer buy property for transportation to a market "and eliminate the cost of transportation to such "market, a faculty possessed by no other owner "of the commodity, it must result that the carrier "would be in a position where no other person "could ship the commodity on equal terms with "the carrier in its capacity of dealer. * * * "For here it is unquestioned that the Chesapeake "and Ohio, as a result of its being a dealer, had "become, long prior to the adoption of the Inter-"state Commerce Law and continued to be there-"after, up to the passage of the West Virginia "statute prohibiting a carrier from dealing in coal, "virtually the sole purchaser and seller of all the "coal produced along the line of its road. * * *

"And the considerations previously stated serve "also to demonstrate that the prohibitions of the "act to regulate commerce concerning 'undue or "'unreasonable preference or advantage,' 'undue "'or unreasonable prejudice or disadvantage' and "'unjust discrimination' are in conflict with the "asserted right of a carrier to become a dealer in "commodities which it transports, and as such "dealer to sell at a price less than the cost and the "published rates. * * *

"As we have seen, the president of the Chesa-

"peake and Ohio, by whom the corporation was "represented in making the contract, expressly "testified that from the beginning that corporation "had pursued the policy of acquiring all the coal "mined on its line and sold it, relying upon the "net result of such sales for its freight compen- "sation, and that the particular contract was made "in continuation of that policy. * * * Indeed, "the proof leaves no doubt upon our minds that, "in making the contract, the Chesapeake and Ohio "sought to accomplish results which it deemed "beneficial by means which it considered effectual, "even although resort to such means was pro- "hibited by the Interstate Commerce Act. In "other words, we think it is established beyond "doubt that, desiring to stimulate the production "of coal along its line and thereby, as it conceived, "to increase the carriage of that commodity and "to benefit the railroad and those living along "its line by the reflex prosperity which it was "deemed would arise from giving a stimulus to "an industry tributary to the railroad, the Chesa- "peake and Ohio bought and sold the coal with- "out reference to whether the net result to it would "realize its published rates. * * *

"Further, as the prohibition of the Interstate "Commerce Act is ever operative, even if the facts "established that at the particular time the con- "tract was made, considering the then cost of coal "and other proper items, the net published tariff "of rates would have been realized by the Chesa- "peake and Ohio from the contract, which is not "the case, it is apparent that the deliveries under "the contract came under the prohibition of the "statute whenever for any cause, such as the en- "hanced cost of the coal at the mines, an increase "in the cost of the ocean carriage, etc., the gross "sum realized was not sufficient to net the Chesa- "peake and Ohio its published tariff of rates. "* * * We say this because we think it ob- "vious that such prohibitions would be rendered "wholly ineffective by deciding that a carrier may "avoid those prohibitions by making a contract

"for the sale of a commodity stipulating for the "payment of a fixed price in the future, and thereby "acquiring the power during the life of the con- "tract to continue to execute it, although a viola- "tion of the act to regulate commerce might arise "from doing so. * * *

"Because no express prohibition against a carrier "who engages in interstate commerce becoming a "dealer in commodities moving in such commerce "is found in the act, it does not follow that the "provisions which are expressed in that act should "not be applied and be given their lawful effect. "Even, therefore, if the result of applying the pro- "hibitions as we have interpreted them will be "practically to render it difficult, if not impossible, "for a carrier to deal in commodities, this affords "no ground for relieving us of the plain duty of "enforcing the provisions of the statute as they "exist. This conclusion follows, since the power "of Congress to subject every carrier engaging in "interstate commerce to the regulations which it "has adopted is undoubted. * * *"

"It was shown in both cases that the carriers "prior to the adoption of the Interstate Commerce "Act were authorized by their charters or legis- "lative authority to carry on both the business "of mining and selling the coal so mined and trans- "porting the same to market. Indeed it was "found in both cases that the functions of pro- "ducing and transporting, as authorized, were "so interblended that it was impossible to separate "one from the other. Whilst it is true that in "both of the cases it was also shown that the car- "riers bought, sold and transported some coal "which was not produced in the mines which they "owned, this fact was evidently treated in view "of the other circumstances of the case as of minor "importance, since the commingled powers of pro- "ducing, selling and transporting were alone made "the basis of the conclusion reached by the Com- "mission as to the character of relief which could "be afforded. Solely in view of the lawful power "of the carriers to mine, sell and transport existing

"before the passage of the act to regulate commerce "the Commission decided that its authority, under "that statute and under the circumstances of the "case, was confined to compelling the exaction of "rates which were just and reasonable. The fact "that the rulings in the two cases just referred to "were solely placed upon the peculiar powers of "the defendant corporations possessed by them "prior to the passage of the Interstate Commerce "Act was pointed out by the Commission in Grain "Rates of Chicago Great Western Ry. Co., 7 Inters. "Com. Rep. 33. * * *

"The Haddock and Coxe cases, said (p. 38):

"'Those cases are in no respect similar to this. "'In both the common carrier was also the owner "'of extensive coal fields, and indeed it had be- "'come a common carrier largely for the purpose "'of transporting the product of those mines to "'market. This state of things existed before the "'passage of the act, and had no reference to the "'act. Unless the carrier was permitted to trans- "'port its coal, the result would be in effect the "'confiscation of its property, and to order it to "'charge itself with a particular rate would merely "'result in a matter of bookkeeping. Under these "'circumstances it was held that the only remedy "'was to enquire whether the rate charged the "'complainant was a reasonable one.'

"Now, without at all intimating that as an "original question we would concur in the view "expressed in the case last cited that to have ap- "plied the act to regulate commerce, under proper "rules and regulations for the segregation of the "business of producing, selling and transporting "as presented in the Haddock and Coxe cases, "would have been confiscatory, and without re- "viewing the rulings made by the Interstate Com- "merce Commission in those cases and adhered "to by that body during the many years which "have followed those decisions, we concede that "the interpretation given by the Commission in "those cases to the act to regulate commerce is "now binding, and as restricted to the precise

"conditions which were passed on in the cases "referred to, must be applied to all strictly identical "cases in the future, at least until Congress has "legislated on the subject."

When Mr. Justice White spoke of "segregation," it was of such segregation of the business of producing, of selling and of transporting, as would apply to each branch of the business, the Act to regulate commerce, without permitting one to cover something improper in the other.

It is obvious that what was said in England, is inapplicable here, inasmuch as, there, the carriers come into existence under Act of Parliament, their powers being derived therefrom. The body which grants the power, can put upon such grant, conditions. If, therefore, in England, the Parliament was of the opinion that duality of ownership and transportation was contrary to public policy, it had an unlimited power so to declare and to enforce the declaration by prohibition. It could say, as a condition of corporate birth, that the carrier should engage in no other business. Necessarily, if, after it had thus said, the carrier, in violation of the declaration, acquired property, it could be forbidden to transport the same. Such forbidding was a proper punishment, for deliberate violation of a valid law.

In our case, however, it is not within the power of Congress to limit the charter rights of railroad corporations. The State may confer upon them whatever powers it may see fit. It may forbid them from engaging in any other business; or, being of the opinion that it is necessary to permit them to invest their capital in the development of the mineral wealth of the Commonwealth for the public benefit, it may permit such investment. The policy to be considered is the policy of the State of Pennsylvania, as the same existed when the powers were granted and contractual rights arose. What was by the State permitted can be availed of, without subjecting the defendants in error to the charge of wrong doing.

We concede that the State cannot, by its legislation, control, in any way, the conduct of interstate commerce by

a carrier by it created; but, when Congress undertakes to deal with such carrier, it must recognize a situation which has legally resulted from the exercise of State power. It must recognize the fact, that the carrier is the owner of the coal by legal grant and is entitled to whatever rights of commerce in, and with, its property are vested in a citizen.

We cannot too often call attention to the fact that *quâ* the owner of the coal, there is a prohibition, though his title is perfect, none the less perfect because acquired from a railroad company, against the exercise of his right; and this although he has nothing whatever to do with conducting the interstate transportation and depends upon an entirely independent corporation, *i. e.*, the vendor railroad company, for its carriage.

In this connection it may not be amiss to quote from Schollenberger *vs.* Pennsylvania, 171 U. S., 1, 14:—

> "We do not think the fact that the article is "subject to be adulterated by dishonest persons, "in the course of its manufacture with other sub- "stances, which it is claimed may in some instances "become deleterious to health, creates the right in "any State through its legislature to forbid the "introduction of the unadulterated article into the "State. The fact that the article is liable to adul- "teration in the course of manufacture, and that the "articles with which it may be mixed may possibly "and under some circumstances be deleterious to the "health of those who consume it, is known to us by "means of various references to the subject in books "and encyclopædias, but there is no affirmative "evidence offered on the trial to prove the fact. "From these sources of information it may be "admitted that oleomargarine in the course of its "manufacture may sometimes be adulterated by "dishonest manufacturers with articles that possibly "may become injurious to health. Conceding the "fact, we yet deny the right of a State to absolutely "prohibit the introduction within its borders of an "article of commerce, which is not adulterated and "which in its pure state is healthful, simply because

"such an article in the course of its manufacture "may be adulterated by dishonest manufacturers "for purposes of fraud or illegal gains. The bad "article may be prohibited, but not the pure and "healthy one."

Were it not for the fact, that owing to the manner in which the mines are located, practically but one railroad company can carry therefrom, the Act could be rendered abortive by delivery by all the coal companies whose shares are owned by each railroad company, of their product, to another railroad company, and *vice versa*. The situation is such that the prohibition of carriage by the railroad company interested in the coal, amounts to a prohibition against any carriage, and the Act which under ordinary circumstances would be far less harmful, will perpetrate the greatest wrong.

It is sometimes said, that the power to regulate domestic and foreign commerce, conferred in the same clause, and in the same language, is equally extensive in both cases. This statement, however, ignores the fact that whilst the power to regulate is expressed in the same language, there is a difference in the thing to be regulated. There is a vast difference between domestic and foreign commerce, and in the rights of citizens to conduct one, or the other.

Foreign commerce is the intercourse between two countries, which, often, may be hostile. In determining the extent of, and limitations upon, foreign commerce, we have recourse to the law of nations. We find that one nation, for the protection of its citizens and its property, may put an embargo upon trade and fetter the intercourse. Were it otherwise, the nation itself might be destroyed, because of its inability to protect itself against the danger of unlimited intercourse. When, therefore, Congress regulates foreign commerce, it regulates something which has inherent limitations. The nation's protection may be involved in the exercise of a power, under certain circumstances, to bar all communication. There is no need, and no right, to forbid the citi-

zens of one State from transferring their possessions and their persons to another.

The theory of the Government is, that Congress may destroy the existence of several branches of commerce, and regulate what remains.

Domestic commerce is very different in its nature, scope and extent. It is the intercourse between the citizens of the different States in the transportation of persons and property from one to the other. This intercourse between citizens of the different States is an intercourse of persons, all of whom are citizens of a Union, which was largely created in order to bring about unlimited intercourse, saving only to such extent as it should be found necessary to regulate the same.

We claim that it is a fundamental right of every owner of property in one State, to sell it to citizens of another State, and to have the same, when thus sold, transported. This right cannot be forbidden by Congress. However the intercourse may be regulated, such regulation must proceed upon the concession of the inability to deprive, altogether, of the right.

If Congress may forbid commerce between the States in the sense of transactions in trade in harmless articles, it may forbid intercourse between persons. It may forbid the carrier to transport its shareholders or its directors, because it may be tempted to give them greater privileges in their carriage.

We are not, for the moment, dwelling upon the constitutional restrictions upon the exercise of the power to regulate; but upon the existence of an absolute right to commercial intercourse, which, however it may be regulated, cannot be destroyed.

In Buttfield *vs.* Stranahan, 192 U. S., 492, it is said:—

> "Whatever difference of opinion, if any, may have "existed or does exist concerning the limitations of "the power, resulting from other provisions of the "Constitution, so far as interstate commerce is con- "cerned, it is not to be doubted that from the

"beginning Congress has exercised a plenary power "in respect to the exclusion of merchandise brought "from foreign countries; not alone directly by the "enactment of embargo statutes, but indirectly as "a necessary result of provisions contained in tariff "legislation. It has also, in other than tariff legis- "lation, exerted a police power over foreign com- "merce by provisions which in and of themselves "amounted to the assertion of the right to exclude "merchandise at discretion. This is illustrated by "statutory provisions which have been in force for "more than fifty years, regulating the degree of "strength of drugs, medicines and chemicals entitled "to admission into the United States and excluding "such as did not equal the standards adopted. "9 Stat. 237; Rev. Stat. sec. 2933 *et seq.*

"The power to regulate foreign commerce is cer- "tainly as efficacious as that to regulate commerce "with the Indian tribes. And this last power was "referred to in United States *v.* 43 Gallons of "Whiskey, 93 U. S., 188, 194, as exclusive and "absolute and was declared to be 'as broad and "'as free from restrictions as that to regulate com- "'merce with foreign nations.' In that case it was "held that it was competent for Congress to extend "the prohibition against the unlicensed introduction "and sale of spirituous liquors in the Indian country "to territory in proximity to that occupied by the "Indians, thus restricting commerce with them. "We entertain no doubt that it was competent for "Congress, by statute, under the power to regulate "foreign commerce, to establish standards and pro- "vide that no right should exist to import teas "from foreign countries into the United States, "unless such teas should be equal to the standards.

"As a result of the complete power of Congress "over foreign commerce, it necessarily follows that "no individual has a vested right to trade with "foreign nations, which is so broad in character as "to limit and restrict the power of Congress to "determine what articles of merchandise may be "imported into this country and the terms upon "which a right to import may be exercised. This

"being true, it results that a statute which restrains "the introduction of particular goods into the "United States from considerations of public policy "does not violate the due process clause of the "Constitution."

The Commodities Clause forbids a carrier, which finds it necessary, to use small sizes in economically firing of its locomotives, and which, to get the same, breaks up lump coal in the ordinary course of its business, if it has on hand larger sizes as residuaries, to sell the same. A carrier may have purchased more material than was actually necessary, to enable it to make some improvement, or it may have on hand worn out rails, and second hand machinery. It cannot sell these, if the Commodities Clause is valid, to the citizens of another State, requiring the same to be delivered.

Whether this forbidding be viewed from the standpoint of unreasonableness, or from that of an exercise of a power which does not exist, it is equally indefensible.

In United States *vs.* Joint Traffic Association, 171 U. S., 505, it was held:—

"That Congress, with regard to interstate com- "merce, and in the course of regulating it in the "case of railroad corporations, has the power to "say that no contract or combination shall be "legal, which shall restrain trade and commerce, "by shutting out the operation of the general law "of competition."

This court said (page 570):—

"Although the franchise when granted by the "State becomes by the grant the property of "the grantee, yet there are some regulations respect- "ing the exercise of such grants which Congress may "make under its power to regulate commerce among "the several States. This will be conceded by all, "the only question being as to the extent of the "power.

"We think it extends at least to the prohibition "of contracts relating to interstate commerce, "which would extinguish all competition between "otherwise competing railroad corporations, and "which would in that way restrain interstate trade "or commerce. We do not think, when the grantees "of this public franchise are competing railroads "seeking the business of transportation of men and "goods from one State to another, that ordinary "freedom of contract in the use and management "of their property requires the right to combine as "one consolidated and powerful association for the "purpose of stifling competition among themselves, "and of thus keeping their rates and charges higher "than they might otherwise be under the laws of "competition. * * *

"The cases cited by the respondents' counsel in "regard to the general constitutional right of the "citizen to make contracts relating to his lawful "business are not inconsistent with the existence of "the power of Congress to prohibit contracts of the "nature involved in this case. The power to regu- "late commerce has no limitation other than those "prescribed in the Constitution. The power, how- "ever, does not carry with it the right to destroy "or impair those limitations and guarantees which "are also placed in the Constitution or in any of "the amendments to that instrument. Mononga- "hela Navigation Co. *v.* United States, 148 U. S., "312–336; Interstate Commerce Commission *v.* "Brimson, 154 U. S., 447–479.

"Among these limitations and guarantees counsel "refer to those which provide that no person shall "be deprived of life, liberty or property without "due process of law, and that private property "shall not be taken for public use without just "compensation. The latter limitation is, we think, "plainly irrelevant.

"As to the former, it is claimed that the citizen "is deprived of his liberty without due process of "law when, by a general statute, he is arbitrarily "deprived of the right to make a contract of the "nature herein involved.

"The case of Allgeyer *v.* Louisiana, 165 U. S., 578, "is cited as authority for the statement concerning "the right to contract. In speaking of the meaning "of the word 'liberty,' as used in the Fourteenth "Amendment to the Constitution, it was said in "that case to include, among other things, the "liberty of the citizen to pursue any livelihood or "vocation, and for that purpose to enter into all "contracts which might be proper, necessary and "essential to his carrying out those objects to a "successful conclusion.

"We do not impugn the correctness of that state- "ment. The citizen may have the right to make a "proper (that is, a lawful) contract, one which is "also essential and necessary for carrying out his "lawful purposes. The question which arises here "is, whether the contract is a proper or lawful one, "and we have not advanced a step towards its "solution by saying that the citizen is protected by "the Fifth, or any other amendment, in his right to "make proper contracts to enable him to carry out "his lawful purposes. We presume it will not be "contended that the court meant, in stating the "right of the citizen 'to pursue any livelihood or "'vocation,' to include every means of obtaining a "livelihood, whether it was lawful or otherwise. "Precisely how far a legislature can go in declaring "a certain means of obtaining a livelihood unlawful, "it is unnecessary here to speak of. It will be con- "ceded it has power to make some kinds of voca- "tions and some methods of obtaining a livelihood "unlawful, and in regard to those the citizen would "have no right to contract to carry them on.

"Congress may restrain individuals from making "contracts under certain circumstances and upon "certain subjects. Frisbie *v.* United States, 157 "U. S., 160."

In Lawton *vs.* Steele, 152 U. S., 133, this court said:—

"To justify the State in thus interposing its "authority in behalf of the public, it must appear, "first, that the interests of the public generally,

"as distinguished from those of a particular class, "require such interference; and, second, that the "means are reasonably necessary for the accom- "plishment of the purpose, and not unduly oppres- "sive upon individuals. The legislature may not, "under the guise of protecting the public interests, "arbitrarily interfere with private business, or "impose unusual and unnecessary restrictions upon "lawful occupations. In other words, its deter- "mination as to what is a proper exercise of its "police powers is not final or conclusive, but is "subject to the supervision of the courts."

Again, in this connection, we repeat what was said in Union Bridge Co. *vs.* United States, 204 U. S., 364, 397, in these words:—

"If the means employed have no real substantial "relation to public objects which government may "legally accomplish; *if they are arbitrary and un- "reasonable, beyond the necessities of the case*, the "judiciary will disregard mere forms, and interfere "for the protection of rights injuriously affected "by such illegal action. The authority of the "courts to interfere in such cases is beyond all "doubt."

The railroad company, under the laws of the State of Pennsylvania, is *compelled* to conduct the business of transportation within that State. If deprived of the right to use its own highway, for the transportation into other States, of coal by it owned, or of coal belonging to companies in whose shares it is interested, it will be deprived of freights to such extent as will prevent it from doing business except at a loss and will render valueless its property. Can such a regulation be held to be other than invalid, because of its unreasonableness? Capital punishment should be inflicted in but few cases; and in none, until there has been a judicial determination of guilt.

Railroad companies, whose railways, in connection with each other, are the highways for interstate commerce,

are severally brought into existence by the legislation of the different States in which they are located.

These highways, in the respective States, belong to each company, subject to its obligation, within each State, to perform its duties as prescribed by its charter and by State legislation.

There is something repugnant to a sense of justice in the suggestion that the corporations which construct these highways in subordination to law, though they obey the law of the States of their creation in every respect, can be forbidden to use the same for the transportation of their own commodities, and can be compelled to use them, only in the transportation of the commodities of others.

We own highways constructed, ready for transportation of commodities from State to State. Conceding that such transportation can be regulated by Congress, we deny it can be forbidden because of a situation not within the power of Congress to condemn as wrong, or even to prohibit, *i. e.*, duality of ownership and transportation.

By the Act of Congress of June 15th, 1866 (14 Statutes at Large, 66), it was enacted as follows:—

> "Whereas, the Constitution of the United States "confers on Congress in express terms the power "to regulate commerce among the several states, "to establish post roads, and to raise and support "armies, therefore,
>
> "Be it enacted, That every Railroad Company "in the United States whose road is operated by "steam, its successors and assigns, be and is hereby "authorized to carry upon and over its road, boats, "bridges and ferries, all passengers, troops, govern- "ment supplies, mails, freight and property, on "their way from any state to another state, and "to receive compensation therefor, and to connect "with roads of other states so as to form contin- "uous lines for the transportation of the same, to "the place of destination."

In Railroad Company *vs.* Richmond, 19 Wall., 584, it was held:—

"The act of Congress of June 15th, 1866, authorizing every railroad company in the United States, whose road was operated by steam, and its successors and assigns, to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so far as to form continuous lines for the transportation of the same to their place of destination; and the act of July 25th, 1866, authorizing the construction of certain bridges over the Mississippi River, and among others a bridge connecting Dubuque with Dunleith, in the State of Illinois, and providing that the bridges, when constructed, should be free for the crossing of all trains of railroads terminating on either side of the river, for reasonable compensation, were designed to remove trammels upon transportation between different States, interposed by State enactments or by existing laws of Congress, and were not intended to interfere with private contracts and annul such as had been made on the basis of existing legislation and existing means of interstate communication. * * *

"The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was not intended that the power should be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse."

This court said (page 590):—

"When counsel speaks of the public policy established by the acts of Congress mentioned, he must mean nothing more than that the acts

"were intended to facilitate commercial inter-
"course among the States. Undoubtedly such was
"the case, and it is of great public interest that
"such intercourse should be free and untrammelled.
"But if comparisons may be made with respect to
"a subject of this nature, we should say that the
"observance of good faith between parties, and
"the upholding of private contracts, and enforcing
"their obligations, are matters of higher moment
"and importance to the public welfare, and more
"far reaching in their consequences."

Since 1866, railroad companies have been permitted, by express enactment of Congress, to carry over their respective roads, "freight and property on their way "from one State to another and to receive compensation "therefor." During all that time there was no public policy enacted, or found necessary, forbidding duality of ownership and transportation. Wherein lies the justification, in the year 1906, to conjure into existence, for the purpose of prohibiting a transportation permitted for nearly half a century, a public policy so long dormant—one directly contrary to that under which the highways were created and the transportation rendered possible, and destructive of the purpose for which they were constructed ?

If public policy is opposed to duality of transportation and ownership in the case of a railroad company, why is it not equally opposed to such duality in the case of all other kinds of common carriers?

It does not appear, by aught said in the Commodities Clause itself, that Congress forbade the exercise by the carrier of its charter right to transport, and of its charter, or statutory, right to trade, because of any public policy. It would rather appear that it objected to a railroad company engaging in any other business, and sought to prevent its thus engaging therein by depriving it of any opportunity to derive benefit therefrom by forbidding the transportation of the results of such business. Upon no other theory could it have acted, in forbidding the

railroad company to transport goods in which its interest had ceased, having sold the same after they had been mined or manufactured by it.

As we have already shown, by reference to decided cases, a corporation, *quâ* the subject under discussion, stands precisely as an individual, to such extent as it has a corporate right to do what may be done by an individual. The doctrine contended for by the United States, would justify the forbidding any individual, engaged in carrying goods by wagon from one State to another, from such carriage of his own goods.

It would justify Congress in compelling any such person to carry the goods of others, although his vehicles were built solely for the purpose of his own business.

The United States, through the Attorney General, contends that Congress may declare it contrary to public policy for an interstate commerce carrier to carry its own goods over its own railroad; and that such declaration is an exercise of the power to "regulate" and is valid.

We will endeavor later to show that if such an enactment be within the grant of a power to regulate, the exercise of such power is subordinate to certain constitutional guards; but, at the present time, we are considering merely the question, whether a right to do what is suggested, is to be found in the grant of power merely to "regulate."

Congress, as we have already said, deals with railroad companies, which have constructed their highways in, and which are operating the same within, the several States.

All that is within its power is, the regulation of the transportation over these highways from one State to another. The transportation, over its whole length, is conducted in States which favor a policy different from the public policy asserted by Congress to exist.

We submit that in dealing with the transportation over the railroad highways, Congress must deal with the matter only to such extent as the transportation being from State to State, is subject to its regulation. A Pennsylvania corporation may transport coal to a point near

the New Jersey line. A New Jersey corporation may transport from a point within its boundary line to another point within its boundaries in the North East. A third carrier may connect the two railroads. The Pennsylvania corporation cannot be compelled to carry outside the State. Neither can the New Jersey corporation be so compelled. Neither can be forbidden to own coal lands in its own State. Why should the continuous transportation subject either to the destruction of its property?

It has no right, concerning such transportation, to declare a policy which destroys property validly owned and used, under the State policy. It deals with the transportation; not with any policy regulating the moral quality or situation, of the transporter. More than this, there being, in the owner of the goods, the right to sell the same, deliverable in other States, and to have the same transported into those States in performance of its contract of sale, it has no right to forbid the exercise by the owner of his right, merely because the transportation must be conducted by a carrier whose situation of duality it does not like.

An anomalous result follows the prohibition. The owner of the coal, who has constructed a highway, in order that it may be transported, is compelled to turn over the use of such highway, exclusively, to "independent" coal owners, who contributed nothing towards its construction, with the result that the corporation which built the highway finds the value of the commodity it owns destroyed and the use of its highway for transportation at a reasonable profit, rendered impossible.

What public policy should prevail? The policy of the State of Pennsylvania, whose mineral wealth needing to be developed, by means of what it promised in the way of legislation, induced its corporations to develop such wealth, or, a so-called public policy of the United States, which renders abortive all that was done by, and within, the State, because of an assumption that other shippers thereby may be injured? To the fullest extent we con-

cede that the carrier, notwithstanding its situation, under the laws of the States, may not indulge in favoritism or discrimination, or charge unreasonable rates; but we contend that it cannot be condemned, for no reason other than a situation of affairs legally existing when it put itself into a condition to transport. From the moment of commencing the transportation, it is under Federal regulation; but it cannot be forbidden to commence because of its existing situation.

The inevitable result of permitting prohibition of transportation under the guise of public policy would be, that no State could safely develop its wealth by encouraging legislation hereafter, because it can not be known by the persons sought to be induced to make such development, what treatment they may receive from the United States.

The real question must be, whether or not the carrier, in fact, does injure other shippers, because of a temptation to favor itself. This, we submit, is a question of fact. If it exists, it can be ascertained. If found to exist, it can be punished. If it does not exist, the rights of the carrier, properly existing under State legislation, ought not to be destroyed.

In entire accordance with the provisions of the Act of Congress of 1866, railroad companies have been transporting coal, in interstate commerce, for nearly half a century. The expenditures which have been made by them, in order that such business may be conducted, have amounted to hundreds of millions of dollars. Under the power to regulate commerce, it is claimed Congress, at any moment, may render utterly valueless all the property resulting from these expenditures—that it can do this, although the carrier has violated no duty, saving the offense it gives Congress by a duality of ownership and transportation, legally existing.

No such confiscation of property has ever been heretofore attempted. It rests upon a construction of a power to regulate, which converts it into a power to destroy. Congress has a right to say to every carrier

engaged in interstate commerce: "You shall not dis-"criminate between shippers." It may subject those who engage in such commerce to supervision and investigation, in order that it may ascertain whether there is such discrimination. We submit, however, with great confidence, that it may not say to these carriers: "We "do not know whether you discriminate or not; but it "will be possible for you to do so, if you are interested "in transportation of commodities over your own lines, "and as it will be difficult to determine whether you "do or do not, we will forbid you thus to transport."

The only duty which rests upon the railroad company to carry, is that which results from its charter, and from the enactments of the State in which it is chartered. There is no duty incumbent upon it to transport beyond the State. The only right, we submit, which vests in Congress is to say, if it thus transports beyond the State, that it shall do so in such a way as will do equal justice to everybody interested in such transportation.

Under this head we are quite willing to refer to the full quotation we have heretofore made from the language of Mr. Justice Peckham in the Addyston Pipe and Steel Company case.

In Atlantic Coast Line R. R. Co. *vs.* North Carolina Corporation Commission, 206 U. S., 1, 20, it was said:—

> "As the public power to regulate railways and "the private right of ownership of such property "co-exist and do not the one destroy the other, "it has been settled that the right of ownership "of railway property like other property rights "finds protection in constitutional guarantees, and, "therefore, whenever the power of regulation is "exerted in such an arbitrary and unreasonable "way as to cause it to be in effect not a regulation, "but an infringement upon the right of owner-"ship, such an exertion of power is void because "repugnant to the due process and equal protection "clauses of the Fourteenth Amendment. The re-"sult, therefore, is that the proposition relied upon 'is well founded if it be that the order which the

"court below enforced was of the arbitrary and "unreasonable character asserted.

"In coming to consider the question just stated "it must be borne in mind that a court may not, "under the guise of protecting private property, "extend its authority to a subject of regulation "not within its competency, but is confined to "ascertaining whether the particular assertion of "the legislative power to regulate has been exer- "cised to so unwarranted a degree as in substance "and effect to exceed regulation, and be equivalent "to a taking of property without due process of "law, or a denial of the equal protection of the "laws."

V. The Commodities Clause is unconstitutional because it was intended to violate, and does actually violate, a right reserved to the States.

In the State Governments alone, to the exclusion of the United States, is vested the right to declare what property may, and what may not, be held by its citizens, within its limits, and the manner in which title thereto may be acquired. Any Federal Statute which has for its purpose the destruction of title to property or of the enjoyment of property, title to which is vested by the law of the State in a third person, trenches upon the reserved right thus expressed in the Constitution of the United States by Article X of the Amendments:—

"Powers not delegated to the United States by "the Constitution, nor prohibited by it to the "States are reserved to the States respectively, "or to the people."

In United States *vs.* Fox, 94 U. S., 315, there was a devise to the United States of real estate situated in the State of New York. By the laws of that State, a devise of lands therein could only be made to natural persons or to such corporations as were created under its laws and were authorized to take by devise. It was held that the United States took no title.

It is impossible to read the Commodities Clause without reaching a conclusion that what was intended by Congress was, to prevent the mining of coal by railroad corporations, or their engaging in any way in such business. We say the mining of coal, because we are dealing with that special subject. The general intent was to prevent a railroad company from engaging in mining, manufacturing or producing, any commodity.

We cannot fail to reach this conclusion, in view of the fact that railroad companies are forbidden to transport any article manufactured, mined or produced by them, whether they are, or are not, the owners thereof, or interested therein at the time of transportation. The only intelligent construction of the statute is that which holds it was intended to prevent the conducting of such other business.

It is hardly necessary to do more than state the fact that the State alone can determine whether its corporations may, or may not, engage in other business. Practically, to deprive third persons of their property, by denying them transportation which is a necessary pre-requisite to its valuable use, because a railroad company mines, manufactures or produces, is to put a penalty upon the acquisition and enjoyment of property in a State, under the laws and protection of that State.

In like manner, to deny to coal companies, permitted, even though their shares be held by railroad companies, to mine and own coal, the right to make use of the coal in the only way in which such use can be valuable, is to deny them, though they have committed no wrong, a right guaranteed by the State which alone has control thereof.

Had the Commodities Clause enacted that no corporation of any State, possessed of title to a "*rem*," should transport the same in interstate commerce, although authorized under the laws of the State to own or enjoy such "*rem*," would it be hard to maintain that the enactment was invalid, because destructive of State rights, in a matter over which the United States has no control? It

must be conceded, we submit, that it is not competent for Congress to say that a railroad company shall not mine coal in the State of Pennsylvania. The statute we are considering is not expressed in the language suggested, but such is its obvious intent.

Because Congress entertains a different view of the policy of duality of ownership and of transportation, it says that any corporation authorized to exercise such duality by the law of the State which is supreme in the matter, shall exercise it under penalties amounting almost to confiscation.

To say that any purchaser of coal in Pennsylvania, possessed under the laws of that State, of a valid title thereto, shall, for any cause over which he has no control, lose his right of property therein, by a denial to him of the right to transport into another State, is, practically, to annul and override, Pennsylvania legislation.

VI. The Commodities Clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of "liberty and property."

The clause of the Constitution which is violated by the Commodities Clause is Article V. of the Amendments, reading thus:—

> "Nor shall any person be deprived of life, liberty "or property without due process of law, nor shall "private property be taken for public use without "just compensation."

The numerous decisions arising under the Fourteenth Amendment, are applicable, in interpreting the meaning and extent of the Fifth Amendment.

In McCray *vs.* United States, 195 U. S., 27, it was said that "both the Fifth and Tenth Amendments qualify, in "so far as they are applicable, all the provisions of the "Constitution."

In Carroll *vs.* Greenwich Insurance Co. of New York, 199 U. S., 401, it was said (page 410):—

"While we need not affirm that in no instance "could a distinction be taken, ordinarily if an Act of "Congress is valid under the Fifth Amendment it "would be hard to say that a state law in like terms "was void under the Fourteenth. It is true that by "the provision in the body of the instrument Con- "gress has power to regulate commerce, and that the "act of Congress referred to in the case cited was "passed in pursuance of that power. But even if "the Fifth Amendment were read as contemporane- "ous with the original Constitution, the power given "in the commerce clause would not be taken to over- "ride it so far as the Fifth Amendment protects "fundamental personal rights. It is only on the "ground that the right to combine at will is a "fundamental personal right that it can be held to "be protected by the Fourteenth Amendment from "any abridgment by the State. Cincinnati Street "Ry. Co. *v.* Snell, 193 U. S., 30, 36. Many State "laws which limit the freedom of contract have "been sustained by this court, and therefore an "objection to this law on the general ground that it "limits that freedom cannot be upheld."

The decisions leave us in no doubt as to what is meant by "liberty" as used in the Fifth Amendment. It is not confined to a right of movement, free of restraint. It covers the enjoyment of property to the fullest extent of which property is capable of being enjoyed, including the right to make contracts concerning the same. Whatever interferes with the right to make legal contracts in and about property, amounts to a deprivation of "liberty."

The power possessed by Congress, under the grant to it of the right "to regulate commerce" must be so exercised as not to destroy the right to dispose of property, or to make legal contracts concerning the use, or transportation, thereof.

To forbid a coal company to sell its coal to the citizens of another State, or to cause the same to be transported into such State, is to deprive it of its "liberty," because of the deprivation of the power to use its property, in accordance with its legal right.

In like manner, to deny to the part owner of coal, such right, because a railroad company also owns a portion thereof; or to make valueless, in the hands of minority, or majority, shareholders, the shares of stock of a coal company, by forbidding its coal to be transported; or to forbid the transportation of coal in the only way in which it can be transported into another State, by an owner, because of the fact that he derived title thereto from a railroad corporation, would be to deprive him of "liberty" in the sense in which the word is used in the Fifth Amendment.

The result of holding legal, the Commodities Clause, would be to take away from railroad corporations the right to use their highways, in interstate transportation; to render valueless coal lands by them owned; to destroy the utility and value of sidings, branches and terminals; to subject them, where they are the owners of coal lands, to the duty to pay royalties, although coal cannot be mined; and to render valueless, in each year, upwards of 45,000,000 tons of coal.

It would be difficult to find a case in which there could be a deprivation of "liberty" to a greater extent.

In Butchers' Union Co. *vs.* Cresson City Co., 111 U. S., 746, Mr. Justice Bradley said, page 762:—

> "The right to follow any of the common occupa-
> "tions of life is an inalienable right. It was formu-
> "lated as such under the phrase 'pursuit of happi-
> "'ness' in the Declaration of Independence, which
> "commenced with the fundamental proposition that
> "'all men are created equal, that they are endowed
> "'by their Creator with certain inalienable rights;
> "'that among these are life, liberty and the pursuit
> "'of happiness.' This right is a large ingredient in
> "the civil liberty of the citizen. * * * I hold
> "that the liberty of pursuit—the right to follow
> "any of the ordinary callings of life—is one of the
> "privileges of a citizen of the United States. * * *
> "But if it does not abridge the privileges and im-
> "munities of a citizen of the United States to pro-
> "hibit him from pursuing his chosen calling, and

"giving to others the exclusive right of pursuing it,
"it certainly does deprive him (to a certain extent)
"of his liberty; for it takes from him the freedom
"of adopting and following the pursuit which he
"prefers; which, as already intimated, is a material
"part of the liberty of the citizen."

In Powell *vs.* Pennsylvania, 127 U. S., 678, Mr. Justice Harlan said:—

"The main proposition advanced by the defendant
"is that his enjoyment upon terms of equality with
"all others in similar circumstances of the privilege
"of pursuing an ordinary calling or trade, and of
"acquiring, holding and selling property, is an essen-
"tial part of his rights of liberty and property, as
"guaranteed by the Fourteenth Amendment. The
"court assents to this general proposition as em-
"bodying a sound principle of constitutional law."

In Monongahela Navigation Co. *vs.* United States, 148 U. S., 336, it was said:—

"It cannot be doubted, in view of the long list
"of authorities,—for many more might be cited,—
"that Congress has the power in its discretion to
"compel the removal of this lock and dam as ob-
"structions to the navigation of the river, or to
"condemn and take them for the purpose of pro-
"moting its navigability. In other words, it is
"within the competency of Congress to make such
"provision respecting the improvement of the
"Monongahela River as in its judgment the public
"interests demand. Its dominion is supreme.

"But like the other powers granted to Congress
"by the Constitution, the power to regulate com-
"merce is subject to all the limitations imposed by
"such instrument, and among them is that of the
"Fifth Amendment, we have heretofore quoted.
"Congress has supreme control over the regulation
"of commerce, but if, in exercising that supreme
"control, it deems it necessary to take private
"property, then it must proceed subject to the

"limitations imposed by this Fifth Amendment, "and can take only on payment of just compensa- "tion. The power to regulate commerce is not "given in any broader terms than that to estab- "lish post-offices and post-roads; but, if Congress "wishes to take private property upon which to "build a post-office, it must either agree upon the "price with the owner, or in condemnation pay "just compensation therefor. And if that property "be improved under authority of a charter granted "by the State, with a franchise to take tolls for "the use of the improvement, in order to determine "the just compensation, such franchise must be "taken into account. Because Congress has power "to take the property, it does not follow that it "may destroy the franchise without compensation.

* * * * * *

"Much reliance is placed upon the case of Bridge "Company *v.* United States, 105 U. S., 470. But "that was a case not of the taking, but of the "destruction, of property. It is true, Mr. Chief "Justice Waite, in delivering the opinion of the "court, uses this language in reference to the power "of Congress: 'But the power of Congress in respect "'to legislation for the preservation of interstate "'commerce is just as free from state interference "'as any other subject within the sphere of its "'legislative authority. The action of Congress is "'supreme and overrides all that States may do. "'When, therefore, Congress, in a proper way, "'declares a bridge across a navigable river of the "'United States to be an unlawful structure, no "'legislation of a State can make it lawful. Those "'who act on state authority alone, necessarily "'assume all the risks of legitimate congressional "'interference.' But such affirmation of power was "not made with reference to a question like this. "The facts in that case were these: The Bridge "Company was a creature of the legislation of the "States of Ohio and Kentucky, and incorporated "to build a bridge across the Ohio River, between "Newport and Cincinnati. The state charters au- "thorized the construction of a bridge in accord-

"ance with the provisions of an act of Congress of
"July 14, 1862, or any act that Congress might
"pass on the subject. On March 3, 1869, Congress
"passed a resolution giving its assent to the con-
"struction of this bridge. This resolution contained
"this reservation: 'But Congress reserves the right
"'to withdraw the assent hereby given, in case the
"'free navigation of said river shall at any time be
"'substantially and materially obstructed by any
"'bridge to be erected under the authority of this
"'resolution, or to direct the necessary modifica-
"'tions and alterations of said bridge.' 15 Stat., 347."

In Allgeyer *vs.* Louisiana, 165 U. S., 589, it was said:—

"The liberty mentioned in that amendment means
"not only the right of the citizen to be free from the
"mere physical restraint of his person, as by incar-
"ceration, but the term is deemed to embrace the
"right of the citizen to be free in the enjoyment of
"all his faculties; to be free to use them in all law-
"ful ways; to live and work where he will, to earn
"his livelihood by any lawful calling; to pursue any
"livelihood or avocation, and for that purpose to
"enter into all contracts which may be proper,
"necessary and essential to his carrying out to
"a successful conclusion the purposes above men-
"tioned."

VII. The Commodities Clause is unconstitutional because it is in effect a taking of private property for public use without just compensation.

As we have endeavored to show, the United States cannot enforce a public policy opposed to duality of ownership and of transportation, where a different policy had been adopted by the State which left no room for a public policy only capable of being worked out by a sacrifice of the State right.

If the supposed national public policy is of sufficient importance, and if the power given to Congress is sufficient, to make it necessary to prohibit transportation in

the way the Commodities Clause prohibits it, then it was incumbent upon Congress, because of its desire to effectuate a public use, though private property should be taken, to provide due compensation.

The effect of the statute is to destroy, in the hands of part owners, of coal companies, and of vendees, in Pennsylvania, of coal bought from coal mining companies and from railroad companies, respectively, the value of such coal; the value of railroad properties; the value of coal company properties; the right of transportation; and the right to trade in interstate commerce.

It is said that no property is taken, even though the statute may operate to deprive the owner of all benefit of its ownership; and that the deprivation, if there be a deprivation, is but consequential.

Any right of property in a "*rem*," however, involves more than the mere possession of the "*rem*." Its value depends largely upon the incidental right of disposition and transportation. These rights are taken away, and the taking is the direct result of the Act.

To say to an owner who has coal, valuable only if transported, that it must remain in the place in which it was found, without right to be transported, is practically to take possession of the coal. Whether it be physically taken and removed, or whether the owner is compelled to allow it to remain, and is prevented from removing, brings about the same result—the actual deprivation of a property right.

In the Monongahela case, the franchise was not taken; but, by reason of the taking of the property upon which it attached, it was destroyed. The navigation company was held entitled to compensation.

An ownership of coal shares, involves the right to receive whatever benefit may result from the exercise of powers conferred by the law of the State which incorporated. Practically, to destroy the exercise of its franchises by the company, is to take its property as completely as though it was physically seized.

The numerous cases in which damages have been permitted to be recovered for the flooding of lands, in the

course of construction of government works, demonstrate the fact that a taking results, where an act is done, which practically deprives the owner of the use of his property. In the present case there was such deprivation.

In Mugler *vs.* Kansas, 123 U. S., 623, it was said:—

> "It is supposed by the defendants that the doc-
> "trine for which they contend is sustained by
> "Pumpelly *v.* Green Bay Co., 13 Wall., 166. But
> "in that view we do not concur. That was an
> "action for the recovery of damages for the over-
> "flowing of the plaintiff's land by water, resulting
> "from the construction of a dam across a river.
> "The defense was that the dam constituted a part
> "of the system adopted by the State for improving
> "the navigation of Fox and Wisconsin rivers; and
> "it was contended that as the damages of which
> "the plaintiff complained were only the result of
> "the improvement, under legislative sanction, of
> "a navigable stream, he was not entitled to com-
> "pensation from the State or its agents. The case
> "therefore, involved the question whether the
> "overflowing of the plaintiff's land, to such an
> "extent that it became practically unfit to be used,
> "was a taking of property, within the meaning of
> "the constitution of Wisconsin, providing that
> "'the property of no person shall be taken for
> "'public use without just compensation therefor.'
> "This court said it would be a very curious and
> "unsatisfactory result, were it held that, 'if the
> "'government refrains from the absolute conversion
> "'of real property to the uses of the public, it can
> "'destroy its value entirely, can inflict irreparable
> "'and permanent injury to any extent, can, in
> "'effect, subject it to total destruction, without
> "'making any compensation, because, in the nar-
> "'rowest sense of that word, it is not *taken* for the
> "'public use. Such a construction would pervert
> "'the constitutional provision into a restriction
> "'upon the rights of the citizen, as those rights
> "'stood at the common law, instead of the govern-
> "'ment, and make it an authority for the invasion

"'of private right under the pretext of the public
"'good, which had no warrant in the laws or prac-
"'tices of our ancestors' pp. 177, 178."

In United States *vs.* Lynah, 188 U. S., 445, it was held:—

"All private property is held subject to the
"necessities of government and the right of eminent
"domain underlies all such rights of property.

"When the United States government appropriates
"property which it does not claim as its own, it does
"so under an implied contract that it will pay the
"value of the property it so appropriates.

"When it is alleged in an action that the govern-
"ment of the United States in the exercise of its
"powers of eminent domain and regulation of com-
"merce, through officers and agents duly empowered
"thereto by acts of Congress, places dams, training
"walls and other obstructions in the Savannah
"River in such manner as to hinder its natural flow
"and to raise the water so as to overflow the land
"of plaintiff along the banks to such an extent as to
"cause a total destruction of its value, and the
"government does not deny the ownership, admits
"that the work was done by authority of Congress,
"and simply denies that the work has produced the
"alleged injury and destruction, the Circuit Court
"of the United States has jurisdiction to inquire
"whether the acts done by the officers of the United
"States under the direction of Congress have resulted
"in such an overflow and injury of the land as to
"render it absolutely valueless and, if thereby the
"property was, in contemplation of law, taken and
"appropriated by the government, to render judg-
"ment against it for the value of the property so
"taken and appropriated.

"Where the government of the United States
"by the construction of a dam, or other public
"works, so floods land belonging to an individual
"as to totally destroy its value, there is a taking
"of private property within the scope of the Fifth
"Amendment.

"The proceeding must be regarded as an actual "appropriation of the land, including the possession "and the fee and, when the amount awarded as "compensation is paid, the title, the fee and what-"ever rights may attach thereto pass to the govern-"ment which becomes henceforth the full owner.

"Notwithstanding that the work causing the "injury was done in improving the navigability "of a navigable river and by the Constitution "Congress is given full control over such improve-"ments, the injuries cannot be regarded as purely "consequential, and the government cannot ap-"propriate property without being liable to the "obligation created by the Fifth Amendment of "paying just compensation."

This court said (page 472):—

"It is true that a majority of the court held in "that case, that the destruction of access to land "abutting on a navigable river by the construction "by Congress of a pier on the submerged lands "in front of the upland, was not a taking of private "property for public uses, but only an instance "of consequential injury to the property of the "riparian owner. But the right of compensation "in case of a taking was conceded. There have "been many cases in which a distinction has been "drawn between the taking of property for public "uses and a consequential injury to such property, "by reason of some public work. In the one class "the law implies a contract, a promise to pay for "the property taken, which, if the taking was "by the general government, will uphold an action "in the Court of Claims; while in the other class "there is simply a tortious act doing injury, over "which the Court of Claims has no jurisdiction. "Thus, in Transportation Co. *v.* Chicago, 99 U. S., "635, the city, duly authorized by statute, con-"structed a tunnel along the line of LaSalle Street "and under the Chicago River. The company "claimed that it was deprived of access to its "premises by and during the construction. This

"deprivation was not permanent, but continued "only during the time necessary to complete the "tunnel, and it was held that there was no taking "of property, but only an injury, and that a tem- "porary injury thereto. In the course of the "opinion, after referring to the Pumpelly case, "*supra*, and Eaton *v.* Boston, Concord & Montreal "Railroad Company, 51 N. H., 504, we said (p. "642):

"'In those cases it was held that permanent "'flooding of private property may be regarded as "'a "taking." In those cases there was physical "'invasion of real estate of the private owner, and "'a practical ouster of his possession. But in the "'present case, there was no such invasion. No "'entry was made upon the plaintiff's lot. All "'that was done was to render for a time its use "'more inconvenient.'"

The dissenting opinion of Judge Buffington sustains, as strongly as is possible, the contention that the Commodities Clause is a valid exercise of the power of Congress to regulate interstate commerce.

It may not be amiss, before closing this argument, briefly to refer to what is said by him.

His opinion substantially asserts that the power to regulate commerce includes the right to forbid all commerce even in articles of necessity, for no other reason than that such articles belong, at the time of transportation, to the carrier, or to a coal company, some of whose shares the carrier owns, or to the carrier and some one jointly interested with it therein.

Further than this, it asserts that such power includes the right to forbid the transportation by a carrier of all articles it had once mined or produced, although its title had been conveyed away before a commencement of the transportation. It treats as immaterial, the fact that the carrier had acquired its property under, and in obedience to, the law and policy of the State in which such property was located.

The opinion asserts the doctrine, that under this power, articles may be excluded from commerce and their owner may be practically deprived of their use and value, not because such owner—a common carrier or a coal company some of whose shares it holds—has violated any regulation governing transportation; but, because, by reason of its position, it may be tempted so to do.

In other words, the power to regulate commerce is asserted to go far beyond the right to prescribe the manner in which it shall be conducted and the rules applicable thereto, and to deny carriage to such articles as are immoral or hurtful. It concedes, in effect, the right to forbid the transportation of legitimate articles of commerce, by a carrier who obeys every rule prescribed for its transportation. It practically forbids transportation, inasmuch as there can be no transportation otherwise than by the corporations forbidden to carry, of an enormous amount of necessary articles, because Congress thinks the Legislatures which created the carrier corporations, "ought not to have permitted them to engage in any other business."

Judge Buffington holds that a coal company, by reason of the fact that a majority, or even a minority, of its shares, are held by a railroad company, can be forbidden to deal with the citizens of other States, in the only articles it was organized to produce, such articles being a part of the necessaries of life.

He holds that the courts have no right to declare invalid, any legislation prohibiting commerce in harmless merchandise, and debarring the citizens of the several States from dealing with each other, wherever Congress thinks a common carrier ought not to have been permitted by the State of its creation to acquire title to such articles.

He holds it to be within the power of Congress, practically to deprive the owners of very many hundreds of millions of dollars, of lands and of the products thereof, and of all benefit from their ownership.

The power to regulate commerce is held to be paramount to the right to life, liberty and property. There is nothing in the Constitution, if this opinion prevails, which can be enforced by way of limitation upon the unrestrainable exercise of this power.

Those who deny that this power extends so far as claimed in the dissenting opinion, contend that a power to regulate commerce includes one, reasonably to determine that certain articles are so harmful that they do not belong to commerce. Under such circumstances, their exclusion from the right of transportation is a regulation of commerce by restricting commerce within the limits of what may properly be so designated.

The opponents of this unlimited right, contend that the citizens of the several States have a right to commerce, which covers intercourse of persons and property and the transportation thereof; that the power does not include power to deprive of such right; that its exercise must be subordinate to the continuance of commerce and only by way of regulation of the same, and that to forbid the interchange between the States, by the owners thereof, of necessary articles of trade, is to violate provisions of the Constitution which protect life, liberty and property and forbid the taking of property without just compensation.

It is said by Judge Buffington, concerning the Commodities Clause, that (Record in No. 562, p. 64):—

> "It does not forbid the railroad to own or operate "mines or manufactories. It does not forbid the "sale of its product or debar carriage thereof from "a State."

It is true that the Act does not forbid a railroad to "own or operate mines or manufactories;" but it makes it unlawful, *inter alia*, for any railroad company to "trans- "port" in interstate commerce "any article or commodity * * * manufactured, mined or produced by it."

There is no doubt what was intended was, to prohibit any railroad company from "owning or operating "mines or manufactories;" but, appreciating the absolute

invalidity of any Act which forbade such owning or operating, Congress made unlawful the subsequent transportation by any carrier, of any article or commodity thus manufactured, mined or produced, under its authority, knowing that if the article or commodity thus manufactured, mined or produced would not be allowed to be transported into another State, the carrier, as a matter of course, would cease to mine, manufacture or produce what could not be sold.

As we have heretofore said, there is practically but one railroad in the case of each mine, over which its product can be carried. To forbid carriage by such carrier is, therefore, to stop production, in view of the fact that the very great bulk of anthracite coal must be transported into other States to citizens of such States.

The "sale of its product" by a railroad company to any customer within the State, could not be forbidden; but by preventing carriage, for the purchaser, in interstate commerce, of coal which had been produced by such carrier, the same result would be attained. The sale of the product owned by a railroad, or by the coal companies whose shares it holds, is, in effect, precluded, by denial of the right to transport it, after sale.

The learned Judge says (Record in No. 562, p. 64):—

> "It simply puts the carrier-owner on the basis "of all other owners and shippers of commodities, "viz: transportation of its and their product by "a disinterested carrier. Its manifest purpose is "to prevent, in shipments, favor to any, and to "secure fairness to all."

The carrier-owner is not put "on the basis of all other "owners and shippers of commodities." Being the only carrier physically able to receive and transport its coal, or that of the coal companies whose shares it owns, the foreign market is closed to it, whilst other owners and shippers may there sell.

If the "manifest purpose" of the Commodities Clause "is to prevent, in shipments, favor to any, and to secure

"fairness to all," such purpose is rendered impossible of accomplishment.

If there are two mines, side by side, one owned by a private individual and the other by a railroad company, or by a coal company whose shares it holds, the individual owner will be at liberty to transport all his coal, whilst the "carrier-owner" will be unable to make such transportation over a railroad constructed and equipped by it largely for its own purposes.

Inasmuch as an Act could easily have been drafted which would have forbidden, under penalties and punishments, a carrier's favors to itself, or to coal companies in whose shares it is interested, and, inasmuch as the Act in question did, in most detailed provisions, do that very thing, it is difficult to see how it was necessary to do more than forbid favoritism. The necessity of denying to the carrier all right to transport is not "manifest."

The learned judge also says (Record in No. 562, p. 64):—

> "At this point we note that the prior action of "any State authorizing such carrier to own manu- "factories or mines could in no way detract from "the power of Congress thereafter to regulate "interstate commerce. Manifestly such purchases "under State authority created no obligation or "contract on the part of Congress that it never "would in pursuance of its power to regulate com- "merce between the States, make laws which might "restrict carriers from the interstate carriage of "their own products."

We think all will assent to the correctness of a proposition that the power of Congress to regulate interstate commerce cannot be detracted from by the different States.

The proposition, however, assumes that the action of the State in permitting mining, share ownership, &c., was one regulating commerce between the States. In point of fact, the mine development resulted from the power possessed by each State, to create corporations and to confer upon them dual power. Each State had the

right to confer upon its common carriers the right to own mines and manufactories, and to mine coal.

The Commodities Clause confronts us with a situation in which everything which had been done by the State had been done within its constitutional power. The only question is, whether Congress, under the pretext of regulating, may prohibit legitimate interstate commerce in the necessities of life, and may destroy the value of property legally held. In other words, may Congress, under the pretext of regulating commerce, destroy it? May Congress say to the citizens of other States: "You shall not deal with the owners of coal in "Pennsylvania where your coal requires to be trans-"ported by a carrier who owned it originally?" Can it deny to the citizens of other States the right to receive any portion of the immense amount of coal whose transportation is, by the Commodities Clause, practically rendered impossible?

As we have heretofore argued, the question is not simply whether Congress may "regulate interstate com-"merce," but also whether, without compensation, property to an immense extent can be rendered valueless?

The case, as the learned judge put it, is not the case before this court. It must determine what is a "regulation of commerce," and how far Congress may go, in the way of prohibition, in destroying the value of property and intercourse between the States.

If any shares of stock in a coal company are in the ownership of a carrier company, the product of such coal company cannot be sold, because it cannot be transported.

We are dealing with something beyond a mere theory—with vested rights, not only of the carriers, but of third persons.

It may be, and doubtless is, a proper regulation of commerce to forbid favoritism, but to prohibit a carrier, or a coal company whose shares the former holds, from transportation *in toto*, transcends any proper interpretation of the power to "regulate commerce."

It ignores certain constitutional rights of property and also a duty to compensate where such property is taken. A carrier presents itself at the boundary line of Pennsylvania and New Jersey desiring to continue transportation into the latter State. It is told it must stop on the Pennsylvania side and throw out of its cars all coal which belongs to itself, although it has done nothing wrong, duality of ownership up to the time it reached the State of New Jersey not having been wrong, but in accordance with law. All the coal in its train is a proper subject of interstate commerce and may be transported from one State into another. This transportation may be regulated. It cannot be forbidden. It is right that the transportation shall be under such rules and regulations as Congress may deem to be proper for transportation, but this immense body of interstate commerce articles cannot be excluded from carriage.

In the case of the Delaware & Hudson Co. and of the Delaware, Lackawanna & Western R. R. Co. each was originally authorized to transport coal intended to be mined by itself. From time to time, independent operators have arisen, who have acquired a right of transportation without favoritism. The right of the mine owners is to have their coal transported on equal terms with those of the carrier company; not to be given a monopoly by exclusion therefrom of everything not belonging to them.

This court, in Union Bridge Co. *vs.* United States, 204 U. S., 400, did hold that as soon as a bridge was found to interfere with a river, a public highway, it was within the power of Congress to remove it, in order that commerce might be transacted. There was no vested right in a bridge owner perpetually to obstruct commerce by blocking up the highway. In the case we are dealing with, there is an inherent right in every owner of merchandise to sell the same to the citizens of other States, and to have the product, when sold, transported.

There is a vested right in the citizens of other States to purchase, in Pennsylvania, coal which they desire, and to

have the same transported into another State for the purpose of enabling them to conduct their business needing a coal supply.

In the Union Bridge case, interstate commerce was directly affected, injuriously, by the bridge, which was constructed, originally, with the full knowledge by all concerned, that Congress could, at any time, exercise its power to open the highway. In the present case, there is no obstruction of commerce. Every carrier desires that its volume shall be as great as possible; but demands that it shall be made subject to regulation, not prohibition.

The great care with which this court, in the Lottery Cases, first established the fact that the transportation of lotteries was of an article not proper for transportation, seems strongly to support the assertion that the prohibition of carriage can only be, in the case of articles not legitimate subjects of intercourse.

This court investigated the question, whether or not lottery policies were properly a part of legitimate interstate commerce; asserting that whenever it was found that an article was not properly within the category of those in which commerce should be permitted, the power to regulate, carried with it the right and duty to prohibit, anything other than legitimate commerce.

There is nothing illegitimate in duality of ownership and transportation. Such duality results from the law of the State having jurisdiction over the carrier. Congress cannot say the carrier may not be the owner of coal, and where its coal reaches the boundary line of the State its transportation cannot be forbidden because the carrier is in a situation in which it *might* violate regulations.

The "regulation," so-called, prohibits, because of the possibility the carrier may favor itself. Why, under this doctrine, may not a prohibition go against the carrier because some of its officers have been convicted of crime, or because its stockholders and officers travel over its lines?

It can hardly be said that Congress, being of the opinion that three lines of railroad were sufficient to transact all the interstate commerce business, could forbid any other lines of carriers.

Every carrier which is ready to conduct interstate commerce under the rules and regulations governing the same, is at liberty to carry. The *methods* of its carriage can be regulated. The carriage itself cannot be forbidden.

Of course, rebates and lower rates under like circumstances, ought not to be allowed, or charged. A regulation is properly one of commerce, which forbids either, or both.

In the Chesapeake & Ohio case it was found not difficult to lay down the rule operative upon an interested carrier, the violation of which could be ascertained as a matter of fact.

Suppose there was but one line of railroad from the coal regions and a possession of all the coal mines by the company owning it. Under Judge Buffington's reasoning, the carrier might be forbidden to carry, no matter how much the citizens of other States might need coal, for he holds that Congress may forbid persons in other States buying within Pennsylvania from a carrier with a right of transport. He holds that a coal company in which a railroad company has an interest, however slight, may be debarred from the carriage of such coal.

No citizen of the United States, under this ruling, could buy coal from a carrier, which must be by it transported over its own line. His reasoning, if sustained, would render it impossible for an owner of coal in Pennsylvania, to sell to a citizen of another State, or for the citizen of another State to buy coal which must be carried over the line of a railroad company which had owned the coal or shares of stock in the company which had been the owner.

As we have already said, if the coal belongs to a coal company and the carrier owns a few shares of stock therein, it cannot be transported over the only line by

which it can be delivered into another State—the line of the "carrier-owner."

In other words, all interstate traffic in coal can be destroyed by Congress and all commerce can be prevented, under a power granted to it to "regulate" interstate commerce.

The carrier, if it deals alike with its own coal and with that of other shippers, does no harm.

In the case of the Attorney General of Great Britain *vs.* Great Northern Railroad Co., 29 Law Journal (N. S. Eq.), 794, nothing more was held than that an Act of Parliament which granted the charter to operate to a railroad company, contained in it an implied prohibition against the company engaging in any other business. The business was that of buying and selling coal from time to time. The court, in the English case, enforced the law which prohibited the carrier from engaging in any other business.

What was dealt with in the New Haven case was not only the favoritism which *might* be exercised by a carrier when it bought coal at the mines from persons it desired to favor, and transported it at such rates as balanced the disadvantage of high purchase price, but with the favoritism which was *actually* exercised. The railroad company gave itself, in fact, a rebate of part of the charge for transportation.

In the New Haven case the carrier had no vested right in coal land nor in coal mining. A., from whom it purchased coal, was enabled by what it did, to get a higher price for its coal than could have been obtained, if he had transported it, in the usual course, into another State.

It was found that there had been practically a rebate allowed, in violation of the Interstate Commerce Law.

If the defendants in error had been guilty of allowing indirectly a rebate, they could now be punished. There is no pretense they have not been charging the full rates of transportation. On the contrary, it is averred they did.

The learned dissenting Judge says (Record in No. 562, p. 68):—

> "That Congress in passing this Act sought not "to confiscate private property, but rather to avert "by due regulation the evils the carrier had itself "brought about by allowing private interest to "injuriously affect public duty. * * * yet the "recognition by courts of an evil to be remedied "and the avowed purpose of Congress to stop such "evil may throw some light on that which, after "all said, is a question of fact rather than law, "namely, whether this act is a real regulation of "commerce, or under the guise of regulation, a "prohibition of holding property."

There is no proof, upon the record, that any carrier had allowed "private interest to injuriously affect public "duty."

There was an evil to be remedied, *i. e.*, allowing rebates and making concessions. This evil Congress might punish.

Theft is an evil; but it would hardly be thought within the power of the Legislature to deprive a person of his property before he had done wrong, so as thus to remove the temptation to steal.

Supporting the criminal classes in prisons is expensive. Because the members thereof are prone to the temptation of appropriating the property of others, may they be electrocuted in advance? Such drastic means as the Commodities Clause, it is true, if introduced generally, might save much trouble, in ascertaining the existence of crime.

The large percentage, (90%), of unmined area of anthracite coal, owned or controlled by the defendants in error, and their so-called "subsidiary coal companies," is the result of a validly granted power by the State of Pennsylvania. The learned dissenting Judge says (Record in No. 562, p. 69):—

> "Ninety per cent approximately of the entire "unmined area of anthracite coal is owned or con-"trolled by the following named companies" (most "of whom are defendants in error) "or by so-"called 'subsidiary coal companies.'"

We concede that this fact is "highly suggestive." The Court, we hope, will be reluctant to protect the independent shipper, holding ten per cent. of the product, who has not been found to have been injured by allowance to others of lower rates, rebates or concessions, at a cost of destruction of the value of ninety per centum of the property held as is stated in this Record. This ownership being one Congress had no right to control, it has no right to inflict a penalty upon those who possess it.

We do not think a lesion of the brain would result from any mental effort necessary to determine whether or not the Commodities Clause is a "real regulation of "commerce" or a prohibition of holding. The result of a prohibition against the ownership of coal property, or of an enactment that the property shall continue to be held under such treatment as must destroy its value, is the same.

At the present time, if the coal properties were still in the hands of private owners, the Legislature of Pennsylvania might enact a Statute which would forbid the common carrier from buying them, and many would concede such legislation to be proper; but, under the circumstances which exist, the Legislature of Pennsylvania can pass no enactment which will interfere with the ownership, by the defendants in error, of coal lands or of coal companies' shares.

The "evil" which exists is not duality of ownership, but the allowance of low rates, rebates and concessions. There is no proof that private interest, on the part of any of the defendants in error, injuriously affected their performance of their public duty. Did such proof exist, the carriers could be punished, under the Act which announces the evil, and provides for its repression.

The learned Judge says, Congress may have felt justified in restricting transportation regulation "when it saw "that these private acquisitions by public carriers, up to "ninety per cent. of the entire anthracite supply, had "resulted from the mere inaction of Congress to restrict "carriers in their interstate relations to their public and "primary service of transportation."

Had Congress been active in legislation of that character, between 1840 and 1875, the carriers would not, perhaps, have owned ninety per cent. of the coal mining properties; but most probably, there would have been no transportation facilities for the coal and it would not have been mined, because the mere right to transport would not have justified the construction of the railroads themselves.

Congress was inactive and the carriers were, by reason thereof, induced to open mines and build railroads. Congressional action came too late to justify, in 1907, the confiscation of property which had been acquired, in order that there might be interstate commerce.

It is said "it follows that any control or regulation of "the carrier by a State which affects the performance of "the carrier's interstate service, is unconstitutional."

The State is not attempting to control, or regulate, the carrier. Its statutes were enacted in order that there might be something to carry. The past action of the State cannot be invoked against the carrier, as amounting to a "control or regulation," by it, of such carrier.

Congress will be "trenching on the right of the State" if it destroys the value of property in any State, held under the charter grants. Concede that the State may not insist that the carrier shall not transport into another State. It has a right, however, to insist that Congress shall not destroy the value of property, held under its laws, by forbidding its use in such way, and under such circumstances, as have been immemorially existing.

We fail to see any logical connection between premises and conclusion thus stated (Record in No. 562, p. 70):—

> "Such being the case, one of two results must "follow—either the right to regulate the interstate "carrier's efficient performance of duty rests in "Congress and its regulation must prevail, or no "power to regulate interstate carriers exists and "the carriers 'are a law unto themselves.'"

Congress may pass such regulations as will secure punishment for inefficient performance of duty. There

is a great gulf, however, between the power to do this, and the power to prevent interstate commerce, conducted without any favor, by a carrier who obeys every transportation demand and requirement.

There is an unwarranted assumption in these words (Record in No. 562, p. 70):—

> "Now, it would seem idle for practical men to "discuss the question whether regulation of the "carrier to insure performance of its duty is not "vital to the regulation of commerce. In the very "nature of things, the right of the people of one "state to market their products in another, and "the corresponding right of the people of the latter "to enjoy the products of the former, cannot be "mutually enjoyed unless there be some regula- "ting power over the carrier who performs the "interstate service."

The so-called regulation does, "in the very nature of "things," affect the rights of American citizens to transact interstate commerce.

We concede that this right is the subject of regulation; but we deny that regulation covers absolute prohibition. Regulation is "vital to the regulation of commerce;" but the destruction of ninety per cent. thereof to protect ten per centum can hardly be called "regula- "tion."

The learned dissenting Judge says (Record in No. 562, p. 71):—

> "And clearly, the general power to forbid a public "carrier from doing what hinders its performance of "a public duty could not, before the Constitution, "be denied to a sovereign State for 'the States were "'unquestionably supreme and each possessed that "'power over commerce which is acknowledged "'to reside in every sovereign State.'"

There was no power in the State to forbid a railroad corporation by it created, to which it had granted the right to own coal lands and coal shares and to mine coal,

THE UNITED STATES *ex rel.* THE ATTORNEY GENERAL OF THE UNITED STATES *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES, APPELLANT, *v.* DELAWARE AND HUDSON COMPANY.

SAME *v.* ERIE RAILROAD COMPANY.

SAME *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY.

SAME *v.* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

SAME *v.* PENNSYLVANIA RAILROAD COMPANY.

SAME *v.* LEHIGH VALLEY RAILROAD COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570. Argued January 19, 20, 1909.—Decided May 3, 1909.

Although a limitation to its operation might be reasonable and thus assuage the radical results of a prohibitory statute, if it is not expressed in the statute, to engraft such a limitation would be pure

judicial legislation. In construing the commodities clause of the Hepburn Act the suggestion of the Government to limit its application to commodities while in the hands of a carrier or its first vendee, and, as thus construed, extend the indirect interest prohibition to commodities belonging to corporations the stock whereof is owned in whole or in part by the carrier, or those which had been mined, manufactured or produced by the carrier prior to the transportation, cannot be accepted.

The duty of this court in construing a statute which is reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, to adopt that construction which saves its constitutionality (*Knights Templar Indemnity Co.* v. *Jarman*, 187 U. S. 197) includes the duty of avoiding a construction which raises grave and doubtful constitutional questions if the statute can be reasonably construed so as to avoid such questions. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.

This rule applied to the commodities clause of the Hepburn Act so as to avoid deciding the constitutional questions which would arise if the clause were construed so as to prohibit the carrying of commodities owned by corporations of which the carrier is a shareholder, or which it had mined, manufactured or produced at some time prior to the transportation.[1]

---

[1] The grave constitutional questions which the court could not have avoided answering by adopting the construction contended for by the Government are as follows (see p. 406, *post*):

1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce.

2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.?

Also as necessarily involved in the determination of the foregoing questions:

a. Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as

Where ambiguity exists it is the duty of a court construing a statute to restrain the wider and doubtful provisions so as to make them accord with the narrow and more reasonable provisions and thus harmonize the statute.

A prohibition in an act of Congress will not be extended to include a subject where the extension raises grave constitutional questions as to the power of Congress, where one branch of that body rejected an amendment specifically including such subject within the prohibition.

In the construction of a statute the power of the lawmaking body to enact it, and not the consequences resulting from the enactment is the criterion of constitutionality.

The provision contained in the Hepburn Act approved June 29, 1906, c. 3591, 34 Stat. 584, commonly called the commodities clause, does not prohibit a railway company from moving commodities in interstate commerce because the company has manufactured, mined or produced them, or owned them in whole or in part or has had an interest direct or indirect in them, wholly irrespective of the relation or connection of the carrier with the commodities at the time of transportation.

The provision of the commodities clause relating to interest, direct or indirect, does not embrace an interest which a carrier may have in a producing corporation as the result of the ownership by the carrier of stock in such corporation provided the corporation has been organized in good faith.

Rejecting the construction placed by the Government upon the commodities clause, it is decided that that clause, when all its provisions are harmoniously construed, has solely for its object to prevent carriers engaged in interstate commerce from being associated in

---

well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible?

b. Although the Government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

interest at the time of transportation with the commodities transported, and it therefore only prohibits railroad companies engaged in interstate commerce from transporting in such commerce commodities under the following circumstances and conditions:

a. When the commodity has been manufactured, mined or produced by a railway company or under its authority and at the time of transportation the railway company has not in good faith before the act of transportation parted with its interest in such commodity;

b. When the railway company owns the commodity to be transported in whole or in part;

c. When the railway company at the time of transportation has an interest direct or indirect in a legal sense in the commodity, which last prohibition does not apply to commodities manufactured, mined, produced, owned, etc., by a corporation because a railway company is a stockholder in such corporation. Such ownership of stock in a producing company by a railway company does not cause it as owner of the stock to have a legal interest in the commodity manufactured, etc., by the producing corporation.

As thus construed the commodities clause is a regulation of commerce inherently within the power of Congress to enact. *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. The contention that the clause if applied to preëxisting rights will operate to take property of railroad companies and therefore violate the due process provision of the Fifth Amendment, having been based upon the assumption that the clause prohibited and restricted in accordance with the construction which the Government gave that clause is not tenable as to the act as now construed which merely enforces a regulation of commerce by which carriers are compelled to dissociate themselves from the products which they carry and does not prohibit where the carrier is not associated with the commodity carried.

The constitutional power of Congress to make regulations for interstate commerce is not limited by any requirement that the regulations should apply to all commodities alike, nor does an exception of one commodity from a general regulation of interstate commerce necessarily render a statute unconstitutional as discriminating between carriers; and the exception of timber in the commodities clause of the Hepburn Act does not render the act unconstitutional, nor can the question of the expediency of such an exception affect the question of power.

Where, as in this instance, the provision for penalties is separable from the provisions for regulations, the court will not consider the question of the constitutionality of the penalty provisions in a suit brought

by the Government to enjoin carriers from violating the regulations and in which no penalties are sought to be recovered.

As the construction now given the act differs widely from the construction which the Government gave to the act and which it was the purpose of these suits to enforce, it is not necessary in reversing and remanding, to direct the character of decrees which shall be entered, but simply to reverse and remand the case with directions to enforce and apply the statute as it is now construed.

Although the Delaware and Hudson Company may originally have been chartered principally for mining purposes, as it is now engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, it is a railroad company within the purview of the commodities clause and is subject to the provisions of that clause as they are now construed.

164 Fed. Rep. 215, reversed.

THE facts which involve the constitutionality and construction of the commodities clause of the Hepburn Act, § 1, c. 3591, act of June 29, 1906, 34 Stat. 584, are stated in the opinion.[1]

The Attorney General and *The Solicitor General*, with whom *Mr L. Allison Wilmer* and *Mr. Thomas C. Spelling* were on the brief, for the United States:

The question of the reasonableness of a statute is for the legislature, but the clause in question is a reasonable exercise of the power of Congress.

If a statute pertains to a subject exclusively committed to Congress, the statute is within the scope of constitutional power; this statute is within the scope of power conferred by the Con-

[1] "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

stitution. *The Lottery Case*, 188 U. S. 321, 357; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 344; *The Daniel Ball*, 10 Wall. 557, 566.

Congressional non-action lends no color of authority or validity to state regulations of anything properly pertaining to interstate commerce. *Leisy* v. *Hardin*, 135 U. S. 100, 109, 110–122; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 216, 229, 232; *Crandall* v. *Nevada*, 6 Wall. 35, 48, 49; *Houston* v. *Moore*, 5 Wheat. 23; *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386. When the Federal power has been exercised, it is, by the express terms of the Constitution, the exercise of the supreme will, and the state regulation must, in so far as there is a conflict, give way. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 199; *McCulloch* v. *Maryland*, 4 Wheat. 422; *Asbell* v. *Kansas*, 209 U. S. 251, 254; *Leisy* v. *Hardin*, 135 U. S. 100, 109; *Houston* v. *Moore*, 5 Wheat. 1, 23; *Brown* v. *Maryland*, 12 Pet. 446; *Groves* v. *Slaughter*, 15 Pet. 448, 510, 511; *New York* v. *Miln*, 11 Pet. 102, 157–159.

Not even a State, still less one of its artificial creations, can stand in the way of the enforcement of an act of Congress constitutionally passed under its authority to regulate commerce. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 333; *McCulloch* v. *Maryland*, 4 Wheat. 427, 429, 432, 435; *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414.

Corporations created by the States are as much subordinate to the powers of Congress, in the regulation of interstate commerce, as if they had been created by acts of Congress. *Hale* v. *Henkel*, 201 U. S. 43, 75.

If a State can by the creation of a corporation and by conferring upon the corporation certain powers forestall the operation of subsequent Federal laws before their enactment, the provision in the Constitution that laws made pursuant to its provisions shall be the supreme law of the land, may be at any time nullified. See *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Henderson* v. *Mayor of New York*, 92 U. S. 259, 272; *Railroad Co.* v. *Husen*, 95 U. S. 471.

The prohibitions contained in this statute do not prevent its constituting legislation which Congress may enact under the commerce clause of the Constitution.

Congressional power over commerce among the States is analogous to the same power over foreign commerce. *Crutcher* v. *Kentucky*, 141 U. S. 57; *Brown* v. *Houston*, 114 U. S. 622, 630; *Gibbons* v. *Ogden*, 9 Wheat. 1, 192.

The recognized powers as to foreign commerce, such as laying an embargo as to products of other nations in a time of peace, and the power to forbid and punish introductions of coins of foreign nations, illustrate Congressional power to forbid transportation of commodities from State to State, under circumstances requiring such prohibition in the national interest. *United States* v. *Marigold*, 9 How. 560, 566.

Interstate railroads are peculiarly subject to regulation, by reason of their performance of public functions and duties. They are vested with public rights to enable them to serve public interests as common carriers, and Congress has the power to divorce their public duties as such public servants from their private interest in carrying their own products. *New Haven R. R.* v. *Interstate Com. Comm.*, 200 U. S. 361; *Cherokee Nation* v. *South Kansas R. R. Co.*, 135 U. S. 657.

The question of the reasonableness or of the wisdom of the enactment is not for the courts but for the legislature. *Silz* v. *Hesterberg*, 211 U. S. 31, 40; *State* v. *Hyman*, 98 Maryland, 618, 619; *City of Baltimore* v. *Radecke*, 49 Maryland, 217, 229, 230.

Arguments *ab inconvenienti* are not to be considered unless the language of the act be ambiguous. *Ex parte Kearney*, 7 Wheat. 38, 44; *Beardstown* v. *Virginia*, 76 Illinois, 34; *Greencastle* v. *Black*, 5 Indiana, 557; *Smith* v. *Thursby*, 28 Maryland, 244; *Henshaw* v. *Foster*, 9 Pick. (Mass.) 312, 316; *Gage* v. *Currier*, 4 Pick. (Mass.) 399.

The courts are not at liberty to declare an act void because in their opinion it is opposed to a spirit supposed to pervade the Constitution but not expressed in its words. Cooley,

Const. Lim. (5th ed.) 205; *People* v. *Fisher*, 24 Wend. 215, 220; *State* v. *Staten*, 6 Coldw. (Tenn.) 238; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *People* v. *Rucker*, 5 Colorado, 455; *Commonwealth* v. *McCloskey*, 2 Rawle, 374.

The presumption is in favor of validity, and only when the question is free from reasonable doubt will the Supreme Court hold an act of Congress to be in violation of the Constitution. *Nicol* v. *Ames*, 173 U. S. 509; *Fletcher* v. *Peck*, 6 Cranch, 126.

For protection against unjust or unwise legislation, within the limits of recognized legislative power, the people must look to the polls and not to the courts. It would be an abuse of judicial power for the courts to attempt to interfere with the constitutional discretion of the legislature. *Covington Bridge Case*, 105 U. S. 470, 482; *The Lottery Case*, 188 U. S. 321; *Joint Traffic Association Case*, 171 U. S. 505, 573; *Northern Securities Case*, 193 U. S. 337; *Beebe* v. *State*, 6 Indiana, 501, 528; *Johnston* v. *Commonwealth*, 1 Bibb, 603; *Flint River Steamboat Co.* v. *Foster*, 5 Georgia, 194; *State* v. *Kruttschnitt*, 4 Nevada, 178; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *Hills* v. *Chicago*, 60 Illinois, 86; *Ballentine* v. *Mayor &c.*, 15 Lea, 633; *State* v. *Traders' Bank*, 6 So. Rep. 582.

If power exists, it is to be assumed that legislative discretion has been properly exercised. Cooley, Const. Lim. (6th ed.,) 220; *People* v. *Lawrence*, 36 Barb. 177; *People* v. *N. Y. Cent. R. Co.*, 34 Barb. 123; *Baltimore* v. *State*, 15 Maryland, 376; *Goddin* v. *Crump*, 8 Leigh, 154; *Soon Hing* v. *Crowley*, 113 U. S. 703.

The prevention of monopoly has long been a legitimate object of legislation. *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 676; *Northern Securities Case*, 193 U. S. 341. Far stronger reasons, referable to a well-founded fear of monopoly, exist for prevention of a union of ordinary occupations, such as trading and producing, with transportation, by railroad corporations, than can be urged against consolidations such as were forbidden in the *Northern Securities Case*.

The term "commerce," as used in the Constitution, embraces the instrumentalities by which commerce is carried on.

Northern Securities Co. v. *United States*, 193 U. S. 197; *Railroad Co.* v. *Fuller*, 17 Wall. 500, 508; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203. When a railroad is engaged, as are the roads owned by the defendants, in interstate commerce, it is necessarily an instrumentality of interstate commerce. When, therefore, they entered into such combinations as are shown in this case, such restrictive arrangements gave them the essential character of contracts, combinations, or conspiracies in restraint of trade or commerce, whereby the defendants monopolized, or attempted to monopolize, trade or commerce among the several States or with foreign nations. *Coxe Brothers & Co.* v. *Lehigh Valley Railroad Co.*, 4 I. C. C. Rep. 468; *New Haven R. R.* v. *I. C. C.*, 200 U. S. 392, 393; *United States* v. *Freight Association*, 166 U. S. 290, 333, 334; *Joint Traffic Association Case*, 171 U. S. 577; *Addyston Pipe Case*, 175 U. S. 211, 244.

The highways of commerce are, in a sense, the public property of the Nation and subject to all the requisite legislation by Congress, which necessarily includes the power to keep them open and free from any obstruction, and Congress has, in this regard, all the powers that existed in the States before the adoption of the Constitution. *Gilman* v. *Philadelphia*, 3 Wall. 713, 724; *In re Debs*, 158 U. S. 564, 586.

These combinations between state corporations, one or more being industrial and the other a common carrier, would be amenable to a state law formulated in like terms as the Anti-Trust Act. *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 294; *People* v. *North Riv. Sug. Ref. Co.*, 54 Hun (N. Y.), 377. And if such combinations interfere with the laws of free competition in interstate commerce, and cannot be effectively dealt with under the anti-trust act, Congress can provide another and more effective remedy. *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *McCulloch* v. *Maryland*, 4 Wheat. 315; *United States* v. *Fisher*, 2 Cranch, 358, 396; *Juilliard* v. *Greenman*, 110 U. S. 440, 441; *In re Jackson*, 14 Blatch. 250.

The law here in question does not violate the guarantees of the Fifth Amendment, nor any other constitutional guarantees. The prohibition of the so-called commodities clause is not arbitrary as that word is defined in the decisions of this and other courts. *Gulf, Col. & S. F. Ry.* v. *Ellis*, 165 U. S. 150, 155; *A., T. & S. F. R. R.* v. *Matthews*, 174 U. S. 96; *Clark* v. *Kansas City*, 178 U. S. 114; *Tullis* v. *Lake Erie & Western R. R.*, 175 U. S. 348; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

It cannot be said that this statute is on its face a deprivation of life, liberty or property without due process of law, in the sense in which the phrase is ordinarily used. It is as proper an exercise of power under the commerce clause to forbid, conditionally, shipments of a certain class or description as to forbid discrimination. See *Joint Traffic Association Case*, 171 U. S. 571; *Addyston Pipe Case*, 175 U. S. 211. When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, the court cannot declare a limitation under the notion of having discovered something in the spirit of the Constitution which is not even mentioned in the instrument. *People* v. *Fisher*, 24 Wend. 215, 220. To the same effect are *State* v. *Staten*, 6 Coldw. (Tenn.) 238; *Walker* v. *Cincinnati*, 21 Ohio St. 14; *State* v. *Smith*, 44 Ohio St. 348; *People* v. *Rucker*, 5 Colorado, 455; *Whallon* v. *Ingham*, 51 Michigan, 503; *Wooten* v. *State*, 5 So. Rep. 39; *Cochran* v. *Van Surlay*, 20 Wend. 365, 381, 383; *People* v. *Gallagher*, 4 Michigan, 244; *Benson* v. *Mayor &c.*, 24 Barb. 248; *Grant* v. *Courter*, 24 Barb. 232.

The clause does not violate the provision that no person shall be deprived of property without due process of law. When it is claimed that a legislative act is inhibited by the due process clause, as applied to property, there must be an interest amounting to a vested right of property. If a right claimed is not of that character, then it is merely an inchoate right—a privilege. Rights are vested when the right to enjoyment, present or prospective, has become the property of

some particular person or persons, as a present interest. 8 Cyc. L. & Proc., 894; Cooley, Const. Lim. 438, 465; *Pearsall* v. *Great Northern R. R. Co.*, 161 U. S. 646, 673. No right can be vested as a result of action which invades the domain of congressional power to regulate commerce, whether Congress has already acted or yet withholds action on the subject. Cooley, Const. Lim. (6th ed.) 437, 438; *Fitzgerald* v. *Grand Trunk R. R. Co.*, 63 Vermont, 169; *S. C.*, 13 L. R. A. 70; *Union Bridge Case*, 204 U. S. 364.

Retrospective Federal laws, unless *ex post facto*, are not within the due process clause or any other prohibition of the Constitution, however repugnant to the principles of sound legislation. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Satterlee* v. *Mathewson*, 2 Pet. 380; *Bonaparte* v. *Camden*, Baldw. 205; *S. C.*, Fed. Cas. No. 1617; *Bennett* v. *Baggs*, Baldw. 60; *S. C.*, Fed. Cas. No. 1319; *Albee* v. *May*, 2 Paine, 74; *S. C.*, Fed. Cas. No. 134.

No valid argument can be based upon long acquiescence in the use made of their coal lands and their output by the railroads on the part of the United States; for no estoppel can be asserted against constitutional legislation. *Louisville & Nashville R. R. Co.* v. *Kentucky*, 161 U. S. 677, 689; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Bridge Company* v. *United States*, 105 U. S. 470.

Not only is the Government not barred by acquiescence in what the defendants have done, whether with or without state authority, but Congress could not have bartered away or estopped itself to exercise any of its constitutional powers. *Monongahela Nav. Co.* v. *Coons*, 6 W. & S. (Pa.) 101; *Susquehanna Canal Co.* v. *Wright*, 9 W. & S. (Pa.) 9; *New York & Erie Railroad Co.* v. *Young*, 33 Pa. St. 175; *McKeen* v. *Delaware Canal Co.*, 49 Pa. St. 424; *Freeland* v. *Pennsylvania Railroad*, 66 Pa. St. 91; *Bailey* v. *Phil., Wilm. & Balt. Railroad*, 4 Harr. (Del.) 389; *Rundle* v. *Del. & Raritan Canal Co.*, 14 How. 80.

The clause does not violate the provision that private prop-

erty shall not be taken for public use without just compensation. See *Union Bridge Co.* v. *United States*, 204 U. S. 364; Cooley, Const. Lim. (6th ed.) 473.

The commodities clause is not open to the objection that the penalties imposed for violations thereof are of such magnitude and so unduly excessive and extortionate as to be substantially destructive of the property and franchises of the carriers affected thereby. nor does it, in respect to such carriers, constitute a denial of the equal protection of the law. Cooley, Const. Lim. 402; *Coffey* v. *Harlan County*, 204 U. S. 659, 665.

The clause does not give a preference to the ports of one State over those of another, contrary to Art. I, § 9, clause 6 of the Constitution. *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80; and see also *Pennsylvania* v. *Bridge Co.*, 18 How. 421, 435.

The clause does not deny full faith and credit to the public acts of a State contrary to Art. IV, § 1 of the Constitution.

This clause did not confer any power or jurisdiction upon the States, but merely assured the recognition of their acknowledged jurisdiction over persons and things within the respective territory of each of them. Story, Const., § 1313; *Bissell* v. *Briggs*, 9 Massachusetts, 462, 467; *Shunway* v. *Stillman*, 4 Cowen, 292; *Borden* v. *Fitch*, 15 Johns. 121; Story, Confl. of Laws, § 609; *McElmoyle* v. *Cohen*, 13 Pet. 312; *D'Arcy* v. *Ketchum*, 11 How. (U. S.) 165. The States of New York and Pennsylvania could no more diminish or increase or forestall Federal regulation of interstate commerce than they could bind the Nation by a treaty with a foreign government, or by a declaration of war against a friendly nation.

The clause does not deny persons any privileges or immunities of citizens of the States contrary to Art. IV, § 2, subd. 1, of the Constitution.

A corporation acquires by its charter no extraterritorial powers, immunities, or privileges, even if it were clear that this constitutional provision was intended to apply to corporations. In fact this constitutional provision has been always held a

prohibition against state, and not against Federal, action, though there is nothing in this statute or in the record rendering the question relevant.

The clause does not invade the reserved rights of the people or of the States contrary to the Ninth and Tenth Amendments or any other provisions of the Constitution, nor does it deprive any person of any right of property or other right secured by § 2 of Art. IV, or by the Fifth, Eighth, Ninth, Tenth or Fourteenth Amendment, or by any other Amendment or provision of the Constitution.

This objection is yet another form of saying that the people have never conferred upon Congress the power to enact the commodities clause, or that it is not on its face a constitutional exercise of the power to regulate interstate commerce. It is only where Congressional power is claimed upon an inherent sovereignty theory, or under the general-welfare clause, that such an objection can be pertinent, as, for example, in a case like *Kansas* v. *Colorado*, 206 U. S. 46, where power was claimed for Congress to interpose in the distribution of the inland waters of a State for irrigation purposes.

No right not under protection of the prohibitions or guarantees of the Federal Constitution can be set up against an authorized regulation of interstate commerce, even though such right be given in terms by a state law. If the court finds constitutional authority for the commodities clause then no state charter can furnish to the defendant any protection or defense in an action brought for its enforcement.

No relations assumed by individuals, nor rules governing such relations *inter sese*, whether made by the individuals themselves or by a State, can stand in the way, where an issue arises between them and the Government, to prevent the enforcement of a constitutional law. The right of a State to create a corporation and vest it with certain powers does not carry with it the right to project either the powers of the State or of the corporation across state lines, and thus invade the domain of interstate commerce, which it is the sole province of Congress

to regulate and protect. *W. U. Tel. Co.* v. *Pendleton*, 122 U. S. 347, 357, 358.

Each State has plenary local powers over its own territory and its own corporations. But a State, while exercising state sovereignty over a corporation of its creation, cannot prevent or embarrass the exercise by Congress of any power intrusted to it by the Constitution. *Railroad Co.* v. *Maryland*, 21 Wall. 456, 473; *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347. See also *Brown* v. *Maryland*, 12 Wheat. 419; *Passenger Cases*, 7 How. 283; *In re Debs*, 158 U. S. 564; *Lottery Case*, 188 U. S. 321; *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 11, 16.

The clause does not impair the obligation of contracts. Without going so far as to say that such obligations as are set forth in the answers are invalid, notwithstanding the authority and sanction of state laws, defendants will not be heard to set them up to defeat a Federal law, passed in the exercise of power constitutionally conferred. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 347; *New Haven R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 569, 571.

All the defendant companies have an "interest" in the coal transported, within the meaning of the word "interest" as used in the statute. The interest of the companies, or any one of them, may not be a legal interest, but it is none the less real and substantial. *Humphreys* v. *McKissock*, 140 U. S. 304, 312; *Burton* v. *United States*, 202 U. S. 344.

The exception in the statute of "timber and the manufactured products thereof" from the prohibition contained in the statute, does not render the statute unconstitutional. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, discussed, and distinguished from this phase of the case at bar.

The contention of the defendants that they have no interest, within the meaning of the clause in question, in the coal trans-

ported by them which is mined and sold by the coal companies of which they own all, or a large part, or some part, of the capital stock, is wholly without force. The same is true of the assertion of the Delaware and Hudson Company that because of a sale of part of its coal at the mines, it is not the owner thereof when transportation begins, or at any time thereafter. Equally without merit is the contention of the Lackawanna Company that its ownership of capital stock of coal companies does not constitute an interest, direct or indirect, in the coal mined by such companies and transported over its lines of railroad.

The purpose to be attributed to Congress in enacting the statute, as well as the language of the statute itself, precludes the view that a legal interest only was referred to. The purpose of the statute, which was to be gathered from the history of the times and the conditions that were to be remedied, was to prevent discrimination on the part of railroads engaged in interstate commerce against the shippers of the country in the interest of themselves or persons or corporations under their control or in which they were interested. The idea of Congress was to free interstate transportation from the dangers arising from self-interest on the part of the carriers. The temptation to indulge in secret rebating in the transportation of coal in interstate commerce, and in other favoritism, is as great where the carrier owns a majority of the stock of a coal mining company as where it is itself directly engaged in the mining of coal. In the one case its interest in the coal is direct, in the other it is indirect, but in both cases its interest is substantially the same so far as the purpose which Congress may be presumed to have had in view is concerned. *Burton* v. *United States*, 202 U. S. 344.

A railroad company has an interest in a corporation or the property of a corporation whose stock it holds. It is true it is not such an interest as it can mortgage or assign (*Humphreys* v. *McKissock*, 140 U. S. 304, 312); it is not a legal interest, but it is none the less real and substantial. See *Pullman Car Co.* v.

Missouri Pacific Co., 115 U. S. 587, 597; 4 Words and Phrases Judicially Defined, 396 *et seq.*, and cases there cited.

As to the Delaware and Hudson's claim, it is argued on behalf of that company that the statute should be read as if the word "or" in the expression "any article or commodity other than timber and manufactured products thereof, manufactured, mined, or produced by it or under its authority, *or* which it may own in whole or in part," should be read as if it were "and," so that it would not apply to the transportation by a railroad company of coal mined by it, but the title to which had passed from it. Otherwise, it is argued, it would be impossible for a railroad company to transport any coal mined by it, although title to it may have passed through several purchasers. This amounts merely to saying that the statute, as drawn, is impolitic, but the statute is to be given a reasonable construction to accomplish the purpose of Congress in its enactment. The interest that a railroad might have in transporting for the vendee, at less than the published tariff rate, coal mined by it and sold at the mines, is apparent. But ordinarily it would have no such interest in respect to the transportation of such coal for any subsequent purchaser from its vendee. The latter case would not be within the spirit and purpose of the act, although it might come within its letter.

Mr. John G. Johnson, *Mr. Robert W. De Forest* and *Mr. Walker D. Hines* for defendants in error and appellees. (*Mr. Johnson* and *Mr. De Forest* for defendants in error and appellees generally, *Mr. Hines* for the Delaware and Hudson Company.)

Mr. Johnson and *Mr. De Forest:*

The commodities clause is not applicable in the case of carriers who do not own or mine coal, but simply own shares of stock in coal companies. Under the statutes of Pennsylvania and under the decisions of that State, a railroad company does not have an interest in the coal because of its ownership of shares of stock of coal companies. See act of assembly of

Pennsylvania, approved April 26, 1855 (P. L. 329); *Commonwealth* v. *Monongahela Company*, 216 Pa. St. 114; *Shepard's Estate*, 170 Pa. St. 323; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406; *Commonwealth &c.* v. *N. Y., L. E. & W. R. R. Co.*, 132 Pa. St. 591; *Buffalo Loan, Trust & Safe Dep. Co.* v. *Medina Gas & Electric Co.*, 162 N. Y. 67, 76; *Saranac & Lake Placid R. R. Co.* v. *Arnold*, 167 N. Y. 368, 374; *Peterson* v. *C., R. I. & P. Ry. Co.*, 205 U. S. 364; *Pullman Car Co.* v. *Mo. Pac. Co.*, 115 U. S. 587.

The commodities clause is unconstitutional because its penalties are so prescribed as practically to amount to a denial of an opportunity by railroad companies to obtain a judicial determination of the questions involved. See *Ex parte Young*, 209 U. S. 147; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 595; *Chicago Railway Co.* v. *Minnesota*, 134 U. S. 418, 456.

The commodities clause is unconstitutional because, making illegal discriminations, it is not due process of law. If the act is improperly discriminating in any vital part, it is invalid as to the whole. All the vital portions of an act constituting a whole, have mutual relation, and any failure in any one vital part destroys the entire enactment. Non-uniformity cannot be sustained because sought to be effected under the guise of a classification of that which cannot be classified. A statute of the United States, establishing a public policy, in the matter of uniformity must stand upon the same basis as a statute of a State. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 560. The commodities clause discriminates in three important particulars: between different owners of coal, without justification; between carriers of timber and its manufactured products; between different classes of common carriers.

The commodities clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessaries of life. The act is not a regulation but a prohibition. In discussing this proposition, there is no difference between the rights of

an individual and the rights of a corporation. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 204. The *Lottery Case*, 188 U. S. 321, is not an authority sustaining the right of Congress to pass the commodities clause. In the present case, the article carried is harmful neither to morals nor to health. It is a necessity of life. The *Lottery Case* (*supra*), quoted from and discussed. As to what is included in the word "commerce," see *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203.

Whilst prohibition of the transportation of articles injurious to health or morals is included within the idea of a regulation of commerce, a prohibition of such transportation, where the articles are necessaries of life, is not within such idea. A requirement that transportation shall be conducted without favoritism, or discrimination, and not at excessive rates, is included within a regulation. Congress may forbid contracts in restraint of trade, because such contracts interfere with commerce and indirectly regulate the same. *The Addyston Case*, 175 U. S. 211, 226.

Where articles are forbidden to be transported because the owner is engaged in the carriage of like commodities for itself as well as for others, such forbidding goes beyond the province of regulation and introduces something not within the grant of a power to regulate, *i. e.*, a condemnation of a duality of ownership and transportation which had resulted from legislation by the States, in a matter over which they had control. It practically takes away property, or at least destroys the value of property, vested in its owner by the law of the only country which can control it, *i. e.*, the State in which it is located.

Commerce does not result from any grant in the Constitution, to Congress, of power to permit or disallow the same, nor from any permission by Congress. It is an inherent right, possessed by every citizen. A prohibition, therefore, which does not regulate the right, but denies and destroys it, must rest upon a power different from that granted by a permission to regulate.

The very grant of power to regulate commerce, recognizes the existence of a right to carry it on, derived from some other, and independent, source.

The right of property is one secured to every citizen of the United States, under and against the Government, by the Constitution of the United States. This right, which, as will be probably conceded, includes that of commerce, is taken away by the commodities clause. Countless hundreds of millions of dollars of property values are destroyed at a stroke of the Congressional pen, without evidence of the existence of any necessity for such destruction.

The interstate commerce which is forbidden by the commodities clause is (1) transportation of its own products by a railroad company; and (2) sales by the citizens of one State, of their property, to citizens of another State, under certain circumstances.

Conceding the right to regulate the transportation in such way and manner as to compel it to conform to all such reasonable rules as the legislature may prescribe, the right does not exist to prohibit it where such rules are complied with. Included in this denial, is a denial of the conclusion that duality of ownership and of transportation, *ex necessitate*, amounts to violation of such rules of transportation.

Neither intercourse between the States, involving a carriage of persons or of property, nor transactions of sale and purchase, involving a delivery, can be forbidden, unless the person against whom the prohibition goes, violates some law enacted properly in exercise of the power to regulate. See *Northern Securities Co.* v. *United States*, 193 U. S. 197, 199; *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *Adair* v. *United States*, 208 U. S. 161; *Dobbins* v. *Los Angeles*, 195 U. S. 223, 236; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *Ex parte Jackson*, 96 U. S. 727; *Chicago Ry. Co.* v. *Minnesota*, 134 U. S. 418, 455. Case of *Union Bridge Co.* v. *United States*, 204 U. S. 364, discussed and distinguished. The case of *New Haven Ry. Co.* v. *Interstate Commerce Commission*, 200 U. S. 361, is not an authority in

support of the contentions of the United States herein. The case is clearly distinguishable from the case at bar.

Foreign commerce is the intercourse between two countries, which, often, may be hostile. In determining the extent of, and limitations upon, foreign commerce, we have recourse to the law of nations. We find that one nation, for the protection of its citizens and its property, may put an embargo upon trade and fetter the intercourse. Were it otherwise, the nation itself might be destroyed, because of its inability to protect itself against the danger of unlimited intercourse. When, therefore, Congress regulates foreign commerce, it regulates something which has inherent limitations. The nation's protection may be involved in the exercise of a power, under certain circumstances, to bar all communication. There is no need, and no right, to forbid the citizens of one State from transferring their possessions and their persons to another.

The theory of the Government is, that Congress may destroy the existence of several branches of commerce, and regulate what remains.

Domestic commerce is very different in its nature, scope and extent. It is the intercourse between the citizens of the different States in the transportation of persons and property from one to the other. This intercourse between citizens of the different States is an intercourse of persons, all of whom are citizens of a Union, which was largely created in order to bring about unlimited intercourse, saving only to such extent as it should be found necessary to regulate the same.

It is a fundamental right of every owner of property in one State, to sell it to citizens of another State, and to have the same, when thus sold, transported. This right cannot be forbidden by Congress. However the intercourse may be regulated, such regulation must proceed upon the concession of the inability to deprive, altogether, of the right.

If Congress may forbid commerce between the States in the sense of transactions in trade in harmless articles, it may forbid intercourse between persons. It may forbid the carrier to

transport its shareholders or its directors, because it may be tempted to give them greater privileges in their carriage. *Buttfield* v. *Stranahan*, 192 U. S. 492; *Lawton* v. *Steele*, 152 U. S. 133; *Railroad Co.* v. *Richmond*, 19 Wall. 584.

The commodities clause is unconstitutional because it was intended to violate, and does actually violate, a right reserved to the States.

Any Federal statute which has for its purpose the destruction of title to property or of the enjoyment of property, title to which is vested by the law of the State in a third person, trenches upon the reserved right under the Tenth Amendment: *United States* v. *Fox*, 94 U. S. 315.

The commodities clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of liberty and property.

The power possessed by Congress to regulate commerce must be so exercised as not to destroy the right to dispose of property, or to make legal contracts concerning the use, or transportation, thereof.

To forbid a coal company to sell its coal to the citizens of another State, or to cause the same to be transported into such State, is to deprive it of its "liberty," because of the deprivation of the power to use its property, in accordance with its legal right. *McCray* v. *United States*, 195 U. S. 27; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 336; *Allgeyer* v. *Louisiana*, 165 U. S. 589.

The commodities clause is unconstitutional because it is in effect a taking of private property for public use without compensation.

An ownership of coal shares, involves the right to receive whatever benefit may result from the exercise of powers conferred by the law of the State which incorporated. Practically, to destroy the exercise of its franchises by the company, is to take its property as completely as though it was physically

seized. *Mugler* v. *Kansas*, 123 U. S. 623; *United States* v. *Lynah*, 188 U. S. 445.

Mr. William S. Opdyke, Mr. James M. Beck and *Mr. Walker D. Hines* filed a separate brief on behalf of the Delaware and Hudson Company. The first point of their brief relates only to the case of the Delaware and Hudson Company:

The Delaware and Hudson Company being organized primarily to produce and handle anthracite coal, and possessing its railroad powers merely as an incident to such primary purpose, is not embraced in the prohibition of the commodity clause. The Delaware and Hudson Company is a corporation whose railroad powers were granted as an incident to its industrial powers. It is a corporation organized to acquire land and mine therefrom anthracite coal and supply the same to consumers, and its railroad powers are incidental to that particular purpose. Clearly the term "railroad company" as used in the commodity clause does not apply to every corporation which operates a railroad. There are numerous industries throughout the country which operate, as incidental to their business, more or less railroad mileage. As to such mileage these corporations may be charged with the duties of a common carrier, and as business may be handled on through bills of lading such corporations would be, with respect to such matters, carriers subject to the act to regulate commerce. Yet such corporations could not, in any just sense, be regarded as railroad companies within the meaning of the commodity clause. In this class the Delaware and Hudson Company is included. The legislative history of this company shows that it is a coal company with incidental railroad functions. Unless, therefore, the expression "railroad company" in the commodity clause is to be taken as meaning every corporation of an industrial character which merely as an incident to its industrial functions operates a railroad, then the clause should not apply to this appellee. It is perfectly legitimate for an industrial corporation to promote the efficiency and economy

of its operations by the construction of railroads when legally empowered to do so. It would be a superlative injustice to treat an industrial corporation as a railroad company because of the operation of a railroad under such circumstances, and then, because the industrial corporation is so treated as a railroad company, to prohibit the industrial corporation from performing the very transportation functions which alone serve as the inducement to the operation of the railroad.

Another grave reason for not construing the clause to apply to this appellee is that such construction unnecessarily overturns a deliberate and long-settled policy jointly entered upon with respect to this appellee by the States of Pennsylvania and New York. The legislation of those two States with respect to this appellee shows a clear purpose to provide for the acquisition and mining of coal in Pennsylvania by a corporation formed for that purpose, and to provide further for the transportation of that coal to the State of New York by the same corporation. The commodity clause, if construed to apply to this company, does not merely impair, and to a large extent destroy, the rights of the individuals who have invested as bondholders and stockholders in the Delaware and Hudson, and the rights of individuals who may have contracted with that company, but the clause utterly nullifies the policy of the States of Pennsylvania and New York with reference to this corporation. An act of Congress ought not unnecessarily to be so construed as to nullify such a policy deliberately adopted and carried out by two States of the Union. The original legislation is now irrepealable by either of the two States.

To apply the commodity clause in this unnecessary manner to the Delaware and Hudson is to work a destruction of property rights of great magnitude, which have existed for nearly a century. To exclude appellee's coal from the only practical channel of interstate transportation is confiscatory, because largely destroying the value of appellee's coal and coal lands. To exclude the interstate coal traffic from appellee's railways

is confiscatory, because largely destroying the value of these railways and equipment. Such confiscation would be unconstitutional. However, even if such unconstitutionality were not clear, but were merely doubtful, it would be the duty of the court to avoid an unnecessary construction of the statute which would develop such constitutional doubts. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407.

Mr. George F. Brownell and *Mr. Adelbert Moot* filed a separate brief on behalf of the Erie Railroad Company:

It is undisputed that the first predecessor of the Erie Railroad Company was organized in 1832, and that it is a stockholder in the Pennsylvania Coal Company which was authorized by a statute of Pennsylvania, in 1838, to transact the usual business of companies engaged in mining, transporting to market and selling coal, with power to purchase or lease coal lands, and to construct railroads, and that said coal company did acquire coal lands, develop mines, and enter into authorized contract relations with defendant's predecessors for the construction of railroads and the transportation of its coal to market.

The Hillside Coal & Iron Company was organized under a statute of Pennsylvania in 1869, with similar powers; and into this corporation many other coal corporations were afterwards merged, under the laws of Pennsylvania.

"Solely" to furnish an outlet, by authority of Pennsylvania and New York, this defendant's predecessors and said coal corporations, built railroads and mine branches in connection with said coal companies, to transport their coal to interstate markets; the railroads so built being duly authorized, and aggregating, in lines, branches, yards and sidings very expensive to build in the mountainous country in which they were built, about 190 miles.

These railroads will be "substantially valueless" if the defendant can no longer haul their tonnage to the usual interstate markets over its tracks, and the mines of these companies will be deprived of their only outlet to these markets, such

interstate markets being substantially their only markets for their output.

These railroad lines, branches, sidings, and yards, built "solely" for the accommodation of this coal business, have little business except such coal business, and that coal business is of such magnitude that it constitutes over 22% of the entire freight tonnage of all the railway lines of the Erie Railroad Company, and brings it over 20% of its revenue for transportation, and to deprive the defendant of such coal tonnage would greatly impair, and in many cases wholly destroy, both mines and railways.

The bondholders of this defendant and its predecessors hold bonds aggregating upwards of $136,000,000 that rest upon these properties, which will be greatly impaired or destroyed if the authorized contract and stockholding relations of railroads and mining corporations above described are destroyed, as they will be if the commodities clause is upheld, and it is held to also apply to this defendant as a mere stockholder.

This defendant is a minority stockholder in the Temple Iron Company, some of the coal of which also reaches interstate markets over defendant's lines, but defendant has nothing to do with mining coal, or dealing in it, and is in no way interested in coal mining except as "a stockholder" in the three coal mining corporations named.

Anthracite coal is harmless and necessary fuel, and the investigation of the Anthracite Strike Commission shows there is nothing unnatural about the present status of the business, in view of the natural difficulties encountered, the capital necessary to develop and carry it on, and the authority necessarily given capital by the State of Pennsylvania, to cause the formation of corporations to develop the expensive coal mines, and, therefore, the present status of the business furnishes no reason whatever for such legislation as the commodities clause.

The present status of timber lands and lumbering, as compared with coal properties and mining, furnishes no reason to

support the exemption of timber alone from the commodities clause.

The history of the commodities clause shows that it was enacted to prohibit mining according to the laws of that State, by corporations of Pennsylvania, by making it impossible for mining corporations of that State to sell in that State the coal mined, since the clause, if broadly construed, as the Government claims it should be, prohibits common carriers from carrying such coal to interstate markets upon any terms and conditions whatever, even for the lawful purchasers and consumers thereof.

The commodities clause not only vitally affects this defendant, and other railroad companies, if it is sustained as to stockholders, but it is vital to the interests of millions of citizens who are consumers of all necessary commodities, and also the stockholders and bondholders of all great industrial corporations, since they can no longer buy or sell the very necessaries of life without the consent of Congress.

That clause is unconstitutional because it is contrary to the fundamental and "unalienable" rights of citizens reserved to them by the Federal Constitution, by which they have the right to buy food, fuel, or other harmless necessaries of life, in any State they please, from anyone they choose, so long as their purchases are lawful in that State, although it is conceded the Federal Government can regulate, but not prohibit, the carriage of such necessaries to interstate markets.

Timber is a fuel, and Congress could not make a partial and unjust law discriminating between purchasers of timber fuel and purchasers of coal, or between stockholders and bondholders in common carriers owning timber lands and those owning coal lands, without violating the "due process of law" part of the Fifth Amendment, because there is no ground for exempting timber in the commodities clause, if it should apply to any fuel at all.

The only possible effect of the commodities clause upon coal is upon the mining or production thereof, if that clause is literally obeyed, hence it does not regulate interstate commerce,

it being a harmless and necessary commodity, but it undertakes to regulate its antecedent intrastate production, contrary to the Constitution and all such precedents.

MR. JUSTICE WHITE delivered the opinion of the court.

We dismiss for the present a contention made by one of the corporations that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other States. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for persons to whom the coal had been

sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been possessed by them for a long time and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other States, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.[1]

---

[1] It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the State of New York, April 23, 1823, and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson River in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the State of Pennsylvania, between the years 1823 and 1871, and that these acts of the State of Pennsylvania resulted from the desire and policy of said State to create and foster the industry of mining such coal and developing the transportation thereof; that under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its capital

After the first day of May, 1908, the Government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying

in the purchase of a large quantity of coal lands in the State of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware River to the Hudson River; that later, under statutes of both States, it invested additional capital in the construction of railroads, in the State of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the State of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it, viz., The Northern Coal & Iron Company, The Jackson Coal Company, and The Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company, and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware and Hudson Company, that this said "commodities clause" does not apply to it because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes,

in interstate commerce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to ac-

---

as thereafter stated) "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal.

(2) "The answer of the Erie Railroad Company states that it was originally organized under the laws of the State of New York in 1832; that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the States of New York, Pennsylvania, New Jersey, Ohio, Indiana and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838, its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857, 1864, 1867 and 1868; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the State of Pennsylvania in 1869 for the purposes and with powers similar to those

complish the same result. Both the equity causes and the mandamus proceedings were based upon the assumption that the first section of the act to regulate commerce, as amended

---

of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the State of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part, of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the State of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the State of Pennsylvania, one of which, approved April 15th, 1869, was entitled "An act to authorize railroad and canal companies to aid in the development of coal, iron, lumber and other material interests of this Commonwealth;" that pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than $1,414,400, and not

and reënacted by the law usually referred to as the Hepburn Act, approved June 29, 1906, c. 3591, 34 Stat. 584, contained a provision, generally known as the commodities clause, which

---

to exceed $2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to $9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849; that all the lines of railroad owned by it are wholly within the State of Pennsylvania, extending from the Delaware River, at the boundary line of the State of New Jersey, in a northwesterly direction across the State of Pennsylvania to the boundary line between the State of Pennsylvania and the State of New York, with a branch line extending from Scranton, in the State of Pennsylvania, to Northumberland, in said State. Said defendant also admits and alleges that, under express authority of acts of the legislature of the States of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and long prior to May 1st, 1908, has operated, various lines of railroad in the two last-mentioned States, by which it has direct traffic connection with the city of Buffalo and other cities in the said States. Defendant also admits that for many years it has owned in fee, extensive tracts of coal land in the State of Pennsylvania; that it has also leased large tracts of coal land in the said State, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been and continues to be, under and by virtue of the authority of the laws of the State of Pennsylvania.

That in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said State of Pennsylvania, have been merged into said defendant corporation; that by an act of the general assembly of the State of Pennsylvania, approved April 15th, 1869, entitled "An act to authorize railroad and canal companies

caused it to be illegal for the corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of

---

to aid in the development of the coal, iron, lumber, and other material interests of this Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of $5,155,697, and for taxes $1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other States as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "Interstate Commerce Act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the State of Pennsylvania April 13th, 1846; that as early as 1871, under authority of two general statutes of the State of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one-third of the shares of the Mineral Railroad

the modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities

---

Mining Company, corporations of the State of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the State of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either directly upon, or so contiguous to the system of railroads operated by said defendant, as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the State of Pennsylvania. Under the authority of various acts of assembly of the said State, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that by means of its own and of said leased lines of railroad it conducts, and for many years has conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York and Middle Coal Field Railroad and Coal Company, a corporation of the State of Pennsylvania; also the entire capital stock of Coxe Bros. & Company, a corporation of said State; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest in the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the State of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the companies whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defend-

clause, they all defended substantially upon the ground that when correctly interpreted the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, abstractly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the Fifth Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that in any event the clause was repugnant to the Constitution, because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the Government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject

---

ant, under which mortgage bonds to the amount of $23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital stock of Coxe Bros. & Company, Inc., owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1st, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of $18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the State of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of $36,068,431 for the last fiscal

was at least formally approached, not for the purpose of deciding whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration is whether the so-called commodities clause amendatory to the act to regulate commerce, passed June 29, 1906, so far as its scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole and in relation to the agreed facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized and the relevant industrial condi-

year, or $15,010,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies its business could not be continued, except at a net loss of many millions of dollars per annum.

tions which being matters of common knowledge may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the State of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other States. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three-quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other States. It is not questioned that pursuant to this general policy investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies, and that coal production was enormously increased and its economies promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different States of the Union and Canada for the year 1905 (the last year for which there is authoritative statistics) was 61,410,201 tons; that approximately four-fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets in other States and Canada, and of this four-fifths, from 70 to 75 per cent, was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any

point where there may be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the constitution and laws of the State of Pennsylvania, and that their right to enjoyment of the same has never been doubted or questioned by the courts or people of that Commonwealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. Rep. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that in a large and ultimate sense it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when enacted was operative upon the defendants, and therefore required them to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in

whole or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The Government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined or produced by them or under their authority, or which they own or may have owned in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined or produced by a corporation, in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the Government insists should be given to its text, but on the significance of the text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced or owned by them, etc., but moreover to divorce the business of transporting commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the Government: "It (the clause) forbids the carrier, who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in

accordance with this principle, the insistence in argument is that it was the duty of the carrier who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the Government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the Government, in argument, suggests that the radical result of the statute may be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the Government relies.

Let us as a prelude to an analysis of the clause, for the purpose of fixing its true construction and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the Government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the Government has placed upon it. We do this because obviously mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power to regulate com-

merce possessed by Congress is in the nature of things ever enduring, and therefore the right to exert it to-day, to-morrow and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be in and of themselves lawful regulations of commerce, if prospectively applied, nevertheless they cannot be so considered, because of their retroactive effect upon the rights of the defendants alleged to have been secured by valid state laws. We further concede for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although by existing state laws the railroad company may have a lawful right of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the Government as to the meaning of the commodities clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions: 1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in

interstate commerce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide, (*a*) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the States of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, a power which the States from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several States have been developed, their enterprises fostered, and vast investments of capital have been made possible? (*b*) Although the Government of the United States, both within its spheres of national and local legislative power, has in the past for public purposes, either expressly or impliedly, authorized the manufacture, mining, production and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision, if the contention of the Government, as to the meaning of the commodities clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analysis, which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.

Knights Templars Indemnity Co. v. *Jarman*, 187 U. S. 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U. S. 407.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions, that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined or produced; 2, which have been so mined, manufactured or produced under its authority; 3, which it owns in whole or in part, and, 4, in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if at the time of the transportation they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the Government places upon the clause as a whole is in direct conflict with the literal meaning

of the prohibitions as to ownership and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case since in practical execution it would come to pass that where a carrier had manufactured, mined and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that as thus construed it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier and at the same time to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the Government, in view of the purpose of Congress to prohibit railroad companies engaged in

interstate commerce from being at the same time manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions they should all be construed so as to accomplish the result intended, and, therefore, their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining and production from the clause, as ownership in whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining and production if the proposed reconciliation of the conflict between the prohibitions be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the Interstate Commerce Law, prior to its amendment by the Hepburn Act, will serve to make clear the unsoundness of the proposition. The case referred to is that of the *New Haven Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361. In that case, after much consideration, it was held that the prohibitions of the Interstate Commerce

Act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so far as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that in view of their long standing the construction which had been thus given to the act should not be departed from, "at least until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the *New Haven case*, to assume that the provisions as to manufacturing, mining and production, while they may be somewhat redundant, were nevertheless expressed

for the purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the Government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and as we think, doubtful prohibitions so as to make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the Government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded

is entirely consistent with the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of *bona fide* manufacturing, mining or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested directly or indirectly." The contention of the Government that the clause forbids a railroad company to transport any commodity manufactured, mined or produced, or owned in whole or in part, etc., by a *bona fide* corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer they cannot be held to include commodities manufactured, mined, produced or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman Palace Car Co.* v. *Missouri Pacific R. R.*, 115 U. S. 587; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406. And that this is well settled also in the law of Pennsylvania is not questioned. It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the Government that if the clause embraces only a legal interest in an article or commodity it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined or produced, or is owned by a corporation in

which the carrier is a stockholder. The contention of the Government substantially rests upon the assumption that unless the words be given the meaning contended for they are without significance. That this is clearly not the case is well illustrated by the *New Haven case, supra.* In that case the Chesapeake and Ohio Railway Company it was shown at one time not only directly engaged in buying, selling and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 1906, 40 Cong. Rec. pt. 7, pp. 7012–7014. And the considerations just stated we think completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the

statement taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power which would arise if that construction was adopted, we hold the contention of the Government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) When the carrier owns the article or commodity to be transported in whole or in part; (*c*) When the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent, and if reference to authority to so demonstrate is necessary it is afforded by a consideration of the ruling in the *New Haven case*, to which we have previously referred. We do not say this upon the assumption that by the grant of power to regulate commerce the authority of the Government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities or to destroy the governmental power of the States as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations en-

tirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all preëxisting rights of the railroad companies were subordinated. *Armour Packing Co.* v. *United States*, 209 U. S. 56.

We think it unnecessary to consider at length the contentions based upon the due process clause of the Fifth Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause as construed by the Government is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappear as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause

under consideration is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed, was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation when adopted should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young*, 209 U. S. 123, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause from the ruling in *Ex parte Young*, a question which we do not feel called upon to decide, nevertheless the proposition is without merit, because, (*a*) no penalties are sought to be recovered in these cases, and, (*b*) the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware and Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the States of New York and Pennsylvania it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines, and, undoubtedly, vast sums of money have been in-

vested in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that by the true construction of its charters the Delaware and Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause and subject to the regulations which are embodied therein as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved, not by reversing and remanding with particular directions as to each of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

And it is so ordered.

MR. JUSTICE HARLAN, dissenting.

As these cases have been determined wholly on the construction of those parts of the Hepburn Act which are here in ques-

tion, and as Congress, if it sees fit, may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my non-concurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.